

IN THE SUPREME COURT OF IOWA

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STATE OF IOWA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	S.CT. NO. 13-0988
	)	
DONALD B.E. REED,	)	
	)	
Defendant-Appellant.	)	

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APPEAL FROM THE IOWA DISTRICT COURT  
FOR BLACK HAWK COUNTY  
HONORABLE TODD A. GEER, JUDGE

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APPELLANT'S BRIEF AND ARGUMENT  
AND  
REQUEST FOR ORAL ARGUMENT

---

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FINAL

## **CERTIFICATE OF SERVICE**

On the 17th day of July, 2014, the undersigned certifies that a true copy of the foregoing instrument was served upon the Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Donald Reed, No. 6890001, Anamosa State Prison, 406 North High Street, P.O. Box 10, Anamosa, IA 52205-1199.

APPELLATE DEFENDER'S OFFICE

  
\_\_\_\_\_  
**PATRICIA REYNOLDS**  
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PR/lr/7/14

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## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

### **I. WHETHER THE RECORD CONTAINS INSUFFICIENT EVIDENCE TO SUPPORT ANY OF THE DEFENDANT'S CONVICTIONS?**

#### **Authorities**

State v. Simpson, 528 N.W.2d 627, 630 (Iowa 1995)

State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980)

State v. Conroy, 604 N.W.2d 636, 638 (Iowa 2000)

State v. Maring, 619 N.W.2d 393, 395 (Iowa 2000)

State v. Gibbs, 239 N.W.2d 866, 867 (Iowa 1976)

State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981)

State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981)

State v. Brubaker, 805 N.W.2d 164, 172 (Iowa 2011)

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State v. Reeves, 209 N.W.2d 18, 23 (Iowa 1973)

State v. Webb, 648 N.W.2d 72, 79 (Iowa 2002)

State v. Cashen, 666 N.W.2d 566, 569 (Iowa 2003)

State v. Maring, 619 N.W.2d 393, 395 (Iowa 2000)

## II. WAS TRIAL COUNSEL WAS INEFFECTIVE?

### Authorities

Kane v. State, 436 N.W.2d 624, 626 (Iowa 1989)

State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982)

State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004)

Meier v. State, 337 N.W.2d 204, 206 (Iowa 1983)

State v. Terry, 569 N.W.2d 364, 368-369 (Iowa 1997)

Gering v. State, 382 N.W.2d 151, 153-54 (Iowa 1986)

State v. Buck, 510 N.W.2d 850, 853 (Iowa 1994)

State v. Westeen, 591 N.W.2d 203, 207 (Iowa 1999)

State v. Hrbek, 336 N.W.2d 431, 436 (Iowa 1983)

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Ledezma v. State, 626 N.W.2d 134, 141 (Iowa 2001)

Iowa R. Evid. 5.401

Iowa R. Evid. 5.402

Iowa R. Evid. 5.404(b)

**III. WAS THE DEFENDANT'S SENTENCE OF UP TO 100 YEARS FOR THE ENHANCED COCAINE OFFENSE WAS CRUEL AND UNUSUAL PUNISHMENT BECAUSE IT WAS BASED ON A PRIOR CONVICTION THAT OCCURRED WHEN REED WAS AGE 17?**

**Authorities**

State v. Bruegger, 773 N.W.2d 862, 884 (Iowa 2009)

State v. Parker, 747 N.W.2d 196, 212 (Iowa 2008)

State v. Brooks, 760 N.W.2d 197, 204 (Iowa 2009)

Roper v. Simmons, 543 U.S. 551, 567, 125 S.Ct. 1183, 1194, 161 L.Ed.2d 1, 20-21 (2005)

State v. Oliver, 812 N.W.2d 636 at 647 (Iowa 2012)

Iowa Code Section 124.411

## **ROUTING STATEMENT**

This case should be transferred to the Court of Appeals because the issue raised involves existing legal principles.

Iowa R. App. P. 6.903(2)(d) and 6.1101(3)(a).

## **STATEMENT OF THE CASE**

**Nature of the Case:** This is an appeal by the defendant Donald Benjamin Earl Reed from his convictions and sentences for Possession of more than 10 grams of cocaine base, with intent to deliver, while in possession of a firearm and as a second offender; a Tax Stamp violation; Possession of a firearm as a felon; two counts of Child Endangerment; and one count of Possession of Marijuana, following jury trial in the Black Hawk County District Court, the Honorable Todd A. Geer presiding.

### **Course of Proceeding and Disposition in the District**

**Court:** Trial Information was filed on April 23, 2012, charging Mr. Reed with: I. Possession of more than 10 grams of cocaine base, with intent to deliver, while in possession of a firearm and as a second offender, a class B felony, in violation of Iowa Code Sections 124.401(1)(b)(3), 124.401(1)(e), and 124.411; II.

a Tax Stamp violation, a class D felony, in violation of Iowa Code Section 453B.12; III. Possession of a firearm as a felon, a class D felony, in violation of Iowa Code Section 726.26; IV & V. two counts of Child Endangerment, aggravated misdemeanors, in violation of Iowa Code Section 726.6; and VII. one count of Possession of Marijuana, a serious misdemeanor, as a second offender, in violation of Iowa Code Section 124.401(5). Co-Defendant Alicia Buchanan was charged in the same trial information with Possession of a firearm by a felon, two counts of Child Endangerment, and one count of Possession of Marijuana. (Trial Information; 11/14/13 Nunc Pro Tunc Order) (App. pp. 1-4, 194).

Count VI, another drug charge, concerning Possession of powder cocaine, as an aggravated misdemeanor, was not submitted to the jury and was dismissed as part of the Sentencing order. (Trial Information; Verdicts, Sentencing Order) (App. pp. 1-4, 139-145, 191-192).

Jury trial commenced on April 23, 2013. (Tr. P.1, LL.1-25) (App. p. 25). On May 6, 2013, the jury returned a verdict

finding Mr. Reed guilty as charged. (Verdicts) (App. pp. 139-145).

On June 10, 2013, judgment was entered and Mr. Reed was sentenced to a prison term not to exceed one hundred years, on the enhanced drug charge, with a one-third mandatory minimum, to a term of up to two years each on the child endangerment charge, to a term of up to five years each on the Possession of a firearm as a felon and on the Tax Stamp charge, and up to 180 days on the marijuana charge. All of the sentences were ordered to run concurrently. (Sentence Order) (App. pp. 191-192). Notice of appeal was filed on June 19, 2013. (Notice of Appeal) (App. p. 193).

**Facts:** The testimony at trial indicated the following: On April 11, 2012, a search warrant was executed at a house located at 1320 Randolph in Waterloo. Officers had been watching the house for a few weeks prior to the search. Short term traffic was observed with people staying for only five to ten minutes. Mr. Reed and Ms. Alicia Buchanan were observed coming and going to and from the house. Mr. Reed's car was observed in the driveway. Children were seen at the

house. (Tr. P.64, LL.1-15; P.67, L.14-P.72, L.17) (App. pp. 26, 27-33).

On the night before the search, Mr. Reed was observed to be at the house from about 9 p.m to around midnight. Ms. Buchanan was also present. No surveillance was conducted overnight. At around 11:20 a.m. the next morning Mr. Reed was observed leaving the house and driving away. His car was stopped by police. (Tr. P.72, L.18-P.76, L.2, P.145, L.25-P.146, L.25) (App. pp. 33-37, 69-70).

When police knocked on the door to execute the warrant, Ms. Buchanan responded with a question and did not open the door. The police forced open the door and found only Ms. Buchanan and two young girls at home. One of the girls was the daughter of Ms. Buchanan and Mr. Reed. (Tr. P.76, L.3-P.81, L.14) (App. pp. 37-44).

Officer Girsch smelled smoked marijuana and observed a small amount of marijuana type substance and white powder on the kitchen table. (Tr. P.82, L.1-P.84, L.5; P.92, L.5-P.93, L.2: Exhibits A-24, A-25) (App. pp. 44-46, 47-49, Exh. App. pp. 1-2).

A plastic bag with a corner torn out of it, consistent with the packaging of crack cocaine, was found on the kitchen counter. (Tr. P.93, L.12-P.94, L.11; State's Exh. A-27) (App. pp. 49-50, Exh. App. p. 3).

In the bedroom, which contained adult items, the officer observed small plastic bags, some with the corners ripped out, white powder, and a small digital scale, which was lacking a battery. (Tr. P.94, L.12-P.97, L.6; P.148, LL.7-13) (App. pp. 50-53, 71).

On the dresser, near the scale, the officer found the Wisconsin photo Identification card of a Raymond Brumfield, which had some white powder, suspected cocaine, on it. The photo was not of the defendant. (Tr. P.97, LL.10-21; Tr. P.148, LL.14-25; State's Exh. A-36) (App. pp. 53-54, 71, Exh. App. p. 5).

In the adult bedroom, in a high cabinet near the ceiling, equipped with doors, above a TV, an X-box was observed. Behind the X-box, the officer found two handguns, a 9 millimeter and a 45 millimeter. (Tr. P.98, L.8-P.100, L.9;

State's Exh. A-34, A-37, A-38) (App. pp. 54-57, Exh. App. pp. 4, 67).

A purse was located on the same shelf. Inside of the purse was a ripped plastic bag. (Tr. P.100, LL.7-16) (App. pp. 56-57).

On a high shelf, within a cabinet equipped with a door, next to the TV, a plate was found under a pair of jeans. The plate contained a plastic bag which held a large amount of crack cocaine. A bag of marijuana was also found in the same location. (Tr. P.100, L.17-P.102, L.25; State's Exh. A-37, A-47, A-48, A-49, A-50) (App. pp. 57-60, Exh. App. pp. 6, 8-11).

No tax stamps were observed on the cocaine. (Tr. P.116, L.25-P.117, L.8) (App. p. 62).

No large amounts of cash were found in the home, or on the person of Alicia Buchanan. (Tr. P.121, LL.5-10) (App. p. 63).

Officer Savage stated that the utilities in the home, at 1320 Randolph, were in the name of a Mr. Chad Wolf, who may also have been the renter of the house. (Tr. P.162, LL.10-22; Tr. P.166, L.7-P.167, L.2) (App. pp. 74, 75).

The officer described a document that was found in the trash from the Randolph Street home, on April 5, 2012. It was a bill from Rent-a-Center, addressed to Alicia Buchanan and Donald Reed at the Randolph Street address, and dated March 12, 2012. The officer also found a letter addressed to Ms. Buchanan at 307 Adams Street. (Tr. P.167, L.17-P.168, L.19; P.170, L.12-P.171, L.16; State's Exh. BB) (App. pp. 75-77, 78-79, Exh. App. p. --).

State's exhibit FF was Rent-A-Center order dated 3/12/2012. It was signed by Ms. Buchanan only, and Donald Reed was listed as husband. The pre-printed form was filled out in long hand. Donald and Alicia were listed as being named in the mortgage. (State's Exh. FF) (App. Exh. App. p. 58).

Officer Savage stopped the defendant after he left the home and while the search was being conducted. Mr. Reed had \$523 cash in his front pocket. (Tr. P.173, L.21-P.176, L.16) (App. pp. 80-84).

Mr. Reed was arrested. At the jail he made remarks that indicated that he was concerned about Ms. Buchanan and the

children, and that he and Ms. Buchanan would help police. (Tr. P.180, L.6-P.182, L.9) (App. pp. 84-86).

Officer Savage had observed the defendant at two other addresses, including 548½ Riehl Street. Mr. Reed's car was registered at an address other than the Randolph address. Mr. Reed was not carrying any identification when he was stopped. (Tr. P.182, L.13-P.183, L.13) (App. pp. 87-88).

Donald Reed, designated as "father," was listed on the Rent-A-Center order as living at 548½ Riehl Street. (State's Exh. FF) (App. Exh. App. p. 58). According to Officer Savage, Donald Reed, Sr. lived at the Riehl Street address. Also the officer was aware that in March of 2011, the defendant lived at the Riehl Street address. (Tr. P.189, L.25-P.190, L.15) (App. p. 92).

When Mr. Reed was stopped he did not smell of marijuana. No drugs were found on his person or in the car. (Tr. P.184, LL.3-16) (App. p. 88).

Officer Gann observed Chad Wolfe, a white male, who entered the house on Randolph Street on the morning of the search, but before the search. He stayed for about 15

minutes. (Tr. P.192, LL.1-11; P.195, L.17-P.196, L.16) (App. pp. 93, 94-97).

Two partial fingerprints were found, one on each of the guns recovered in the search. The prints were suitable for comparison and were found to not belong to either the defendant or Ms. Buchanan. (Tr. P.256 LL.1-13; P.257, LL.15-22; P.272, L.25-P.273, L.21) (App. pp. 115, 116, 122-123).

The cocaine found on the plate weighed over 10 grams. (Exh. EE) (App. Exh. App. p. 57).

## **ARGUMENT**

### **I. THE RECORD CONTAINS INSUFFICIENT EVIDENCE TO SUPPORT ANY OF THE DEFENDANT'S CONVICTIONS.**

#### Standard of Review and Preservation of Error.

The standard of review is for errors at law. State v. Simpson, 528 N.W.2d 627, 630 (Iowa 1995). The error was preserved by counsel's motion for judgment of acquittal. (Tr. P.278, L.14-P.279, L.2; P.281, L.6-P.284, L.16) (App. pp. 123-128).

### Discussion.

The Court on appeal considers the evidence in the light most favorable to the State, and it considers all the evidence presented at trial, not just the evidence which supports the verdict. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980); State v. Conroy, 604 N.W.2d 636, 638 (Iowa 2000); State v. Maring, 619 N.W.2d 393, 395 (Iowa 2000). The verdict must be supported by substantial evidence, “such evidence as could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt.” Robinson at 339.

The ultimate burden is on the State to prove every fact necessary to constitute the crime with which the defendant is charged. State v. Gibbs, 239 N.W.2d 866, 867 (Iowa 1976). The evidence presented must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture. State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981). A verdict is binding unless the finding is clearly against the weight of the evidence. State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981).

“Evidence that allows two or more inferences to be drawn, without more, is sufficient to support guilt.” State v. Brubaker, 805 N.W.2d 164, 172 (Iowa 2011), citing State v. Truesdell, 679 N.W.2d 611, 618-619 (Iowa 2004).

In this case counsel specifically argued that this was a case of constructive possession of the drugs and guns. Mr. Burroughs, for the defense, reasoned that because of this fatal flaw in the State’s case, all of the charges must fail. He argued that, in a light most favorable to the State, the evidence established that Mr. Reed was present in the house some of the time. No evidence placed him in the bedroom where the majority of drugs and the two guns were found. No evidence established that the defendant had dominion or control over the guns. No evidence established that Mr. Reed had knowing possession of the drugs found in the bedroom, with the intent to deliver. (Tr. P.278, L.14-P.279, L.2; P.281, L.6-P.284, L.16; Jury Inst. 21, 30) (App. pp. 123-128, 136, 138).

This is a constructive possession case; actual possession requires substances to be found on the defendant’s person. State v. Atkinson, 620 N.W.2d 1, 3 (Iowa 2000).

In order for a constructive possession case to be upheld on appeal, the State must establish beyond a reasonable doubt that the accused knew of the presence of the items on premises occupied and controlled by him, either exclusively or jointly with others and the nature of the items. State v. Reeves, 209 N.W.2d 18, 23 (Iowa 1973).

In this case there is no clear proof that Mr. Reed lived at the house. The fact that Ms. Buchanan listed him as her husband on an application to rent something, did not establish his residence in the home. (State's Exh. FF) (App. Exh. App. p. 58).

The fact that officers observed him entering and leaving the home, where his daughter and her mother lived, only established that he was a familiar visitor. (Tr. P.64, LL.1-15; P.67, L.14-P.72, L.17; P.76, L.3-P.81, L.14) (App. pp. 26, 27-33, 37-44).

In the bedroom where the large amounts of cocaine was found, hidden under a pair of jeans, the ID of another man, Mr. Brumfield, was found with white powder on it, on the bedroom dresser. (Tr. P.97, LL.10-21; P.100, L.17-P.102,

L.25; P.148, LL.14-25; State's Exh. A-36; A-37, A-47, A-48, A-49, A-50) (App. pp. 53-54, 57-60, 71, Exh. App. pp. 5-6, 8-11). The utilities were in yet another man's name, Mr. Wolf. (Tr. P.162, LL.10-22; Tr. P.166, L.7-P.167, L.2) (App. pp. 74-75).

The guns were located in a very high cabinet equipped with doors. Only part of one gun barrel was visible. (Tr. P.98, L.8-P.100, L.9; State's Exh. A-34, A-37, A-38) (App. pp. 54-57, Exh. App. pp. 4, 6-7). Absolutely no evidence placed Mr. Reed in that bedroom. Even if Mr. Reed were connected to the home as a resident, no evidence connected him to the plate of cocaine and the guns.

In State v. Webb, this Court listed a number of factors to consider in determining whether a defendant had constructive possession. They included: (1) incriminating statements made by the defendant; (2) incriminating actions of the defendant upon the police's discovery of the drugs; (3) the defendant's fingerprints on the contraband; (4) any other circumstances linking the defendant to the drugs. State v. Webb, 648 N.W.2d 72, 79 (Iowa 2002). The factors are only to be used as a guide in determining whether the State has

established constructive possession. Even if some factors are present, the Court still needs to determine whether all of the facts and circumstances allow a reasonable inference that the defendant knew of the drugs' presence and had control and dominion over the contraband. State v. Cashen, 666 N.W.2d 566, 569 (Iowa 2003). In this case all of factors mitigate in favor of the defendant. The factors are also relevant to the question of whether the defendant had dominion or control of the guns. State v. Webb, 648 N.W.2d 72, 79-80 (Iowa 2002).

The defendant made no incriminating statements. He was not present when the search was conducted. (Tr. P.173, L.21-P.176, L.16) (App. pp. 80-84). The only fingerprints found were two prints, one on each gun, which belonged to someone other than Mr. Reed and Ms. Buchanan. (Tr. P.256, LL.1-13; P.257, LL.15-22; P.272, L.25-P.273, L.21) (App. pp. 115, 116, 122-123).

The statements at the jail to the effect that the defendant could help the police were only made after he had been arrested and only indicated that he knew he was facing drug

charges and that he may have had information about others who dealt drugs. (Tr. P.180, L.6-P.182, L.9) (App. pp. 84-86).

The case at bar has a lot in common with the Webb case. Both defendants were not in the dwelling when the search warrant was served. In both cases others lived in the dwelling and were at home at the time of the search. Both defendants were charged with drug charges and child endangerment because at least one child lived in a home where drugs and at least one firearm were located. In Webb, the Iowa Supreme Court found that the evidence was insufficient to prove that Mr. Webb was in constructive possession of the drugs and the gun found in the home. None of the drugs or gun was found among Webb's personal belongings. Webb was not under the influence of drugs and no drugs were found on his person. These facts are very similar to the instant case. (Trial Information; Tr. P.64, LL.1-15; P.67, L.14-P.72, L.17; P.76, L.3-P.81, L.14) (App. pp. 1-4, 26, 27-33, 37-44). State v. Webb, 648 N.W.2d 72, 79-80 (Iowa 2002). This case deserves the same result. The fact that the authorities found a nonsensical unsent text message in the defendant's phone

which contained the word “crack,” proved nothing. (State’s Exh. D, P.16) (App. Exh. App. p. 27).

Regarding the marijuana charge, the bag found in the bedroom was hidden from plain view. (Tr. P.102, LL.13-19) (App. p. 59). No evidence established that Mr. Reed had any knowledge of its presence, or the right to control it. (Jury Inst. 27) (App. p. 137). Unlike, Ms. Buchanan, he did not smell of burnt marijuana. (Tr. P.184, LL.3-16) (App. p. 88). This fact suggests that she began to smoke the illegal drug, only after Mr. Reed left the house.

Also because no adequate connection was made between the drugs and guns and Mr. Reed, the child endangerment charges were not sufficiently proven. No evidence established that he had any authority to control the hidden items found in that house. (Jury Inst. 27) (App. p. 137).

When the appellate court reviews a case on a sufficiency of the evidence challenge, the court is to consider all of the evidence, not just evidence which supports the verdict. State v. Maring, 619 N.W.2d 393, 395 (Iowa 2000).

Since the State failed to prove, beyond a reasonable doubt, a sufficient connection between the defendant and the drugs and guns found in the house, this court should reverse his convictions for the cocaine charge, the firearms possession charge, the tax stamp charge, the child endangerment charges and the marijuana charge.

## **II. TRIAL COUNSEL WAS INEFFECTIVE.**

### Standard of Review and Preservation of Error.

Since the applicant alleges a violation of his constitutional Sixth Amendment right to counsel, review is de novo with this Court making its own evaluation of the totality of the circumstances. Kane v. State, 436 N.W.2d 624, 626 (Iowa 1989).

A claim of ineffective assistance of counsel can be an exception to the general rule of error preservation. State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982). Preserving ineffective assistance of counsel claims for post-conviction, when the claim can be resolved on direct appeal wastes time and resources. State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004).

The test to be applied to a claim of ineffective counsel is whether under the entire record and totality of the circumstances counsel's performance was within the range of normal competency. When the claim is grounded on counsel's failure to take some action, the claimant must demonstrate: (1) counsel failed to perform an essential duty, and (2) prejudice resulted. Claimant must satisfy this burden by a preponderance of the evidence, and rebut the presumption of counsel's competence. Meier v. State, 337 N.W.2d 204, 206 (Iowa 1983); State v. Terry, 569 N.W.2d 364, 368-369 (Iowa 1997).

The defendant must show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Gering v. State, 382 N.W.2d 151, 153-54 (Iowa 1986).

Generally ineffective claims are reserved for post-conviction proceedings. However, claims can be resolved on direct appeal when the record adequately presents the issue.

State v. Buck, 510 N.W.2d 850, 853 (Iowa 1994). When counsel's omission cannot be attributed to "mere improvident trial strategy, miscalculated tactics or mistaken judgment," the issue can be reached on appeal. State v. Westeen, 591 N.W.2d 203, 207 (Iowa 1999); quoting State v. Hrbek, 336 N.W.2d 431, 436 (Iowa 1983).

A. For failing to file a motion to suppress regarding the sufficiency of the search warrant application.

A search warrant was executed in this case on April 12, 2012. Officers were allowed to search the house at 1320 Randolph Street, and Reed's car. The warrant stated that narcotics, paraphernalia, and guns were expected to be found.

The addendum to the search warrant application, dated April 11, 2012, and filed on April 16, 2012, contained only vague, stale, and unverified information. It was recited that over the last several years officers have received information that Reed was involved in the illegal sale and distribution of marijuana and cocaine, and that he had prior arrests in the State of Wisconsin for narcotics from 2000 through 2008. No information was given as to the number of arrests, and

whether any of the arrests resulted in convictions.

(Addendum) (App. pp. 10-12).

On December 6, 2011, a stop of the defendant was attempted while he was driving, for the offense of Driving while Suspended. Mr. Reed drove off quickly and then abandoned the vehicle. He was later arrested for the driving offense on December 12, 2011. Confidential informant # 2 claimed that when Reed ran from officers on December 6, he was in possession of a handgun and narcotics. No specific information was given as to how the informant gained this alleged knowledge. (Addendum) (App. pp. 10-12).

It was reported that on January 23, 2012, nearly three months before the search, Officer Frien "had information" that Mr. Reed was selling large amounts of crack cocaine from an unspecified address on Adams Street and that he was driving to Chicago to obtain narcotics. No one was listed as the source of the information. A check of utilities revealed that on December 23, 1981, Chad James Wolf was the renter at 307 Adams. (Addendum) (App. pp. 10-12).

Mr. Wolf was with Mr. Reed on November 5, 2011, when a Ms. Alicia Buchanan committed an assault. Mr. Wolf was currently listed as the renter at 1320 Randolph Street, the site of the search. On November 14, 2011, Mr. Reed and Ms. Buchanan were listed as renters at a Lincoln Street address. (Addendum) (App. pp. 10-12).

According to the addendum, on February 18, 2012, an Illinois State Trooper reported to a Waterloo Police Officer that he had stopped Mr. Reed in Illinois. The addendum went on to allege that another man was also in the vehicle and that \$4,000 was found in the rental car. It was the belief of the trooper that the trip was for the purpose of purchasing narcotics in Chicago. No details were given as to the date of the stop and why Reed was suspected of an illegal plan. (Addendum) (App. pp. 10-12).

On March 4, 2012 Police Sergeant Richter “received information” that the defendant was selling crack cocaine from 307 Adams Street. No details were given as to the particulars or source of the information received. (Addendum) (App. pp. 10-12).

Surveillance was conducted on March 25, 2012. The defendant and Reed were observed in the residence at 1320 Randolph Street. On April 3, 2012, confidential informant #2 told Officers Savage, the author of the search warrant application, that Reed had been selling marijuana and crack cocaine, and that he had a 9 mm handgun at the 1320 Randolph. No details were given as to how the confidential source came to the conclusions that were provided.

(Addendum) (App. pp. 10-12).

Officer Savage reported that in the five to ten days prior to the application, trash had been collected from 1320 Randolph. In the trash, several clear plastic sandwich bags were found, with the corners ripped off, consistent with the packaging of narcotics. A March 2012, bill was found in the trash, which was addressed to the defendant and Alicia Buchanan at 1320 Randolph Street. (Addendum) (App. pp. 10-12).

Confidential informant #1 made a purchase of marijuana from the residence at 1320 Randolph within three days of the date of the April 11, 2012 search warrant application.

However, the addendum failed to state from what person the purchase was made. (Addendum) (App. pp. 10-12).

Confidential informant #1 told investigator Zubak that the defendant lived at the Randolph street address with Ms. Buchanan. However, no date was provided for when the conversation took place. (Addendum) (App. pp. 10-12).

It was reported that confidential informant #1, told Zubak that Reed had “recently” been in the possession of a firearm. No specific date or details were given for the conversation or for the allegation that Mr. Reed possessed a gun. (Addendum) (App. pp. 10-12).

The applicant for the search warrant requested that a warrant be granted for the house on Randolph Street and for the Buick vehicle owned by Reed. No recent or detailed information was given which would indicate that any contraband would be found in the vehicle. (Addendum) (App. pp. 10-12).

On April 11, 2012, a search warrant was issued for the house at 1320 Randolph Street, and for the vehicle owned by Mr. Reed. (Search Warrant) (App. pp. 13-15).

The attachment for informant #1, provided that the person had provided information more than 25 times in the past which lead to the making of 2 arrests, and stated that the information supplied in this investigation had been corroborated by law enforcement. The details of the corroboration were to be indicated in the narrative, but none are found. (Informant's Attachment #1) (App. p. 7).

The attachment for informant #2, provided only that the informant was a concerned citizen who had been known by Officer Savage for three years. The only other information provided was; "See Addendum." (Informant's Attachment #2) (App. p. 8). The addendum provided that Confidential Informant #2 made damaging and vague allegations that Mr. Reed had been selling drugs and was armed. (Addendum) (App. pp. 10-12).

If the grounds for the issuance of a search warrant are supplied by an informant, the application must establish the credibility of the informant or the credibility of the information given by the informant. Iowa Code Sec. 808.3 (2011).

In this case the application does not establish the credibility of the informants or the information given. Confidential informant #2 claimed that when Reed ran from officers in 2011, he had a gun and narcotics. Nothing established the credibility of this claim. Similarly the claim of the same informant that Reed had been selling drugs and had a gun were not verified in any way. (Addendum) (App. pp. 10-12).

Informant #2 stated that s/he bought marijuana at the Randolph Street house, but did not state from whom. Nothing backed up his story. Other claims by this same informant, that Reed lived at the house and had a gun, were not verified. (Addendum) (App. pp. 10-12).

Iowa R. Crim. P. 2.12(1) provides that a person aggrieved by an unlawful search and seizure may move to suppress for use as evidence any items seized on the ground that the warrant was insufficient, or that probable cause did not exist. Iowa R. Crim. P. 2.12(1) (2002). No such motion was filed in this case.

The defendant has the right to be protected against unreasonable searches and seizures, under both the federal and Iowa Constitutions. No warrant shall issue but upon probable cause. U.S. Const. Amend IV, Iowa Const. art. I, sec. 8.

Thus, any evidence obtained in violation of the Fourth Amendment or article I section 8 will be suppressed and inadmissible, “no matter how relevant or probative that evidence may be.” State v. Predka, 555 N.W.2d 202, 205 (Iowa 1996) (citing State v. Schrier, 283 N.W.2d 338, 342 (Iowa 1976)).

In this case the warrant was insufficient and lacked probable cause. Ordinarily, the determination of probable cause is limited to consideration the information contained within the four corners of the application. State v. Poulin, 620 N.W.2d 287, 289 (Iowa 2000). Credibility of the two informants was not sufficiently established. The information provided directly from officers was stale and vague. Arrests from 2008 and earlier were stale and proved nothing. The fact that Reed fled from a driving while suspended stop about four

months before the arrest did not support probable cause.

Reed's connection with Ms. Buchanan did not support an inference of narcotics sales. The drive in Illinois in a rental car with cash, that was reported about two months prior to the application did not help the State's application. (Addendum) (App. pp. 10-12).

The surveillance lacked a sufficient connection to the defendant. One bill in the trash and Mr. Reed walking into the house did not establish that he lived there, in light of the fact that his child and her mother lived there. The trash rip find of torn baggies were not sufficiently connected to Mr. Reed. Significantly, the officer reported that another man, Mr. Wolf was the current renter of the house. No connection between Mr. Reed's car and narcotics was established. (Addendum) (App. pp. 10-12).

The search warrant application failed to establish probable cause that narcotics and guns would be found in the house or in the defendant's car, in the possession of the defendant. No probable cause even established that Mr. Reed lived in the house. The confidential informants and the

officers provided only stale, vague and unverified information. (Search Warrant Application) (App. p. 5).

Counsel failed to perform an essential duty when he did not file a motion to suppress. Meier v. State, 337 N.W.2d 204, 206 (Iowa 1983). Confidence in the outcome is undermined. Gering v. State, 382 N.W.2d 151, 153-54 (Iowa 1986).

B. For failing to investigate and present evidence that Mr. Reed did not live at the Randolph Street House.

A central issue in this case was whether Mr. Reed lived at the Randolph Street address. According to the addendum to the search warrant, another man, Chad Wolf, was currently the renter at the house. (Addendum) (App. pp. 10-12). However, the jury never heard about this crucial fact. The defense put on no evidence. (Tr. P.289, LL.21-23) (App. p. 131).

The jury heard only scant evidence that Mr. Reed did not live in the drug house. Officer Savage had observed the defendant at two other addresses, including 548½ Riehl Street. Mr. Reed's car was registered at an address other than the Randolph address. Mr. Reed was not carrying any

identification when he was stopped. (Tr. P.182, L.13-P.183, L.13) (App. pp. 87-88). Donald Reed, designated as “father,” was listed on the Rent-A-Center order as living at 548½ Riehl Street. (State’s Exh. FF) (App. Exh. App. p. 58). According to Officer Savage, Donald Reed, Sr. lived at the Riehl Street address. Also the officer was aware that in March of 2011, the defendant lived at the Riehl Street Address. (Tr. P.189, L.25-P.190, L.15) (App. p. 92).

There was other indication in the PSI that Mr. Reed lived with his father, Donald Reed, Sr. Mr. Reed told the author of the Pre-sentence Investigation report that at the time of the search, he was living at 548½ Riehl Street in Waterloo, with his father’s girlfriend Jeanine Williamson. This same address was given as his father’s address. (PSI, P.7-9) (App. pp. 165-167). Reed also reported in the PSI report, that he did not live at the Randolph Street house, but frequently visited his daughter there. He also mentioned that Alicia Buchanan, the mother of his child had a boyfriend, and implied that the boyfriend was the drug dealer. (PSI, P.11) (App. p. 169). The identification card of a Mr. Raymond Brumfield was found in

the bedroom near a scale, with suspicious white powder on it, and yet no other evidence was presented to the jury to indicate that Mr. Brumfield lived there and was the guilty party. (Tr. P.97, LL.10-21; Tr. P.148, LL.14-25; State's Exh. A-36) (App. pp. 53-54, 71, Exh. App. p. 5).

Trial counsel has a duty to investigate and present crucial evidence for the defendant. Ledezma v. State, 626 N.W.2d 134, 141 (Iowa 2001).

Counsel failed to perform an essential duty when he did not investigate and present, essential to the defense, available evidence that Mr. Reed did not live in the drug house and that another man did. Meier v. State, 337 N.W.2d 204, 206 (Iowa 1983). Confidence in the outcome is undermined. Gering v. State, 382 N.W.2d 151, 153-54 (Iowa 1986).

C. For failing to object to the photo of an assault rifle.

The jury was presented with an exhibit showing photos from the defendant's cell phone. One of the photos depicted an assault rifle, a dangerous firearm. (State's Exh. D, P.45; (Tr. P.243, LL.16-21) (App. p. 56). The State's witness

admitted that no similar weapon was found at the Randolph Street house. (Tr. P.247, LL.17-22) (App. p. 113).

Because Mr. Reed was accused of possessing a firearm in connection with the drugs found, the exhibit was very prejudicial. Even though it was established that it could have been a photo sent to Reed, it still unfairly implicated that he was part of a gun culture. (Tr. P.251, L.11-P.252, L.3) (App. pp. 114-115). Counsel should have objected on the basis that it was not relevant, that it presented a danger of undue prejudice, and because it indicated a prior bad act. Iowa R. Evid. 5.401, 5.402, 5.404(b).

In light of the fact that the evidence connecting Mr. Reed to the drugs and guns found in the house was very tenuous, the unfair evidence of Reed's association with an unusually dangerous weapon likely provided the jury with the improper link needed to convict Mr. Reed of all of those charges. The State emphasized the photo of the rifle in closing argument. (Tr. P.309, LL.10-18) (App. p. 133).

Counsel failed to perform an essential duty when he did not object to the photo of the assault rifle. Meier v. State, 337

N.W.2d 204, 206 (Iowa 1983). Confidence in the outcome is undermined. Gering v. State, 382 N.W.2d 151, 153-54 (Iowa 1986).

**III. THE DEFENDANT'S SENTENCE OF UP TO 100 YEARS FOR THE ENHANCED COCAINE OFFENSE WAS CRUEL AND UNUSUAL PUNISHMENT BECAUSE IT WAS BASED ON A PRIOR CONVICTION THAT OCCURRED WHEN REED WAS AGE 17.**

Mr. Reed was denied the opportunity to present evidence that his enhanced sentence, based on a prior offense, which occurred when he was age 17, was cruel and unusual under the Iowa Constitution in that it was grossly disproportional to his alleged crime.

Because of his prior juvenile drug offense adjudication, the Court, the State, and defendant's lawyer all presumed that Reed was eligible for a tripling of his sentence, pursuant to Iowa Code section 124.411. (Trial Info.; Sent. Tr. P.1, L.1-P.16, L.10) (App. pp. 1-4, 171-190). Thus, Mr. Reed was sentenced without an evidentiary hearing as to whether a long sentence was grossly disproportional to his alleged crime.

But in State v. Bruegger, this Court held that defendants receiving an enhanced sentence, based on a juvenile

adjudication, are entitled “to make an individualized showing that the sentence is cruel and unusual as applied to [them].” State v. Bruegger, 773 N.W.2d 862, 884 (Iowa 2009). Because Mr. Reed was denied the opportunity to make such an individualized showing, this Court should vacate his sentence and remand this case for resentencing.

**A. Error Preservation.**

Mr. Reed challenges his enhanced sentence as illegal on constitutional grounds. “A defendant may challenge an illegal sentence at any time.” State v. Bruegger, 773 N.W.2d 862, at 869 (Iowa 2009), (citing State v. Parker, 747 N.W.2d 196, 212 (Iowa 2008)). “Where, as here, the claim is that the sentence itself is inherently illegal, whether based on constitution or statute . . . the claim may be brought at any time.” State v. Bruegger, 773 N.W.2d 862, 872 (Iowa 2009).

**B. Standard of Review.**

“This court reviews constitutional questions de novo.” Id. at 869 (citing State v. Brooks, 760 N.W.2d 197, 204 (Iowa 2009)).

### **C. Merits.**

Mr. Reed was denied the opportunity to show that his sentence for a drug charge, enhanced by a prior juvenile adjudication, was grossly disproportional to his alleged crime. There is no question that the court was considering the prior Wisconsin offense which occurred on October 22, 2002, when Mr. Reed was age 17. The conviction was entered on May 8, 2003. Mr. Reed's date of birth was January 30, 1985. (Trial Info.; PSI, P.1, 4) (App. pp. 1-4, 159, 162).

At trial, the jury convicted Reed of Possession of more than 10 grams of cocaine with intent to deliver, while in the immediate possession of a firearm, in violation of Iowa Code Section 124.401(1)(b)(3). (Trial Info.; Verdict Count 1) (App. pp. 1-4, 139-140).

At a separate hearing, Mr. Reed admitted that he had a prior felony drug offense from Wisconsin, manufacture or delivery of cocaine, with a conviction date of on or about May 8, 2003. Neither attorney, nor the judge mentioned the significance of the fact that Reed was age 17, when the prior

crime occurred. (5/3/13 Tr. P.1, L.1-P.11, L.13) (App. pp. 146-158).

The PSI recommended that Mr. Reed receive a sentence of 150 years due, to triple the normal punishment of 50 years, due to the prior offense. The prior offense was identified in the PSI as occurring on 10/22/2002, when the defendant was age 17. Reed's birth date was January 30, 1985. (PSI, P.1,4) (App. pp. 159-162).

The court never held an evidentiary hearing to determine if doubling the sentence was cruel and unusual as applied to Mr. Reed. The court did not initiate one and neither the State nor the defendant's lawyer requested one. Reed never had the opportunity to challenge his enhanced sentence as cruel and unusual under Iowa's Constitution, as interpreted in Bruegger. Mr. Reed is entitled to challenge his enhanced sentence as cruel and unusual, as applied to him, under Iowa's Constitution. State v. Bruegger, 773 N.W.2d 862, 884 (Iowa 2009).

In Bruegger, this Court held that a defendant convicted of Sexual Abuse in the Third Degree, who receives a

mandatory enhanced sentence based on a juvenile adjudication for sexual misconduct, is entitled to challenge his sentence as cruel and unusual under Iowa's Constitution. State v. Bruegger, 773 N.W.2d 862, 884-85 (Iowa 2009).

"Article I, section 17 of the Iowa Constitution prohibits cruel and unusual punishment." Bruegger at 882.

In this case, Reed should have had the opportunity to challenge his sentence as being "grossly disproportional" to his crime. A sentence is grossly disproportional if the severity of the sentence is "off the charts" when compared to the defendant's underlying crime. In determining whether a sentence is grossly disproportional, this Court will "apply the federal standards" used in cruel-and-unusual-punishment challenges. But this Court need not apply the federal standards in the same way as the federal courts. Instead, "review of criminal sentences for gross proportionality under the Iowa Constitution should not be a toothless review," and should be analyzed using "a more stringent review than would be available under the Federal Constitution." State v. Bruegger, 773 N.W.2d 862, 873, 883, 885-86 (Iowa 2009).

Applying this “more stringent review,” the Court in Bruegger reviewed the constitutionality of a mandatory sentence enhanced by section 901A.2(3), regarding a Sexual Abuse conviction, enhance by a sexually predatory offense committed as a juvenile. The defendant in Bruegger, like Reed, received no evidentiary hearing to determine if the enhancement could not constitutionally be applied. State v. Bruegger, 773 N.W.2d 862, 867, 885-86 (Iowa 2009).

In reviewing the sentence in Bruegger, the Iowa Supreme Court held that a defendant receiving a sentencing enhancement is entitled to present evidence as to the constitutionality of the enhancing statute as applied to the defendant, an individualized assessment of the punishment imposed should be permitted. State v. Bruegger, 773 N.W.2d 862, 884, 886 (Iowa 2009).

The Iowa Supreme Court found that the enhancement law in question presented a risk that the sentence would be grossly disproportionate as applied. The same can be said for the statute in question in Mr. Reed’s case. The fact that both statutes make no distinction between prior adult convictions

and prior convictions that happened when the defendant was a juvenile, add to the risk of disproportionality. State v. Bruegger, 773 N.W.2d 862, 884-885 (Iowa 2009).

The appellate court must consider the differences between juveniles and adults. Juveniles have immature judgment, act impulsively and without full appreciation of the consequences of the acts, are more susceptible to peer pressure, and have less well developed personalities. These differences make juveniles “categorically less culpable than the average criminal.” State v. Bruegger, 773 N.W.2d 862, 876-877 (Iowa 2009), (quoting Roper v. Simmons, 543 U.S. 551 at 567, 125 S.Ct. 1183, at 1194, 161 L.Ed.2d 1, at 20-21 (2005)).

Applying Bruegger’s standards to this case, Reed is entitled to the opportunity to challenge his sentencing enhancement for gross disproportionality. The enhanced sentence imposed in this case may be grossly disproportional to the consequences of Reed’s adolescent act. Thus, like the defendant in Bruegger, Reed “should be allowed to make an individualized showing that the sentence is cruel and unusual

as applied to him.” State v. Bruegger, 773 N.W.2d 862, 884-885 (Iowa 2009).

This case should be remanded for resentencing based on an evidentiary hearing to determine whether an enhanced sentence would be grossly disproportional.

Mr. Reed never had the opportunity to present evidence that the enhanced sentence under Iowa Code Section 142.411, was grossly disproportional to his underlying crimes. Iowa courts use a three-part test in determining whether a sentence is grossly disproportional:

The first step in this analysis, sometimes referred to as the threshold test, requires a reviewing court to determine whether a defendant’s sentence leads to an inference of gross proportionality. This preliminary test involves a balancing of the gravity of the crime against the severity of the sentence. If and only if, the threshold test is satisfied, a court then proceeds to step two and three of the analysis. These steps require the court to engage in an interjurisdictional analysis comparing the challenged sentence to sentences for other crimes within the jurisdiction. Next, the court engages in an interjurisdictional analysis, comparing sentences in other jurisdictional for the same or similar crimes.

State v. Oliver, 812 N.W.2d 636 at 647 (Iowa 2012), (citing

Bruegger, 773 N.W.2d at 873 (internal citations and quotation

marks omitted)). The district court did not hear evidence on, or consider any of these factors at Reed's sentencing.

Therefore the record in this case is factually deficient in a number of respects, just like Bruegger. The record is limited regarding the underlying facts and circumstances of the defendant's juvenile offense, just like in Bruegger, 773 N.W.2d at 885.

The sentencing court in this case should have heard evidence of the underlying facts and circumstances of the prior offense. Evaluating Reed's cruel-and-unusual-punishment claim cannot be done without a proper record. Thus, the sentence of up to 100 years, effectively a life sentence hearing, at which the defendant will be allowed to present evidence as to the constitutionality of the enhancement statute, Iowa Code Section 124.411, as applied to Mr. Reed.

### **CONCLUSION**

Defendant-Appellant Donald Reed respectfully requests that this court reverse all of his convictions and sentences, based on insufficiency of the evidence. In the alternative, Mr.

Reed respectfully requests that trial counsel be found ineffective, and that he be granted a new trial on that basis.

Mr. Reed also respectfully requests that the sentence of up to 100 years be vacated and that the matter be remanded for a new sentencing hearing to evaluate his cruel and unusual claim in the light of the enhanced sentence based on a prior offense which occurred when Mr. Reed was age seventeen.

#### **REQUEST FOR ORAL ARGUMENT**

Counsel requests to be heard in oral argument.

#### **ATTORNEY'S COST CERTIFICATE**

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was \$3.60, and that amount has been paid in full by the Office of the Appellate Defender.

MARK C. SMITH  
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PATRICIA REYNOLDS  
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