

Public Comments Regarding Chapter 2 Amendments

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MAY 10 2020

CLERK SUPREME COURT



[EXTERNAL] Chapter 2 Amendments
Buller, Tyler [AG]

to:
rules.comments@iowacourts.gov
05/10/2020 10:24 PM

Cc:
"Krisko, Susan [AG]"

Hide Details

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To: "rules.comments@iowacourts.gov" <rules.comments@iowacourts.gov>

Cc: "Krisko, Susan [AG]" <Susan.Krisko@ag.iowa.gov>

History: This message has been forwarded.

1 Attachment



Proposed IRCP Rules Comment FINAL.docx

Hello,

Please find attached a Comment regarding the proposed amendments to the rules of criminal procedure.

We have attached the Comment in Microsoft Word format, per the instructions in the Court's order dated March 30, 2020. Please let me know if we can provide any additional information or if you would like us to submit the comment in another format.

Thank you!

-Tyler

Tyler J. Buller
tyler.buller@ag.iowa.gov

Dear Chief Justice Christensen and Members of the Court:

We are prosecutors writing to comment on the proposed revisions to the rules of criminal procedure. Many of the changes improve efficiency, remove outdated references, and accommodate existing practices. We appreciate the Committee's efforts, particularly the work done to conform the rules to Senate File 589.

We also believe some of the proposed changes may have significant unintended consequences or would reflect unintended departures from current law or practice. We submit the following comment, organized by topic, based on our combined 279 years as prosecuting attorneys.

We appreciate the Court's time considering our comment and would be glad to discuss these matters further or provide additional information.

Amended/Additional Minutes of Testimony

The proposed rules appear to have eliminated prosecutors' ability to file additional minutes of testimony without seeking court approval. It is unclear to us whether this change was intentional or unintentional. In any event, it departs materially from existing law and practice, is impractical, and serves no useful purpose.

The proposed changes to Rule 2.4(7)(a)–(c) [p. 8, lines 28–34] specify that minutes of testimony may only be amended by order of the court, following an opportunity for the defense to resist, and will be disallowed if the substantial rights of the defendant are prejudiced. This rule is applicable to prosecutions by information by operation of Rule 2.5(5) [page 9, line 35 — p. 10, line 3]. If this were the only change in this area, it might have been intended only to update language in the rules, with no substantive alteration.

However, the Committee has also proposed a change to Rule 2.19(2) [p. 32, lines 23–32], which currently permits the State to provide notice of additional witnesses to defense counsel no later than 10 days before trial, without conditioning such notice on court approval. *See* Iowa R. Crim. P. 2.19(2). In practice, this notice is often provided by filing “additional minutes of testimony” or a similarly captioned document. The proposed changes to this provision, when read in tandem with the proposed changes to Rule 2.4(7), appear to eliminate the “additional minutes” procedure and require that any additional witnesses appear in “amended” minutes, which are subject to the district court's approval even if filed more than ten days in advance of trial.

If this change was not intended, the Court should make that clear by amending Proposed Rules 2.4(7) and/or 2.19(2) as follows:

2.4(7) Amendment.

a. *Generally.* The court may, either before or during the trial, order the indictment ~~or minutes~~ amended.

[...]

2.19(2) Advance notice of evidence supporting indictment.

a. The prosecuting attorney shall not be permitted to introduce any witness whose minutes of testimony were not filed at least 10 days before the commencement of trial, except rebuttal witnesses.

b. [...]

c. Notice as required by this rule may be supplied by filing additional minutes of testimony, which are not subject to the requirements of Rule 2.4(7).

If the change was intended by the Committee, it should be rejected by the Court for four reasons. First, this is a substantial departure from existing law without any justification. That alone invites skepticism. Second, the change is divorced from the reality of criminal prosecution, in that complete minutes for all witnesses often cannot be filed within 45 days of arrest. Third, the existing rules strike an appropriate balance by requiring notice and avoiding a windfall for criminal defendants. Fourth, requiring court approval for every additional witness wastes judicial resources.

As to the first point, we are not aware of any groundswell of complaints or practical problems that have arisen under the current system, in which prosecutors can and often do file additional minutes of testimony before trial. This kind of change should not be made without ample justification and no justification has been offered here.

Second, the State is frequently unable to prepare full and complete minutes for every trial witness at the time an information must be filed. Particularly in the prosecution of complex felonies, including sexual abuse and murder, forensic reports (such as for DNA or ballistics) are not available within 45 days of arrest, which is when this Court's speedy-indictment rule requires minutes be filed. *See* Iowa R. Crim. P. 2.33(2)(a). Under the proposed rule change, the State's ability to use a DNA report compiled 46 days after arrest, but a year before trial, is conditioned upon a judge's discretionary ruling on whether the State's use of DNA "prejudice[s]" the

defendant's "substantial rights." Proposed Rule 2.4(7)(c) [p. 8, lines 32–34]. The proposed rule would similarly exclude an eyewitness to a murder that came forward after an information and accompanying minutes were filed, even if that witness is made available before trial for depositions and discovery. These kinds of restriction serve no useful public interest and undermine the truth-seeking function of trial. If the Court truly intends that flawless and complete minutes must be filed with every information, the speedy-indictment rule would have to be greatly expanded in every case that involves forensic evidence and include exceptions for later-discovered evidence.

Third, the current rules provide the reasonable timeframe of 10 days to ensure that a criminal defendant is not unfairly surprised by additional witnesses and has the opportunity to file a continuance or seek other relief from the court if a delay is necessary. *See* Iowa R. Crim. P. 2.19(2). Iowa law has long recognized that the preferred resolution for discovery issues is to delay and conduct full discovery, rather than exclude evidence and keep otherwise relevant evidence from jurors. *See, e.g., State v. Bedwell*, 417 N.W.2d 66, 69 (Iowa 1987) (offer of continuance sufficient to cure prejudice from alleged discovery violation); *State v. LeGrand*, 501 N.W.2d 59, 63 (Iowa Ct. App. 1993) (opportunity to interview late-disclosed witness obviated prejudice); *see also* Iowa R. Crim. P. 2.19(3) (listing remedies, noting exclusion is the remedy of last resort). Contrary to this established precedent, the proposed rule appears to outright bar additional witnesses unless permission to amend the minutes is granted by the court. This is bad policy and should be rejected.

Fourth and finally, requiring court approval of every additional minute or additional witness will waste significant judicial resources. The proposed rule appears to suggest that, every time an amended or additional minute is filed, the court must wait a "reasonable" time for the defense to lodge any objection and then, regardless of objection, the court must independently evaluate whether the amended or additional minute "prejudice[s]" the "substantial rights of the defendant." Proposed Rule 2.4(7)(b)–(c) [p. 8, lines 30–34]. This change adds unnecessary work to already-overburdened trial judges and does so for no good reason.

This Court should reject any change that conditions timely notice of additional witnesses on court approval.

Reporting Grand Jury Deliberations

Proposed Rule 2.3(6)(f) [p. 6, lines 19–21] provides, “All grand jury proceedings shall be stenographically reported or electronically recorded, except for the votes of individual members on finding an indictment.” This provision does not exempt the deliberations of the grand jury from stenographic reporting, yet court reporters are (in our view correctly) prohibited from attending deliberations. *See* Proposed Rule 2.3(6)(d)(3) [p. 6, lines 1–4] (requiring secret deliberations, barring the presence of all persons other than the grand jury, including the “court reporter”). We believe this oversight was likely unintentional.

The Court should amend the Committee’s Proposed Rule 2.3(6)(f) as follows:

f. Reporting. All grand jury proceedings shall be stenographically reported or electronically recorded, except for the votes of individual members on finding an indictment **and the deliberations of the grand jurors.**

This amendment resolves the inconsistency and ensures grand-jury deliberations remain secret.

Joint Trials

Proposed Rule 2.6(2) [p. 10, line 29 — p. 11, line 5] was amended by the Committee, with a comment that “[t]he changes to the existing rule of charging multiple defendants are not intended to modify existing law.” Under current law, the presumption is that jointly charged defendants shall be tried together. *See State v. Sauls*, 356 N.W.2d 516, 517 (Iowa 1984) (“The general rule is that defendants who are indicted together are tried together.”); Iowa R. Crim. P. 2.6(4)(a). “It is a defendant’s burden to establish that separate trials are necessary to avoid prejudice that would deny him a fair trial.” *State v. Clark*, 464 N.W.2d 861, 864 (Iowa 1991).

The use of “otherwise” in the penultimate sentence of Proposed Rule 2.6(2)(b) [p. 11, lines 3–4], which is carried-over language from the previous rule, is confusing in light of the presumption that defendants shall be tried jointly. We suggest the following revision to Proposed Rule 2.6(2)(b) for clarity and to better conform to existing case law:

b. Prosecution and judgment. When two or more defendants are jointly charged, each shall be charged in a separate numbered case with a notation in the indictment of the number or numbers of the

other cases. Those defendants shall be tried jointly unless, on motion of a defendant party, the court determines that prejudice **that would deny one or more of the parties a fair trial** will result ~~to one of the parties~~. **Otherwise, in which case the** defendants shall be tried separately. When jointly tried, defendants shall be adjudged separately on each count.

This resolves confusion or ambiguity regarding the presumption that co-defendants be tried jointly unless the condition precedent (prejudice that would deny a fair trial) is met. It also better tracks the language used by this Court in *Clark*, 464 N.W.2d at 864.

Defendant's Presence Required at Depositions

Proposed Rule 2.13(5) [p. 23, lines 20–26] mandates that a criminal defendant be personally present at all depositions and provides a single limited exception for eyewitness identification. The Court should reject the proposed change and instead allow waiver by consent, which is a common practice.

We frequently see defendants choose not to attend depositions, for whatever reasons. Sometimes, for example in a sexual-abuse case, the defense waives the defendant's presence in order to better facilitate questioning the witness to obtain useful information in discovery. Other times, a defendant will choose not to attend a deposition if the defendant is far away from the deposition location or if the attorneys must travel to a distant location for deposition and the defendant prefers not to travel.

This rule infringes on the kind of strategic decisions that should be entrusted to defense counsel, in consultation with their clients. We have worked with many experienced Iowa defense lawyers who have chosen to not have their client attend certain depositions, for the reasons expressed above or for other reasons they decline to explain to us. This proposed rule purports to tell those lawyers how to litigate their cases and for no apparent reason.

The proposed rule should be amended to permit criminal defendants the option to waive personal attendance at deposition. The proposed rule already recognizes a defendant may absent him- or herself due to concerns about eyewitness identification, in accord with this Court's decision in *State v. Folkerts*, 703 N.W.2d 761, 766 (Iowa 2005). The proposed rule should be amended to permit waiver and absence in other circumstances, without infringing on the defense function:

2.13(5) Presence of Defendant. In felony cases, the defendant is ordinarily required to be personally present at all depositions, **subject to the following exceptions:**

(a) If the identity of the defendant is at issue and the defendant makes a timely motion, the court may allow the defendant to be absent during the part of the deposition when the parties question an eyewitness concerning the identity of the perpetrator of the crime. In that event, all parties shall complete their examination of the eyewitness regarding identity before the defendant is required to be present.

(b) **With the consent of the prosecuting attorney, the defendant may waive his or her personal presence at a deposition. Such a waiver may be made orally by the defendant's attorney at the time of deposition or in writing at any time before or after the deposition is taken.**

Minutes of Testimony Provided to Defendant at Arraignment

Proposed Rule 2.8(1)(b) [p. 12, lines 28–29] requires that the defendant be supplied with a copy of the minutes of testimony at arraignment. Under existing law, the defendant is only to be provided a copy of the indictment or information. See Iowa R. Crim. P. 2.8(1).

Although Proposed Rule 2.4(6)(b) [p. 8, lines 25–26] includes slightly modified language, we believe the Committee intended for minutes of testimony to remain confidential.

The Court should retain the current rule that a defendant be furnished with the indictment or information at arraignment, rather than confidential minutes. Minutes frequently contain highly personal information, including the addresses of victims and witnesses, forensic test results, medical records, and the identity of minor children.

A defendant can always obtain minutes of testimony from his attorney or the clerk if pro se. Iowa R. Crim. P. 2.4(6)(a). Supplying confidential documents to criminal offenders in open court is antithetical to protecting the information contained therein.

Regardless of whether the Court retains the current rule, it should include a provision regulating unlawful dissemination of minutes. Drawing on existing language in Iowa Code section 915.36(3) (protecting the

confidentiality of minor victims), we suggest the following amendment to the proposed rule:

2.4(6) Minutes.

a. Contents. A minute of testimony shall consist of a notice in writing stating the name and occupation of the witness upon whose testimony the indictment is found, a full and fair statement of the witness's testimony before the grand jury if such witness testified, and a full and fair statement of expected testimony at trial. Disclosure of addresses shall be governed by rule 2.11(12).

b. Copy to defense. Such minutes of testimony shall be available only to the judge, the prosecuting attorney, the defendant, and the defendant's counsel.

c. Minutes not to be disseminated. A person who willfully disseminates minutes of testimony to any person or entity other than those authorized by rule 2.4(6)(b) commits contempt.

Challenges to Individual Jurors for Cause — Convicted Felons

The proposed revision to Rule 2.18(5)(a) [page 29, lines 15–18) appears to be an intentional departure from existing law. Under current law, all jurors who have been previously convicted of a felony may be challenged for cause. Iowa R. Crim. P. 2.18(5)(a). The proposed new rule would permit convicted felons to serve on a jury if “more than ten years have passed since the juror's conviction or release from confinement for that felony, whichever is later.” We have serious reservations about the intended departure from existing law and have significant concerns about the implementation of this provision.

We first question whether Iowans support permitting a broad class of convicted felons to serve on juries when those felons have not had their rights restored by the Governor. We believe that approximately 49 states (as well as the federal government) impose at least some restriction on convicted felons' jury service, while at least 28 states outright ban convicted felons from serving as jurors.¹ In other words, current Iowa law is hardly an outlier. We have seen no justification that would support the substantial departure from

¹ See James M. Binnall, *A Field Study of the Presumptively Biased: Is There Empirical Support for Excluding Convicted Felons from Jury Service*, 36 LAW & POLICY 1, at 2, 3–5 (Jan. 2014), available at <https://onlinelibrary.wiley.com/doi/pdf/10.1111/lapo.12015>.

existing law recommended by the Committee and we believe this type of policymaking is better suited to the executive and legislative branches, which are directly accountable to the voters, than the judicial department, which is not.

We encourage the Court to revise the proposed change to Rule 2.18(5)(a) to instead defer to the judgment exercised by the elected branches in this area. Specifically, the Governor possesses sole authority over the commutation and restoration-of-rights process. *See* Iowa Const. Art. IV, § 16. To that end, we propose the following revision to the rule:

... A challenge may be made on an individual juror for any of the following causes:

a. A previous conviction of the juror of a felony unless it can be established through the juror's testimony or otherwise that ~~either the juror's voting rights have been restored. or more than ten years have passed since the juror's conviction or release from confinement for that felony, whichever is later.~~

This change resolves concerning inconsistencies that would arise if the Court permitted felons to serve on juries when the Governor and General Assembly had not acted to permit such felons to vote. It also recognizes the efforts the elected branches are making toward ensuring fair treatment in the restoration process and ensures consistency between eligibility for jury service and the restoration of other rights. *See, e.g.*, Senate File 2348 (88th Gen. Assemb.) (proposing a streamlined restoration process for most felons who have "discharged" their sentence, including parole and special parole).² It would be highly anomalous to grant felons access to the jury box if the Governor has denied them access to the ballot box.

If the Court does not adopt the foregoing suggestion, it should still revise the rule to address ambiguities and difficulties that will arise in practice. As written, the rule will lead to odd and inconsistent results. For example, consider a juror convicted of a Class D felony in 2010. If that juror received a suspended sentence and was placed immediately on probation, the juror would be eligible to serve as a juror in 2020. If that juror was incarcerated

² At the time this comment was submitted, the Legislature remained out of session due to COVID-19.

for five years, and the sentence was not suspended, the juror would not be eligible until 2025.

The proposed rule also fails to address offenders on lifetime special parole pursuant to Chapter 903B or lifetime sex-offender registration under Chapter 692A. It is untenable for felons who are actively under court supervision to participate in the jury process. Given that the empirical data demonstrates most convicted-felon jurors have greater anti-prosecution bias than normal jurors,³ it is reasonable to believe that felons actively supervised by the court system have at least as much anti-prosecution bias, if not more. Also, it is undesirable, to say the least, to grant dangerous sex offenders access to a large gathering of people, potentially including child victims or witnesses, in the course of jury service.

If the Court intends to permit some felons to serve on juries, we propose the following revision to the proposed rule:

- a. A previous conviction of the juror of a felony unless it can be established through the juror's testimony or otherwise that either the juror's voting rights have been restored or more than ten years have passed since **the later date of when:**
 - (1) the juror was released from confinement; or
 - (2) the juror's parole, special parole, probation, period of registration pursuant to Chapter 692A, or sentence expired.

This modified language explicitly includes special parole and sex-offender registration and eliminates some of the inconsistent results addressed above.

Thank you very much for your time considering our comments. Please do not hesitate to let us know if we can provide any additional information.

³ See Binnall, *supra* note 1, at 1, 17–18 (“[A] majority of convicted felons harbor a prodefense/antiprosecution bias and, in this way, differ from eligible jurors generally.”).

Respectfully submitted,⁴



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⁴ This comment is submitted in the authors' individual capacity, rather than any official capacity. The views expressed in this comment do not necessarily reflect the views of the Attorney General or the Department of Justice.

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JUN 01 2020

CLERK SUPREME COURT



[EXTERNAL] Chapter 2 Amendments
Reynolds, Jessica

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rules.comments@iowacourts.gov

06/01/2020 08:37 AM

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From: "Reynolds, Jessica" <Jessica.Reynolds@ag.iowa.gov>

To: "rules.comments@iowacourts.gov" <rules.comments@iowacourts.gov>

History: This message has been forwarded.

1 Attachment



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Good morning –

Attached please find our feedback on the proposed revisions to the Iowa Rules of Criminal Procedure.

Sincerely,



Jessica A. Reynolds
Executive Director
Iowa County Attorneys Association
Hoover Building
Des Moines, IA 50319
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Iowa County Attorneys Association

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JUN 01 2020

CLERK SUPREME COURT

June 1, 2020

Iowa Supreme Court
111 East Court Avenue
Des Moines, Iowa

Dear Justices of the Iowa Supreme Court,

Thank you for the opportunity to comment on the proposed revisions to the Iowa Rules of Criminal Procedure. We sincerely appreciate the time and effort that has been devoted to updating the Rules. Our organization represents County prosecutors in Iowa. This letter is submitted after review and approval by our Board of Directors.

Our comments are as follows:

- (1) Proposed Rule 2.4(7)[p.8, lines 28-34]. We see a need for this section to recognize and clarify that additional minutes of testimony are still allowed to be filed by prosecutors, as they are normally done, without approval of the court. Prosecutors routinely amend their minutes of testimony as they continue to receive information in their case. This is done quickly and easily by filing additional minutes of testimony. Allowing objections to this normal practice, hearings, and mandating approval of the additional minutes by the court, would be a large deviation from standard criminal practice in our state as well as a waste of court resources and time.
- (2) Proposed Rule 2.3(6)(f). We recommend that wording be added to recognize the deliberations of the grand jury should not be reported or electronically recorded.
- (3) Proposed Rule 2.6(2). We recommend that clarifying language be added regarding the presumption that co-defendants be tried jointly unless the court finds prejudice regarding a fair trial would result from a joint trial.
- (4) Proposed Rule 2.8(1)(b). We recommend that this rule address the dissemination of the minutes of testimony to anyone other than those authorized. We have concerns about witness intimidation.
- (5) Proposed Rule 2.13(5). We recommend that this rule allow a defendant to waive personal attendance at felony depositions if both parties are in agreement.

Sincerely,

/s/Jessica A. Reynolds

Jessica A. Reynolds
Executive Director

Jessica A. Reynolds, Executive Director

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JUN 24 2020

CLERK SUPREME COURT



Chapter 2 Amendments
Patrick Greenwood to: Rules Comments

06/24/2020 04:05 PM



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Patrick W. Greenwood, Judge
Fifth Judicial District of Iowa



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JUN 24 2020

CLERK SUPREME COURT

FIFTH JUDICIAL DISTRICT OF IOWA
DISTRICT COURT JUDGE PATRICK GREENWOOD
DECATUR COUNTY COURTHOUSE
207 NORTH MAIN STREET
LEON, IOWA 50144

June 24, 2020

Clerk of the Iowa Supreme Court

Re: Chapter 2 Amendments

Greetings,

I write to comment on proposed rule 2.19(3), lines 33-35. In light of efforts to apprehend the spread of the novel coronavirus/COVID-19, I recommend temporary suspension of the restriction on the defendant's ability to waive reporting of voir dire on class C and D felony charges. My experience is that most criminal law practitioners prefer to waive voir dire for these offense levels. Moreover, my casual review of appellate court opinions does not suggest that many appeals are grounded on potential error during voir dire. Otherwise, to require the reporting of voir dire of socially-distanced speakers during the re-start of jury trials during the pandemic will be unduly burdensome.

/s/ Patrick W. Greenwood

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JUN 25 2020

CLERK SUPREME COURT



[EXTERNAL] Chapter 2 Amendments

Colin McCormack

to:

rules.comments@iowacourts.gov

06/25/2020 02:19 PM

Hide Details

From: Colin McCormack <cmc@vcandmc.com>

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1 Attachment



Chapter 2 Comment Letter.docx

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June 24th, 2020

Clerk of the Iowa Supreme Court
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rules.comments@iowacourts.gov

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JUN 25 2020

CLERK SUPREME COURT

RE: Public Comments on Amendments to Iowa Rules of Court Chapter 2: Rules of Criminal Procedure.

Dear Justices:

I have been practicing law in Central Iowa for just shy of ten years, with a large focus on criminal representation specifically. I was pleased to hear of the efforts to update the Rules of Criminal Procedure, and I think, on balance, the committee has done an excellent job modernizing and streamlining the Rules. Having reviewed the proposed changes, I do have some comments and suggestions that arise from my practical experiences in working as a criminal defense attorney that I would hope the committee and the Court would consider in finalizing these new rules. They are as follows:

I. RULE 2.4(6)(A)—MINUTES: CONTENTS

In my experience, minutes of testimony, as they are prepared and provided today, are close to useless, and seem to exist for the sole purpose of checking off the requirement of their existence. The main reason for this is a lack of specificity. While the Court has been clear over the years that the minutes are not intended to

provide every single piece of evidence, this has been taken so far as to be absurd.

As an example, here is a portion of the minutes of testimony I received most recently, with only the specific dates and locations removed:

If called by the State at trial, each witness listed above may testify as follows:

Each witness will describe their relevant personal or professional background including their education, training, experience and responsibilities. In general terms, each will testify about the events of MONTH DAY, YEAR, including their observations of the people, places and things relevant to the crime charged. Each witness will testify about their impressions, conclusions and opinions reached as a result of their observations. They will explain the pertinent relationships among the people, places and things at issue. To the extent they encountered the defendant, each witness will describe the defendant's appearance, the defendant's actions, the defendant's statements and the defendant's intoxication. To the extent each witness recognizes the defendant, they will identify the defendant. Each witness will testify about their own actions and the reasons for those actions. They will testify about the relevant statements and actions of others. The witnesses will testify about any matters relevant to authentication, chain of custody and venue (that the events they observed took place in COUNTY County, Iowa).

Certain police reports and records are attached and are incorporated as Minutes of Testimony; specifically, these reports are described by agency case number as follows: CITY Police Department Case Number CASENUMBER. These reports and records set out more specific information to be provided by the witnesses. The witnesses will testify in detail to the matters contained in these reports and records. Photographs or video or audio recordings documented in the attached reports or records may be introduced into evidence at trial and the witnesses may testify about matters depicted in these photographs, video or audio recordings.

Each witness will also testify about any matters made known to the defense through discovery or depositions in this case. Pursuant to the Iowa Rules of Criminal Procedure, the testimony of each witness is not limited to the matters set out specifically in these Minutes of

Testimony but extends to any matters referred to generally in these minutes, so long as the defendant is fully and fairly alerted to the source and nature of the evidence.

Upon conviction and at the time of sentencing, the State hereby gives notice and reserves the right to call and/or present any testimony or information provided to the defense throughout the course of these proceedings. Specifically, but not limited to, the State gives notice that the victim of the crime may give an oral and/or written victim impact statement pursuant to Iowa Code Chapter 915.

Those were the minutes provided for a list of seven different witnesses, consisting of both professional and lay witnesses, with only two witnesses having additional specific information provided, and that only consisting of information on prior offenses. What portion of that is supposed to be in anyway useful to a Defendant and his counsel? It does not even help narrow the need for deposing witnesses. I have, on multiple occasions, been forced to subpoena as many as ten different officers for questioning, knowing that only one or two likely had any specific, relevant information to provide, because I had nothing else to go on regarding which officers did what.

If minutes are to be required, it is not unreasonable to require some degree of specificity. Simply requiring specific comments as to the general evidence each witness would be expected to provide would be enormously helpful. As proposed additional language, I would suggest something like the following:

“Minutes of testimony shall contain specific descriptions of expected testimony for each listed witness. This should not be interpreted as requiring each individual fact to be disclosed but should be sufficient

to reasonably apprise an otherwise uninformed reader as to what each individual witness is generally anticipated to testify about.”

II. RULE 2.8(4)—PLEAS OF GUILTY TO SERIOUS OR AGGRAVATED MISDEMEANORS

The COVID-19 Pandemic has been, and continues to be, an extraordinarily trying time for the whole world, and we have been forced to fundamentally change many aspects of how we practice in ways that, even a few months ago, would have been unthinkable. One of these changes has been to allow the filing of written guilty pleas in felony cases, and I would suggest that practice should be permanently adopted, if not for all felonies, then perhaps at least for Class C and Class D.

The reason for this is one of efficiency. In Polk County in particular, the felony docket is perpetually overloaded, and, in my experience, one of the biggest time sinks for that docket is guilty pleas, each of which takes thirty minutes or more. In cases where a Defendant is out of custody, this is just a minor irritant, but I have had in-custody clients who were fully prepared to plead guilty forced to wait as much as six weeks to even enter the plea, much less to begin the pre-sentence investigation process. With all respect, that is absurd.

A well-crafted paper form which covers all the rights and information covered by the plea colloquy would not merely save time and allow cases to move faster, but would also allow for attorneys to be able to confer with their client

privately on their own time about any questions, rather than forcing the Court to take time to explain or call a recess to allow a Defendant to confer with counsel. We are watching this process work right now, and I believe we should take the opportunity provided by testing this measure to adopt it more broadly.

III. RULE 2.10(3)—PLEAS AGREEMENTS CONDITIONED UPON COURT ACCEPTANCE

In my decade of practice, I can comfortably count on one hand the number of times a plea bargain I have negotiated made use of this provision, and I am earnestly uncertain why this is an optional provision. We always make it clear to defendants that the final decision on sentencing is up to the presiding judge. Given that, would not the best practice just be to have every plea bargain conditioned on the judge's acceptance? This would remove uncertainty for the parties and streamline plea bargaining, while avoiding the potential for many appeals where the defendant's primary objection is the sentence received. It is also a practice that seems to already occur informally, as, in my experience, most judges are inclined to inform defendants if they are not in favor of the plea bargain out of a general sense of fairness. Making this a uniform practice makes the criminal process fairer and more transparent for everyone and might also encourage more guilty pleas given that many defendants' reluctance to accept a plea (at least in my experience) stems from uncertainty.

**IV. RULE 2.12(3)—SUPPRESSION OF UNLAWFULLY OBTAINED EVIDENCE:
EFFECT OF FAILURE TO FILE**

I think it would be prudent to clarify what constitutes a timely motion to suppress. Assuming that the intent is to apply the general timeline contained in Rule 2.11(6), this presents the issue of what happens when the evidence that requires suppression (or the evidence that would trigger suppression) is not discovered or disclosed until after day forty. The common practice in these matters is to permit the filing anyway, and I am sure that would continue, but it would be nice if the rule made that clear.

A potential additional sentence that could resolve this issue is:

“A motion to suppress should be deemed timely outside of the restrictions of Rule 2.11(6) so long as it is filed as soon as is practicable following the discovery or disclosure of the relevant evidence.”

V. RULE 2.13(3)—DEPOSITIONS: OBJECTIONS TO DEPOSITIONS

I can certainly appreciate what the committee was attempting to accomplish with this change. Stringently limiting objections to depositions to only two situations was perhaps not ideal. However, this new rule feels like a drastic overcorrection. With no guidance whatsoever and no requirement of particularity in objections, what is to stop a county attorney's office from making a blanket objection to all depositions in all cases? This would effectively render the right to depositions by the defendant contained in Rule 2.13(1) meaningless and create a

situation where every deposition would be subject to court approval. While some may think this an overly pessimistic view, the fact that a plain reading of the rule would allow this to happen is good reason to take this idea back to the drafting board. At a minimum, there needs to be a requirement of a particular objection to each deposition objected to that provides a specific reason why this deposition is unusually burdensome or problematic.

VI. RULE 2.13(5)—DEPOSITIONS: PRESENCE OF DEFENDANT

Both currently posted comments make mention of the possibility of permitting the Defendant to be absent from depositions by the agreement of both parties. This is a good idea and if nothing else is done here, that should be adopted. However, I would recommend going a step further and permitting the Defendant to waive their presence at depositions regardless of the State's position. There are valid strategic reasons why a Defendant might not want to be present for depositions, and, while having a defendant present has, occasionally, been helpful during a deposition, my experience is that this is the exception, not the rule. I believe this should be treated as a right a defendant can exercise, not a requirement that handcuffs the defense.

VII. RULE 2.15(2)—SUBPOENAS: FOR PRODUCTION OF DOCUMENTS

While I understand that this was a hotly debated issue in the committee, I feel the need to add my opinion that there is no good reason to completely bar the

defense from using subpoenas to compel the production of documents. The current system places defendants completely at the mercy of state investigators to locate and preserve evidence that could be exculpatory. In situations where investigators develop tunnel vision for a suspect, this can have devastating outcomes, and no one can credibly deny this happens. We have all read stories of exonerations of innocent men and women who, at one point, investigators were sure had committed the crime. How many of those could have been prevented if investigators had been more diligent?

I can appreciate the concern for abuse by defendants, but I do not believe the answer is a complete bar to their use. I would propose a procedure which allows an ex parte application for the issuance of a subpoena duce tecum by the court. This would allow for judicial oversight to prevent abuse while preserving the ability for the defense to investigate matters privately. If defense counsel can provide a credible, cogent reason for why certain evidence should be produced, they should not be at the prosecutor's mercy for obtaining that evidence.

VIII. RULE 2.27—PRESENCE OF DEFENDANT

My office has a significant practice in defending CDL drivers who receive citations. As it stands right now, Rule 2.27 does not explicitly require misdemeanor defendants to appear personally in court. I would encourage the Court to make that an explicit rule. It makes no sense for a person facing a minor

charge to be forced to travel to court for each individual hearing, especially when often the sole purpose of the defendant's presence is simply to *be* present.

Alongside this, I would also encourage the Court to prohibit the practice of local courts being permitted to order every defendant to appear personally for every hearing. Polk County is particularly guilty of this, but they are by no means the only ones. This serves no reasonable purpose except to wear defendants down by attrition into giving up. I am not saying that, in instances where there is a specific, articulable reason, a judge should not be able to order a defendant's personal presence. However, the current system permits prosecutors to pressure defendants into plea bargains simple out of fear of losing their job, or because they cannot find a baby-sitter. A defendant's ability to assert their innocence should not be a factor of means, and this practice does exactly that.

IX. RULE 2.52—SIMPLE MISDEMEANORS: APPLICABILITY OF INDICTABLE OFFENSE RULES

I categorize this comment under Rule 2.52 for lack of a better place to put it. Discovery in simple misdemeanors has been the subject of multiple Iowa Supreme Court rulings over the years. The current state of the law on this topic is that discovery is permissible if it results in minimal cost and delay. *Hadjis v. Iowa District Court* 275 N.W.2d 763 (Iowa 1979). The Court has also specifically ruled that depositions would not qualify as permissible discovery in simple misdemeanor

cases. *Jones v. Iowa District Court of Wapello County*, 620 N.W.2d 242 (Iowa 2000).

As stated above, my office deals with a high-volume of CDL citation defense cases, so we are acutely aware of this issue. The general interpretation of the state of the law on discovery in simple misdemeanor cases, both by prosecutors and by magistrates, is that *all* discovery is prohibited. This is a vast overstatement of the law on this topic and it presents two problems. The first is trial by ambush. Other than the barest statement of the charge, we often know nothing about a case until trial. Even if the officer has provided the state a written report or video recording, we typically will not see it until just before a trial begins, if that. This leads directly into the second issue, which is the waste of resources and time for all involved. While the current rules are intended to streamline the magistrate docket, they often serve to have the exact opposite effect. For example: if the State has dash cam video of the defendant committing the alleged offense, providing that in advance can often result in us convincing our client to plead guilty, as there is no point in challenging a case with evidence that conclusive. If that is not furnished in advance, we have no choice but to take the case to trial, wasting everyone's time and judicial resources to resolve a matter that could have been resolved much earlier and with minimal court involvement.

As frustrating as it can sometime be, I understand the rationale behind prohibiting depositions in these cases. However, requiring prosecutors to provide evidence, such as reports or recordings, which is *already in their possession*, inflicts no substantial burden and could make these cases much simpler. The rules should explicitly state that this sort of production is required in simple misdemeanor cases.

In closing, I thank you all for your attention to these comments and I hope you will give them serious consideration. I greatly enjoy practicing criminal law in Iowa, but I firmly believe that these changes could make the process better, not just for me or for defense attorneys, but for everyone involved.

Sincerely,

Colin McCormack

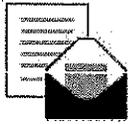
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FILED

JUL 01 2020

CLERK SUPREME COURT

07/01/2020 09:46 AM



Fw: [EXTERNAL] Chapter 2 Amendments
Rules Comment to: David Denison
Sent by: David Denison

----- Forwarded by David Denison/SCA/JUDICIAL on 07/01/2020 09:45 AM -----

From: Russell Lovell <russell.lovell@drake.edu>
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Andrews <iowaNebraskaNAACP@gmail.com>
Date: 06/30/2020 03:53 PM
Subject: [EXTERNAL] Chapter 2 Amendments

The Iowa-Nebraska NAACP respectfully submits its Public Comments on the proposed amendments to the Iowa Rules of Criminal Procedure. As we explain in our Public Comments, we wish to incorporate the attached Addendum, which is Sec.5 of a Lovell-Walker article forthcoming in the Drake Law Review.



Russell Lovell|NAACP Public Comments IA Crim Proc Rules FINAL.docx



Lovell & Walker Article Achieving Fair Cross Section.docx

**NAACP Public Comments
To Iowa Supreme Court on
Proposed Amendments to Rules of Criminal Procedure**

CLERK SUPREME COURT

**Submitted by Russell Lovell & David Walker, Co-Chairs
Legal Redress Committees, Iowa-Nebraska and Des Moines NAACP**

Betty C. Andrews, State Area President, Iowa-Nebraska NAACP

I. Proposed Amendment to Rule 2.18(5)(a), lines 15-18

Since November 2015 when Governor Branstad's Criminal Justice Working Group Committee's confirmed that Iowa's juries do not reflect the racial composition of the community, reforming the Iowa justice system so that our juries truly do reflect the racial diversity that Iowa has been a high priority for the NAACP. The 2019 jury data collected by the Office of State Court Administration (OSCA), although flawed, confirms that progress has been made at the jury pool stage. But it does not confirm that progress has been made at the stage that counts for defendants of color—the petit or trial jury, the 12-persons who decide the case.

It is clear there are at least two principal remaining obstacles: (1) Iowa's felon exclusion rule and (2) discretionary strikes, sometimes referred to as peremptory challenges. They are not one, but two proverbial "elephants in the room." The proposed amendment of Rule 2.18(5)(a) would ameliorate some of the Rule's huge, adverse racial impact on people of color, and particularly African Americans. It would be a first step, but it does not go far enough. We respectfully submit that it remains vulnerable to constitutional challenge by leaving significant remnants of the felon-exclusion rule in place. Reform of the procedures that have unsuccessfully sought to implement the *Batson v. Kentucky*¹ protections against discriminatory discretionary strikes would be a second major step, which we will discuss in our concluding comments.

Felon Exclusion from Jury Service

Most of current Rule 2.18(5)(a)'s impact is below the radar and not reflected in the OSCA data, as many, many of those with a felony conviction apparently do not even respond to a juror summons. They know that to respond will not only be an act of futility, culminating in their exclusion, but also in humiliation in the very public setting of the public court room. In the context of anti-discrimination law it has long been recognized that the most discriminatory systems of all are those in which, because of a longstanding history of and reputation for discrimination, persons of color (or women) do not even apply.² Because Iowa Judges have not viewed the restoration of rights granted by the Executive Orders of Governors Vilsack and

¹ 476 U.S. 79 (1986).

² *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 365-367 (1977).

Culver, or even those based on individual applications, as including the right to serve on a jury, only a minute fraction of former felons in Iowa are considered eligible for jury service.

The racial impact is huge. Nationwide, the most reliable estimates are that a third of adult African American men—one out of every three!—are excluded from jury service by virtue of felon-exclusion rules.³ The NAACP is reasonably confident that the situation is even worse in Iowa given its criminal justice system's consistent ranking among the three worst in the USA in terms of racial disproportionality. OSCA began monitoring strikes for cause in its jury data in 2019, but even the 2019 data is incomplete because it does not disclose whether a "for cause" disqualification was based on a felony. The facts in *State v. Veal*⁴ are demonstrative. The initial voir dire panel was comprised of thirty-four potential jurors and included three African Americans. Three panel members had felony convictions, including two of the three African Americans. While all three with past felony convictions were disqualified for cause, the racial impact of felon exclusion was stark—whereas two-thirds of the African American jurors were eliminated, only 3% of the white jurors were eliminated. The most recent conviction of one of the African American jurors who was struck was a DUI-3d conviction nine years old; his prior burglary/larceny conviction was many years earlier in his youth. The Court will of course recall that the final African American juror was eliminated by the prosecutor's peremptory strike.

The authors of these NAACP Public Comments have written an article which the Drake Law Review has indicated should be published this fall, and we have attached the relevant portion of our manuscript dealing with the felon exclusion rule stated in Rule 2.18(5)(a).⁵ It provides a detailed discussion and analysis of the adverse impact Rule 2.18(5)(a)⁶ is having on the racial diversity of Iowa's juries, and it contends that the current rule violates the Impartial Jury and fair cross-section requirements of the Sixth Amendment and Article I, §10 of the Iowa Constitution. Rather than duplicate the extensive research and argument contained in our Drake article, we ask that it be incorporated into our Public Comments.

There are two aspects of the current Rule of Criminal Procedure 2.18(5)(a), as it operates in practice, that the NAACP submits are unconstitutional in violation of the impartial jury guarantees of our Federal and Iowa Constitutions: (1) the blanket life-time exclusion of all felons from jury service, regardless of the length of time since completion of the sentence, the

³ See Sarah K.S. Shannon et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948-2010*, 54 DEMOGRAPHY 1795, 1807 (2017).

³ See James M. Binnall, *A Field Study of the Presumptively Biased: Is There Empirical Support for Excluding Convicted Felons from Jury Service?*, 36 Law & Policy 1 (2014).

⁴ 930 N.W.2d 319 (2019).

⁵ Russell E. Lovell, II, and David S. Walker, *Achieving a Fair Cross-Section on Iowa's Juries in the Post-Plain World: The Lilly-Veal-Williams Trilogy*, ___ Drake L. Rev. ___ (2020). We have enclosed section V of our article, *Does Exclusion from Jury Service of Persons with a Felony Conviction Constitute Systematic Exclusion?*, and ask that it be incorporated in support of our Public Comments.

⁶ "2.18(5) Challenges for cause. A challenge for cause may be made by the state or defendant, and must distinctly specify the facts constituting the causes thereof. It may be made for any of the following causes: a. A previous conviction of the juror of a felony."

seriousness of the offense, the relationship of the offense to veracity, the individual's acceptance of responsibility and contrition, and evidence of rehabilitation; and (2) the refusal to recognize restoration of civil rights as allowing a felon to serve as a juror. Current Rule 2.18(5)(a) codifies a conclusive, irrebuttable presumption of irremediable, unending bias on the part of one previously convicted of a felony. Experience in other jurisdictions and countless instances of rehabilitation—the very hope and purpose of our criminal justice system—believe the presumption of a lifetime of bias.

The proposed amendment to Rule 2.18(5)(a) provides:

2.18(5) Challenges to individual juror for cause. A challenge for cause of an individual juror may be made orally by the state or defendant and must distinctly specify the facts constituting the cause. A challenge may be made on an individual juror for any of the following causes:

a. A previous conviction of the juror of a felony unless it can be established through the juror's testimony or otherwise that either the juror's voting rights have been restored or more than ten years have passed since the juror's conviction or release from confinement for that felony, whichever is later.

We applaud the proposed amendment to the extent it (1) rejects the life-time ban on jury service for felons who have completed the term of their sentence, and (2) recognizes the restoration of civil rights to include the right to participate as jurors. The NAACP, however, believes the proposed substitution of a "10-year waiting period" for the life-time exclusion is problematic.

A. Ten-Year Ban of Jury Participation following Release from Court Supervision

The NAACP submits that the proposed ten-year bar still violates the fair cross-section principles of *Plain* and *Lilly*, much as a lifetime bar does, because it leads to underrepresentation of a distinctive group—African Americans—whom the Rule systematically excludes from inclusion in jury pools and panels without the State having shown convincingly that the bar serves a significant state interest and has been appropriately tailored to do so, as required by the seminal cases of *Duren v. Missouri*,⁷ and *State v. Plain*.⁸ The NAACP believes the proposed "10-year waiting period" after one has been released from supervision before one can serve as a juror is overinclusive and probably, in individual cases, underinclusive, too. It would bar one from fully integrating into society despite release from incarceration and supervision and despite all indication on voir dire of a person free of bias and ready to fulfill a civic duty. After ten years it presumes that one is free of bias and willing and able to fulfill the civic obligation we have as jurors. Of course, the Rule, and our criminal justice system, rely upon voir dire to detect bias and the ability to dismiss or strike such a juror who *is* demonstrably biased against the criminal justice system notwithstanding the passage of ten years and more. That is as it

⁷ 439 U.S. 357 (1979)

⁸ 898 N.W.2d 801 (2017).

should be, whether or not ten years have passed since release from court supervision. In sum, we cannot conceive of a “significant state interest [that will] be manifestly and primarily advanced by” an overinclusive and underinclusive waiting period of any kind, especially when the cost is underrepresentation of a distinctive group from jury pools and jury panels, and most certainly not by a 10-year waiting period.

B. Restoration of Rights

The Public Comments submitted by Mr. Buller and 17 county attorneys (hereinafter “County Attorneys”) state, “We have seen no justification that would support the substantial departure from existing law recommended by the Committee and we believe this type of policymaking is better suited to the executive and legislative branches . . .” To the contrary, there is substantial justification and experience in other States that support the “departure from existing law” and little more to support existing law than a conclusive presumption and a century or more of unexamined precedent. The NAACP is surprised that the County Attorneys have overlooked this Court’s strong commitment to reinvigorating the fair cross-section requirements of the “impartial jury” guarantee in both the Sixth Amendment of the Federal Constitution and Article I, §10 of the Iowa Constitution.⁹

Governor Reynolds has affirmatively expressed her commitment to issue an Executive Order later this summer or early fall that will restore the right to vote to those felons who have completed their prison, probation, or parole terms. It remains to be seen if there will be any conditions or exclusions in the Governor’s promised Executive Order. Because the Governor’s action appears imminent, within the next two months, it may be prudent for the Court to await her Executive Order so that the Court can take it into account as it considers adoption or modification of the proposed amendment to Rule 2.18(5)(a). Contrary to the suggestions in the County Attorneys’ Public Comments, while the Governor’s Executive Order may purport to be the final word as to the extent of a former felon’s voting rights, it is not the final word regarding a felon’s right to serve on a jury. The Constitutions’ fair cross-section principles may require the Court to take affirmative action beyond whatever the Governor may do. Should the Governor require fulfillment of a monetary obligation, such as payment of restitution or court costs, as a condition of securing the right to vote, that requirement can be and has been challenged as unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.¹⁰ Moreover, such a limitation may cause jury pools and jury panels in Iowa not to reflect the fair cross-section which the Sixth Amendment and the Iowa Constitution require under the Court’s Opinions in *Plain* and *Lilly*.

We are hopeful that the Governor’s Executive Order will not impose conditions on voting rights, because in that case the portion of the proposed amendment to Rule 2.18(5)(a) addressing restoration of rights will significantly advance the Court’s continuing efforts to ensure

⁹ *State v. Plain*, 898 N.W.2d 801 (Iowa 2017); *State v. Lilly*, 930 N.W.2d 293 (Iowa 2019); *State v. Veal*, 930 N.W.2d 319 (Iowa 2019); and *State v. Williams*, 929 N.W.2d 21 (Iowa 2019).

¹⁰ *Jones v. Governor of Florida*, 950 F.3d 795 (11th Cir. 2020).

fulfillment of the Impartial Jury guarantee. However, the Court must be prepared to consider the need to go further than the Governor. The reason for that is that while there is no fair cross-section requirement applicable to voting, there is such a requirement governing jury service; and when systematic exclusion is shown, as we believe is the result of Rule 2.18(5)(a), the State is obligated to show convincingly that the exclusion is tailored to serve a significant state interest. The leading fair cross-section cases of *Taylor* and *Duren* both struck down state jury trial statutes on Constitutional, fair cross-section grounds, and in the event the felon-exclusion rule as crafted still runs afoul of the Constitutions' fair cross-section requirement, the Constitution must prevail whether the rule is rooted in a state statute or court rule. The NAACP, therefore, does not hesitate to reject the County Attorneys' argument that relief from Rule 2.18(5)(a)'s lifetime bar is for the Legislature or the Governor and not for the Court to concern itself; and we urge the Court to do so as well.

C. Voir Dire Is a More than Adequate Check on Felon Juror Bias

The NAACP notes that the County Attorneys' Comments have taken the following quotation from an article by Professor James Binnall out of context: "[A] majority of convicted felons harbor a prodefense/antiprosecution bias and, in this way, differ from eligible jurors generally."¹¹ Professor Binnall's study makes additional findings, including that, "as a group, law students appear to harbor a prodefense/antiprosecution bias as severe as that of convicted felons."¹² Binnall observes that "while convicted felons are banished, law students and other potentially biased groups of nonfelony jurors take part in the jury selection process (voir dire)." Indeed, Binnall reaches the very conclusion for which the NAACP advocates:

This study does, however, call into question the need to exclude convicted felons from the jury pool. As law professor Brian Kalt notes, "Only if every, or almost every, felon is irretrievably biased against the government might it make sense to have a blanket exclusion of felons from criminal juries on these grounds" (Kalt 2003, 106). Kalt contends that excluding convicted felons from the jury process is an overinclusive measure that does little to ensure the impartiality of the jury process (2003).¹³

Binnall's continuing research on this important subject has only reinforced the findings of his 2014 study, and his research has gained increasing credibility through its recognition by the National Center for State Courts.¹⁴ One recent Binnall study has garnered considerable

¹¹ County Attorneys, at 7 n.1 (quoting James M. Binnall, A Field Study of the Presumptively Biased: Is There Empirical Support for Excluding Convicted Felons from Jury Service, 36 LAW & POLICY 1, at 2, 3–5 (Jan. 2014), available at <https://onlinelibrary.wiley.com/doi/pdf/10.1111/lapo.12015>).

¹² Id. (Binnall at 15).

¹³ Id. (Binnall at 17), citing Brian Kalt, The Exclusion of Felons from Jury Service, 53 American U. L. Rev. 65, 106 (2003).

¹⁴ http://www.ncsc-jurystudies.org/data/assets/pdf_file/0023/6836/jurynews31-1_convictedfelons.pdf

attention. Using the same parameters and methodology as on his 2014 study, Binnall has studied the biases of law enforcement personnel and concluded:

The inherent bias rationale for felon-juror exclusion, while ostensibly the codification of logic, instead rests on irrational presumptions about convicted felons and the threat of their pre-trial biases. Data from this field study suggests that law enforcement personnel are as pro-prosecution as convicted felons are pro-defense. As interpreted by courts and lawmakers, the inherent bias rationale therefore demands that pre-trial biases, in either direction, warrant exclusion from the venire. Under that view, law enforcement personnel merit banishment. Yet, such an approach, like felon-juror exclusion statutes themselves, contradicts over a century of Supreme Court precedent weighing in favor of broad participation in the jury process. Rather than exclude law enforcement personnel, jurisdictions ought to embrace their distinctive perspectives, along with those of their convicted counterparts.¹⁵

In contrast to felon-exclusion, Binnall's comparative chart shows only a handful of states, including our neighboring states of Kansas and Nebraska, that exclude law enforcement personnel from juries. Binnall's point is worthy of reiteration: "Rather than exclude law enforcement personnel, jurisdictions ought to embrace their distinctive perspectives, along with those of their convicted counterparts."¹⁶ Like Binnall, the NAACP contends that the more diverse juries that will be brought about by inclusion of persons previously convicted of a felony will be more deliberative than the current homogeneous juries, and inclusion will significantly further the felons' "community engagement[,] a necessary precursor to successful reintegration and criminal desistance."¹⁷ "Finally, by excluding convicted felons from jury service, a majority of U.S. jurisdictions risk delegitimizing verdicts. Research demonstrates that traditionally marginalized populations question the legitimacy of verdicts when a jury appears unrepresentative of their community."¹⁸ These policy considerations have resonated with this Court in *Plain and Lilly*, and it is now time to take the next step, and that would be to DELETE current subsection (a) in its entirety from Rule 2.18(5)'s provision of grounds for a challenge for cause.

It is the NAACP's view that, to the extent there are persons previously convicted of a felony who may harbor hostility towards law enforcement and the prosecution, the voir dire process and strikes for cause based on a specific individual's *demonstrated* bias, especially as enhanced by the individualized voir dire of "sensitive subjects" authorized by the proposed amendment to Rule 2.18(5), provide a more than adequate check on such bias, not to mention the peremptory strikes the prosecution can exercise.

¹⁵ James Binnall, *Cops and Convicts: An Exploratory Field Study*, 16 Ohio St. J.Crim. L. 221, 232 (2018) (footnote omitted).

¹⁶ *Id.*

¹⁷ *Id.* at 233.

¹⁸ *Id.* (footnote omitted).

That has also been the view of the American Bar Association Principles for Jurors and Jury Trials, Principle 2.A(5): “All persons should be eligible for jury service except those who . . . 5. Have been convicted of a felony and are in actual confinement or on probation, parole or other court supervision.”¹⁹ There have been notable advocates for this reform for more than half a century. The Report of the Task Force on Corrections of the President’s Commission on Law Enforcement and the Administration of Justice made such a recommendation in 1967, and there have been many in recent weeks who have lamented that more of that 1967 Presidential Commission’s Recommendations were not implemented.²⁰ The County Attorneys contend “that current Iowa law is hardly an outlier” as some form of felon exclusion has been and continues to be the majority rule in the USA. The NAACP disagrees; as our Drake Law Review articles demonstrates, it appears that the actual operation of Iowa Rule 2.18(5(a) makes Iowa the most restrictive state of all. Indeed, from an international perspective, Iowa may well be the worst in the world in this regard.²¹

The NAACP urges that the Court not merely end felon exclusion from Iowa’s juries but also take affirmative steps to welcome former felons to jury service, to encourage them to re-engage by coming forward to serve and thereby truly re-enter the community.²² Maine has a fifty-year

¹⁹ We note that the ABA Principle is consistent with the County Attorney’s fallback position that felon inclusion should not occur if the felon is still under “court supervision.”

²⁰ TASK FORCE ON CORRECTIONS, THE PRESIDENT’S COMM’N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 90 (1967) (footnote omitted)

²¹ Ohio State law professor Michelle Alexander writes in *The New Jim Crow: Mass Incarceration in the Age of Color-Blindness*:

“[Felon disenfranchisement] is far from the norm in other countries In fact, about half of European countries allow all incarcerated people to vote Prisoners vote either in their correctional facilities or by some version of absentee ballot in their town of residence. Almost all of the countries that place some restrictions on voting in prison are in Eastern Europe, part of the former Communist bloc.”

Id. at 158 (footnotes omitted). Alexander reports: “No other country in the world disenfranchises people who are released from prison in a manner even remotely resembling the United States. In fact, the United Nations Human Rights Committee has charged that U.S. disenfranchisement policies are discriminatory and violate international law.” *Id.* See *The International Convention on the Elimination of All Forms of Racial Discrimination* (Sept. 25, 2014). The Committee on the Elimination of Racial Discrimination recommends that each State party take effective measures to:

“(c) Ensure that all states reinstate voting rights to persons convicted of felony who have completed their sentences; provide inmates with information about their voting restoration options; and review automatic denial of the right to vote to imprisoned felons, regardless of the nature of the offence.”

²² A recent article in *The New York Times* reports that large number of ex-felons in Florida have not registered vote—even though the electorate voted overwhelmingly to restore their voting rights through a constitutional amendment in a highly publicized recent election. “Does Florida Really Want Felons to Vote?” <https://www.nytimes.com/2020/03/16/us/politics/florida-felons-voting-rights.html>. Concerns about whether their vote will make a difference and possible disqualification if they haven’t paid fines and court costs have discouraged large numbers from registering.

history of inclusion of felons in its jury system, and the Maine experience has valuable lessons for the nation and Iowa. The comments of former felons and court personnel about the Maine experience provide a refreshing and moving commentary on the best side of the human condition.²³

- II. Proposed amendments to Rule 2.18(6), lines 12-14 and 18-22 (Challenges for Cause)
- Proposed amendment to Rule 2.18(5)(o), lines 9-10 (Challenges for Cause)
- Proposed amendments to Rule 2.11(10), lines 24-28 (Change of Venue)

The NAACP believes this Court's fair cross-section jurisprudence, *State v. Plain*, *State v. Lilly*, *State v. Veal*, and *State v. Williams*, when coupled with this Court's opinion in *State v. Jonas*²⁴ and the United States Supreme Court's decisions in *Pena-Rodriguez v. Colorado*²⁵ and *Foster v. Chatman*,²⁶ have substantially changed the trial judge's role and responsibility.

The trial judge must take an active role to ensure that the jury selection process achieves a fair cross-section of the community, because good jury management practices can significantly mitigate various factors affecting diversity of the pool and increase its diversity. See *State v. Lilly* (quoting Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 Drake Law Review 761 (2011)). The trial judge cannot be a mere observer and rely solely upon the parties to ferret out racial or implicit bias, but rather must be prepared to be proactive to ensure that a fair cross-section of the community is obtained and that an "impartial jury" as Constitutionally required is secured. We strongly submit that this new role for the trial judge requires the Court to reconsider and modify *State v. Mootz*²⁷ which to our reading discourages trial judges from actively seeking to ensure that the trial jury reflects a fair cross section of the community.

A proactive role for the trial judge demands attention to the jury management process, on which we know the Court and the State Court Administrator along with Chief Judges and Jury Managers are presently working; and it also requires attention to practices and procedures so that a fair cross-section is not destroyed (a) by the failure to strike racially biased jurors for cause, (b) by peremptory strikes reflecting implicit bias or difficult to prove intentional bias, or (c) by a venue not in the interest of justice or its appearance because demographics make diversity of the jury pool highly unlikely. We will discuss the proposed amendments that impact procedures (a) and (c) now; we will defer discussion of the proposed amendment that impacts practice (b) until the conclusion of our Public Comments in part V.

A. Challenges for Cause

²³ James Binnall, *Felon-Jurors in Vacationland: A Field Study of Transformative Civic Engagement in Maine*, 71 Me. L. Rev. 71 (2018).

²⁴ 904 N.W.2d 566 (Iowa 2018),

²⁵ 137 S.Ct. 855 (2017)

²⁶ 136 S.Ct. 1737 (2016),

²⁷ 808 N.W.2d 207 (Iowa 2012).

The NAACP supports both proposed amendments to Rule 2.18(6) and the proposed amendment to Rule 2.18(5), but submits that both need to be strengthened. These amendments are in response to the Report and Recommendations of the Supreme Court's Jury Selection Advisory Committee. At the outset of that Report, in its Preface, the Committee observed at page 5:

In *Pena-Rodriguez*, the Court held a juror's racially biased comments during deliberations if reflected in his or her vote can require the trial court to overturn a jury verdict. 137 S. Ct. at 869. *Pena-Rodriguez* necessarily requires trial judges to be more attentive to disqualification for cause of prospective jurors whose racial bias has become apparent during voir dire questioning.

The Comments to Recommendation VI made the following findings: "Too often courts will not allow a challenge for cause when it should be granted. More often courts attempt to rehabilitate a juror rather than allow a challenge for cause." Pp. 14. When "'actual bias' has been expressed by a potential juror, including but not limited to bias based on . . . race, creed, color . . .," the proposed amendment to Rule 2.18(6) provides that "the court may clarify the juror's position but shall not attempt to rehabilitate the juror by its own questioning." This proposal is intended to end, and should end, the practice of "easy rehabilitation" by judges of jurors who have expressed racial or other biases.²⁸ The amendment implements the teaching of this Court's opinion in *State v. Jonas*:

Where a potential juror initially repeatedly expresses actual bias against the defendant based on race, ethnicity, sex, or sexual orientation, both in a pretrial questionnaire and in voir dire, we do not believe the district court can rehabilitate the potential juror through persistent questioning regarding whether the juror would follow instructions from the court.²⁹

The NAACP submits this reform is crucial to ensuring protection of the defendant's right to an impartial jury, and it has our strong support. We are aware that this will be a significant change for some judges, and, in recognition of this reality but also the critical importance of the change in protecting against biased verdicts, the Jury Selection Advisory Committee recommended judicial education on "the practical limits that *Pena-Rodriguez [v. Colorado]* places on judicial rehabilitation of jurors whose voir dire responses suggest racial bias." P. 17.

The NAACP is concerned that some fine-tuning or wordsmithing is still needed. The NAACP notes that the bases of discrimination listed in Rule 2.18(6) are nowhere listed as grounds for

²⁸ It will prevent judges from keeping potential jurors who expressed racial or other biases on the jury by asking a leading question of the juror: "You can follow my instructions to be fair and impartial, can't you?" Of course the juror is going to answer "yes" allowing the judge to keep the biased juror on the jury.

²⁹*State v. Jonas*, 904 N.W.2d 566, 575 (Iowa 2017).

disqualification for cause in Rule 2.18(5), and it believes this to be an oversight that must be corrected. We do not read the proposed amendment to Rule 2.18(5)(o) as intended to correlate with the final sentence in the proposed amendment to Rule 2.18(6), as subsection (o) addresses “actual bias for or against a party” whereas the bases of “age, race, creed” set forth in the last sentence of 2.18(6) are bases for disqualification when they are “relevant to the case.” The latter should be set forth as bases for disqualification in a separate subsection of Rule 2.18(5).

Accordingly, the NAACP proposes the following text as a new subsection (p) to Rule 2.18(5)[insert at lines 11-13]:

(p) Where the circumstance indicate a juror would have a bias relevant to the case, including but not limited to bias based on age, race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability.

The NAACP also supports the proposed amendment to Rule 2.18(6) [lines 12-14] that authorizes individualized voir dire to examine prospective jurors’ biases regarding race or any of the individual characteristics just noted. The NAACP believes the Rule should assure counsel and the trial court that time spent seeking to eliminate bias, including implicit bias, is time well spent.³⁰ The opportunity for defense counsel to engage in an individualized voir dire should not be conditioned upon an expression of actual bias. Such a limitation would permit much implicit bias to go undetected. Therefore, the NAACP submits that it should be made clear that the limitation imposed by the final sentence [lines 18-22] only has application to the trial judge and how the judge responds to actual expressions of actual bias. The ABA Principles for Juries and Jury Trials Principle 11.B(2) encourage questioning of jurors both as a panel and individually.³¹

Based on feedback from criminal defense lawyers, the NAACP is concerned that defense lawyers in recent years have felt considerable pressure from district court judges to keep their voir dire brief. We believe that the facts in *State v. Williams*, where the trial judge refused to allow individualized voir dire in a murder case involving an African American defendant, is representative of this judicial pressure. The NAACP submits that unless Rule 2.18(6) is further amended to make clear that “scheduling concerns are not a basis” to deny individualized voir dire, defense attorneys will continue to feel substantial pressure to not request individualized voir dire at all or, if requested, to “keep it brief.” That would undercut the new Rule’s effectiveness in serving as a prophylactic measure both against the inclusion of biased jurors and bias in jury deliberations.

³⁰ The NAACP submits that the view expressed by Justices Wiggins and Appel and the late Chief Justice Cady in *State v. Williams* should be reflected in the Rule: “[I]t is necessary to do a thorough voir dire to root out implicit bias. That takes time.” *Williams*, Wiggins Dissent p. 35.

³¹ “Following initial questioning by the court, each party should have the opportunity, under the supervision of the court and subject to reasonable time limits, to question jurors directly, both individually and as a panel.”

Accordingly, the NAACP proposes additional text to follow the first sentence of the proposed amendment to Rule 2.18(6) [insert on line 14]:

Individualized voir dire shall be granted when it is requested on behalf of a defendant in any case when issues of race, color, or ethnicity could be implicated. While the Court may impose reasonable time limits, it must be careful not to discourage counsel from conducting a thorough voir dire. Scheduling concerns are not a basis for refusing to allow individualized voir dire. Expedition of the trial is clearly subsidiary to the duty to impanel an impartial jury.

The NAACP submits the final sentence, drawn from *United States v. Dellinger*,³² should be the touchstone.³³ The NAACP also submits that *Pena-Rodriguez's* recognition that “race is different” in the context of the judicial system, especially in the deliberative role of its juries, permits the Court to limit individualized voir dire as of right to cases “when issues of race, color, or ethnicity could be implicated.”

B. Change of Venue

Here is the proposed amendment to the Rule 2.11(10), lines 24-28:

2.11(10) Motion for change of venue. If a motion for change of venue is filed and the court finds there is a substantial likelihood a fair and impartial trial cannot be preserved with a jury selected from the county where trial is to be held, the court shall order that the action be transferred to another county in which that condition does not exist.

The Court’s Jury Selection Committee recommended that the change of venue rule be changed to “ensure that judges have the ability to move the venue of a trial on their own accord in exceptional circumstances.”³⁴ The Committee Comments explain that the rationale for the proposed change has historic origins: “A trial by one’s peers is a fundamental principle of trial by jury. Some communities may not have the racial or ethnic population to ensure this fundamental principle. In these instances, on motion of the parties or sua sponte, courts should have the ability to change the venue of the trial or import jurors from other counties to ensure a jury pool that is reflective of the defendants’ characteristics.”³⁵

The Committee Comment reflects the belief that a “safety valve option” should be available to trial judges when there is a prosecution of a person of color in a county in which very few residents are persons of color. Under current case law the defendant in such a case would typically be tried by an all-white jury, and there would be little likelihood the jury was not drawn from a fair cross section of the community served by the trial court. Yet as the Court

³² 472F.2d 340, 370 n.42 (7th Cir. 1972),

³³ see also *State v. Williams*, Slip. At 42.

³⁴ Recommendation X, p. 21.

³⁵ Comment to Recommendation X, p. 21.

noted and cited in *Plain*, the lack of diversity on the jury adversely affects *both* the quality of jury deliberations *and* the criminal justice system's appearance of fairness.³⁶ This is true whether the case is resolved by verdict or by plea bargain. An African-American defendant or other defendant of color facing an all-white jury facing serious charges brought by the prosecutor is under considerable pressure to plead guilty to a lesser offense carrying a shorter sentence, despite innocence, especially where a conviction would carry a mandatory minimum sentence.

The NAACP supports the purpose and the objective of the proposed rule change. Specifically, the NAACP supports deletion of the current requirement of a showing of "such degree of prejudice exists in the county" in order to change the venue. That language imposes on a defendant the need to impugn an entire jury pool and likely the whole county in order to change the venue to a county where the appearance of justice will clearly be better secured; and it would be an unrealistic, time-consuming, and expensive burden to discharge when the challenge to the appearance of fairness is obvious for all to see. That should not be the only basis for a change of venue in serious criminal cases involving a defendant of color, and the trial court on its own motion should be able to order a change of venue in the interest of justice, including the appearance of fairness. The NAACP supports the clarification that the jury will be drawn from the jury pool in the judicial district that is the new venue and the additional amendments regarding responsibilities and costs.

The NAACP submits that the rule should be amended to strike the italicized language and to articulate a standard instead that allows and authorizes a court on its own motion to grant a motion for change of venue "if it be in the interest of justice" to do so.

2.11(10) Motion for change of venue. If a motion for change of venue is filed and the court finds there is a substantial likelihood a fair and impartial trial cannot be preserved ~~with a jury selected from~~ in the county where trial is to be held, *or if the court on its own motion finds that the interest of justice so requires*, the court shall order that the action be transferred to another county in which that condition does not exist *or the interest of justice can more clearly be served*.

The "interest of justice" standard has long been applied in federal courts under 28 U.S.C. §§ 1404 and 1406, and the goals of both civil and criminal procedure have forever included both securing justice on the merits and doing so in a way that assures the appearance of fairness. This concern particularly commands our attention when so many question and even lack confidence in the fairness of the criminal justice system. These proposed revisions also

³⁶ Citing researchers at Duke University who "compared data on conviction rates by race in over 700 criminal trials over a ten-year period," Justice Hecht writing for a unanimous Supreme Court on the 6th Amendment issue explained that "they found that where there was one or more black jurors, black and white defendants had roughly equal rates of conviction; however, all-white juries convicted African-American defendants 81% of the time and white defendants only 66% of the time." 898 N.W.2d at 826.

recognize the concerns expressed by the Court in *Plain* about both justice—as required by the Constitution—and its appearance.

III. Proposed Amendment to Rule 2.24(2)(b)(2), lines 35-36, New Trial When Jury Exposed to Unauthorized Information
NAACP Proposed Implicit Bias Instruction

The proposed amendment to Rule 2.24(2)(b)(2) provides the following as a new ground to grant a motion for new trial: “When the jury has been prejudicially exposed to information the jury was not authorized to receive.”

There is no explanatory Comment regarding this new ground for a new trial. The Rule appears to be directed at situations when jurors may have gone online and heard press reports on the pending case, or have used Google maps online and viewed the crime scene area, or obtained other information online that is not admissible or admitted into evidence in court. Construing the rule in this light, the NAACP readily supports the proposed rule.

Neither the proposed amendment, nor any other Rule of which we are aware, purports to provide a procedure guiding trial judges on implementation of *Pena-Rodriguez*'s constitutional mandate that racial bias cannot infect the deliberations of a jury. *Pena-Rodriguez* held racial bias expressed by even one juror can be the basis for impeaching a jury verdict and overturning a conviction, so the opinion and holding in that case merit careful attention. The NAACP has sought to bring the significance of *Pena-Rodriguez* decision to the Court's attention, as we believe it warrants that judges and lawyers be on heightened alert to detect and protect against juror bias. The NAACP submits that *Pena-Rodriguez* has important implications for trial judges (a) during the challenge for cause stage of proceedings (which we discussed above), (b) for the giving of implicit bias instructions at the beginning and conclusion of trial, and (c) for following up on any indication that racial bias may have infected juror deliberations. We are concerned that both (b) and (c) are unaddressed in the Iowa Rules of Criminal Procedure.

Implicit Bias

The proposed Criminal Rules of Procedure are silent with regard to implicit bias, even though the Supreme Court Jury Selection Committee's Recommendation VIII stated: “The Supreme Court should develop a Comprehensive Review of Methods to Reduce Implicit Bias in Jury Selection and Throughout the Course of the Trial.” P. 18. This Court in *State v. Williams* indicated that the study of implicit bias is still in evolution, and the Court was unwilling to mandate a specific jury instruction on implicit bias. The NAACP does not disagree on this point; however, we submit that a Rule that explains the difference between stereotypes and implicit bias would be helpful to judge and juror alike. Justice Sandra Day O'Connor recognized 28 years ago that “conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of

guilt or innocence.”³⁷ In the same case, in his concurring opinion, Justice Thomas expressed his belief, shared by journalists, editors, and the public, “that conscious and unconscious prejudice persists in our society and that it may influence some juries. Common experience and common sense confirm this understanding.”³⁸ None seriously doubts the existence of implicit bias or the potential of its impact.

We recall again the admonition in *Plain* that trial judges should be pro-active in addressing implicit bias. When requested, the NAACP submits that the trial judge should be required to give one of a number of approved implicit bias instructions; it should not be within the discretion of the trial judge not to do so.³⁹

The NAACP proposes the following implicit-bias Rule:

“Judges must be proactive in addressing implicit bias. When a defendant requests an implicit bias instruction, the court shall instruct the jury on implicit bias. In recognition that the science of implicit bias is still evolving, no specific instruction implicit bias instruction is mandated, but the instruction must make clear the hidden and subconscious nature of implicit bias and should be given at the beginning of trial as well as after the evidence is received.”

The NAACP submits the key is that an implicit bias instruction should be given *whenever a defendant requests*. At minimum, it must explain implicit bias can be insidious as it can operate in one’s subconscious.

Procedures to Process a Charge of Biased Jury Deliberations under *Pena-Rodriguez*

The NAACP does not believe proposed Rule 2.24(2)(b)(2)—authorizing the trial court to grant a new trial “When the jury has been prejudicially exposed to information the jury was not authorized to receive.”—is intended to address *Pena-Rodriguez* concerns; however, Rule 2.24(2)(b)(3)—“When the jurors . . . have been guilty of any misconduct tending to prevent a fair and just consideration of the case”--would appear to encompass the juror misconduct that rightfully so concerned *Pena-Rodriguez*. However, the NAACP remains concerned that the Rule does not set forth the procedure for trial judges to follow when a juror comes forward and states racial or ethnic bias occurred during juror deliberations. The Washington Supreme Court’s recent case, *State v. Berhe*,⁴⁰ provides a framework to guide trial judges, and counsel, as

³⁷ *Georgia v. McCollum*, 515 U.S. 42, 68 (1992) (O’Connor, J., dissenting)

³⁸ *Id.* at 515 U.S. at 60, 61 (Thomas, J., concurring in the judgment).

³⁹ Justice Mansfield characterized implicit bias instructions as a cautionary instruction, and therefore applied the very deferential “abuse-of-discretion” standard of appellate review. He also indicated: “[W]e find the district court did not abuse its discretion in declining to give Williams’s requested implicit-bias instruction. This does not mean, of course, that it would have been an abuse of discretion to use Williams’s’ requested instruction.” Slip op. at 21.

⁴⁰ 444 P.3d 1172 (Wash. 2019).

to how to proceed in those instances when a potential issue of juror bias infecting a jury verdict arises. We believe that the thoughtful approach set forth in *Berhe* is well developed and persuasive, and recommend it to the Court as worthy of consideration for a Rule:

Procedure. Rather than permitting the parties alone to investigate allegations of racial bias, once a claim of racial bias is raised, inquiries into the influence of that racial bias on a jury's verdict must be conducted under the court's supervision and on the record. Therefore, as soon as any party becomes aware that there are sufficient facts to support allegations that racial bias was a factor in the verdict, the court and opposing counsel must be notified. In addition, as soon as a court becomes aware of allegations that racial bias may have been a factor in the verdict, the court shall take affirmative steps to oversee further inquiry into the matter and instruct counsel not to have any further communications with the jurors unless it is on the record and supervised by the court.

Before deciding whether there is a prima facie showing of racial bias, the trial judge must conduct a careful and thorough inquiry. A prima facie showing requires evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred, either in the form of explicit or implicit racial bias. When determining whether there has been a prima facie showing of implicit racial bias, the court cannot base its decision on whether there are equally plausible, race-neutral explanations. There will almost always be equally plausible, race-neutral explanations because that is precisely how implicit racial bias operates. At the prima facie stage, courts must limit themselves to determining whether the evidence, taken as true, permits an inference that an objective observer who is aware of the influence of implicit bias could view race as a factor in the jury's verdict. Where the evidence is unclear or equivocal, as it will often be in cases of alleged implicit racial bias, the court must conduct further inquiries before deciding whether a prima facie showing has been made, for example, by asking the juror making the allegations to provide more information or to clarify ambiguous statements. Any such inquiry must occur on the record and be overseen by the court rather than driven by counsel.

The unique challenge of assessing implicit racial bias requires a searching inquiry before a court can decide whether an evidentiary hearing is needed. In addition to overseeing investigations into racial bias by jurors, courts must tailor their inquiries to the specific allegations presented. The alleged racial bias can be either implicit or explicit, and the trial judge must account for the unique nature of implicit bias as implicit racial bias is a unique problem that requires tailored solutions. implicit racial bias can be particularly difficult to identify and address. [In Washington, the Court could invoke Rule 37 that sets out "reasons that have been associated with improper discrimination in Washington States are presumptively invalid", such as "having a close relationship with people who have been stopped, arrested, or convicted of a crime" or "having had a negative experience with law enforcement." Although Iowa doesn't have Rule 37, the Court should carefully examine Rule 37's list and choose those that are applicable and

put them into the proposed Rule]. As our understanding and recognition of implicit bias evolves, our procedures for addressing it will evolve as well.

IV. Rule 2.19(3), lines 33-35 Mandatory Reporting of Voir Dire.

Proposed amendment of 2.19(3):

Reporting of trial. Reporting of the trial shall be governed by Iowa Rule of Civil Procedure 1.903. However, reporting may not be waived except for voir dire in misdemeanor cases.

The NAACP supports the proposed reform as far as it goes; however, we are unaware of any caselaw that the *Batson* constitutional protections barring discriminatory strikes do not apply in misdemeanor cases.⁴¹ Therefore, the NAACP proposes the following change to the second sentence:

However, the reporting of voir dire is required and may not be waived. ~~except for voir dire in misdemeanor cases.~~

This amendment to 2.19(3) represents modest progress in improving the procedures that implement the *Batson* prohibition against discriminatory peremptory challenges or discretionary strikes. This procedural change will provide appellate courts with a full transcript of voir dire, which is essential to appellate review of *Batson* rulings. The Court Reporter's transcript can also be helpful to the trial judge, allowing him or her to consult the record before ruling on a *Batson* challenge. Without a transcript there is no way, on appellate review, the defendant can prove pretext or race or other bias on the part of the prosecutor or defense counsel when they exercise their peremptory challenges.

V. Further Comments on *Batson v. Kentucky* and *Pena-Rodriguez v. Colorado*.

The NAACP does not believe that the language in Rule 2.24(b)(2) or (3) go far enough in dealing with racism and bias that surfaces in jury deliberations, and it does not believe that the proposed rules go far enough in dealing with implicit bias, peremptory strikes, and the inefficacy of *Batson* "protections" against implicit bias leading to the elimination of a juror of color from the petit jury that is selected. The proposed amendment to Rule 2.19(3), requiring a transcript of voir dire proceedings, is a modest reform. More is in order. As we stated in the opening paragraph of our Comments, a single discretionary strike of an African American juror (or other person of color) will typically result in an all-white jury even in Iowa's most urban counties, washing away all of the Court's extensive efforts to achieve juries that are truly representative of the community. It is not as though this comes as a surprise. In his 1986

⁴¹ The proposed change finds support in ABA Jury Trial Principle 11(B), which provides: "B. The voir dire process should be held on the record and appropriate demographic data collected." We note the ABA Principle does not exclude misdemeanor cases.

concurring opinion in *Batson*, Justice Thurgood Marshall predicted that the constitutional command of *Batson* would prove to be a fig leaf, and that only by ending peremptory strikes would American's juries truly reflect the diversity of America.

The failure to address the necessity of *Batson* reform and the failure to put a spotlight on the significance of *Pena-Rodriguez's* protection against biased jury deliberations/verdicts and to provide direction on procedural implementation of *Pena-Rodriguez*, together, are the second "elephant in the room" to which we referred at the outset of these comments. After 34 years of *Batson* failure, justice cries out for redressing *Batson's* failings.⁴²

This Court's Jury Selection Committee's 2018 Report succinctly stated the problem at page 16:

Advocates for discretionary or peremptory strikes contend they represent a source of public trust and confidence, and reflect a mechanism to ensure fairness for both sides in a legal proceeding. However, peremptory strikes, when exercised against minority jurors and particularly when such strikes result in an all-white jury, undermine citizen confidence in the jury system to be fair and impartial. *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986), and *People v. Wheeler*, 583 P.2d 748 (Cal. 1978), have prohibited discretionary or peremptory strikes that are racially motivated for more than thirty years. However, there is a national consensus that the procedural protections to implement *Batson* have proved ineffective because, rather than focusing on the defendant's right to a jury that reflects a fair cross-section of the community, courts have required proof that the strike was intentionally discriminatory. Courts have also failed to recognize that a strike based on implicit bias is just as invidious and has the same impact as a purposeful strike.

The Committee Report recommended that this Court "reduce the number of peremptory strikes." Recommendation VII, page 16. The Report explained:

The committee has not arrived at a consensus on the proper number in different case types, nor as to whether the prosecution should have fewer strikes than the defense, as is done in the federal criminal system. The committee noted England has removed all peremptory strikes. Although initially there was trepidation in England when peremptory strikes were abolished, those fears have vanished.

⁴² This is not a new issue for the NAACP. The NAACP has made many presentations to this Court on the need for *Batson* reforms, commencing with the Court's Annual Judicial Conference in November 2014 and continuing over nearly six years, in its Amicus Brief in *Veal*, and in memoranda and presentations to the Court's Jury Selection and Criminal Rules Review Committees, and quarterly NAACP meetings with Chief Justice Cady and OSCA. The Washington Supreme Court's pathbreaking Rule 37 was promulgated in April 2018, one month after the Jury Selection Committee filed its Report. We unsuccessfully sought to have the Jury Selection Committee reopen its proceedings to consider Washington Rule 37, but we did present Washington Rule 37 to the Criminal Rules Review Committee. Rule 37 bars peremptory strikes rooted in implicit bias and identifies "justifications" that are historically associated with racial discrimination and declares them "presumptively invalid." In *Veal* Justice Appel's Dissent relied upon the Washington Supreme Court's decision in *State v. Jefferson*, 429 P.3d 467 (Wash. 2018), which came down after we filed our NAACP Amicus Brief in *Veal*.

Recommendation VII was modest and, in the judgment of the NAACP, inadequate to address a recognized, serious problem in the workings of the criminal justice system. We cannot emphasize enough that for at least a decade there has been a national consensus that the *Batson* procedures have been woefully ineffective in effectuating the *Batson* ban on discriminatory strikes.⁴³ The problem is aggravated in Iowa. Historical experience confirms that it is virtually impossible to prove purposeful discrimination under *Batson* without pattern and practice proof; and given Iowa's demographics, such proof is never going to occur for African American defendants and rarely, if ever, for Latino defendants. The problem is further exacerbated by the reality that judges are only human and are "hesitant to question the integrity or self-awareness of counsel" with whom they work regularly--"requiring a district court judge to, in effect, charge the local prosecutor with lying and racial motivation from the bench in the course of voir dire is unrealistic."⁴⁴ There can be little doubt that the failure to provide persons of color with truly representative jury pools and jury panels, and in consequence, petit juries, has been a factor in the extraordinary racial disparities in the Iowa criminal justice. It is a factor that comes into play in every criminal case, including the 95% of cases that are resolved by guilty pleas. Whatever progress occurs with respect to jury pools and panels can be lost in an instant through a peremptory strike for which *Batson* is readily acknowledged to provide faint protection. Defendants of color fear facing Iowa's all-white juries, and this reality has provided prosecutors with much greater leverage in plea negotiations.

This Court has been among the leaders in recognizing the insidious reality of implicit bias and in implementing implicit bias training for all judges and judicial personnel. In *Plain*, this Court strongly encouraged trial judges to be pro-active in addressing implicit bias; however, the NAACP cannot think of another component of the judicial system where implicit bias is given such free reign. *Batson* totally fails to address peremptory strikes based on implicit or unconscious bias, and this Court has taken no steps to address this gaping hole in *Batson*'s protections. In *Mootz* this Court recognized the implicit bias inherent in discretionary strikes when it expressly characterized discretionary strikes "as arbitrary and capricious,"⁴⁵ yet, in reversing a trial judge who was pro-active and had raised a *Batson* issue *sua sponte*, this Court sent a powerfully negative signal—a message that not only directly conflicts with the goals of the Court's fair cross-section jurisprudence but also leaves trial judges vulnerable to being viewed as complicit when a strike that has discriminatory impact goes unchallenged by counsel and the judge. Extending *Batson*'s prohibition to implicit bias would be a huge practical step toward reinvigorating the protections that *Batson* promised but has woefully failed to deliver. Allowing trial judges to deny a peremptory strike because the explanation for it, denying intentional discrimination, is too rooted in implicit bias, would free up judges to make protective rulings without impugning the reputations of prosecutors (and defense counsel).

⁴³Symposium: *Batson* at Twenty-Five: Perspectives on the Landmark, Reflections on Its Legacy, 97 Iowa L. Rev. 1393 (2012). *Mootz*

⁴⁴ Appel Dissent, *Veal*, Slip. at 64 and 70.

⁴⁵ *State v. Mootz*, 808 N.W.2d 207, 221 (Iowa 2012) (quoting Blackstone).

it is critical that this Court seize the opportunity, as it promulgates these revised rules of criminal procedure, to recognize that *Batson's* focus only on intentional discrimination is far too narrow because implicit bias is likely a greater problem in the 21st century than conscious or explicit bias; and the NAACP respectfully submits that the greatest problem of implicit bias in the judicial system may be the implicit bias inherent in discretionary or peremptory strikes. Accordingly, in these Public Comments the NAACP urges the Iowa Supreme Court to fashion a rule giving examples of justifications offered by counsel that, because historically such reasons have been associated with racial discrimination, reflect implicit bias and declare them to be insufficient justifications to exercise a discretionary or peremptory strike of a prospective juror who is a person of color. We are recommending that the Court proceed much as the Washington Supreme Court did in promulgating its Court Rule 37.⁴⁶ Such a rule of criminal procedure would reinforce this Court's ongoing efforts to achieve Iowa juries that truly reflect a fair cross-section of the community served by the trial court and to eliminate implicit bias from the justice system.

Simply put, reform of *Batson* and how and on what basis Iowa Judges deal with peremptory strikes of prospective jurors of color is essential to the fair operation of Iowa's criminal justice system, in fact and appearance. Undeniably, under the Court's leadership in several ways, Iowa's criminal justice system is being noticeably strengthened and improved. But in failing to address the problems caused by *Batson*, the Court in these proposed rules has failed to address a major need.

Encl. Addendum, Forthcoming Lovell-Walker Drake Law Review article, Sec. V

⁴⁶ http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&ruleid=gagr37.

ADDENDUM to NAACP COMMENTS on PROPOSED IOWA RULES OF CRIMINAL PROCEDURE, taken from Russell E. Lovell, II, and David S. Walker, *Achieving Fair Cross-Sections on Iowa Juries in the Post-Plain World: The Lilly-Veal-Williams Trilogy*, ___ Drake Law Review ___ (2020).

V. *Does Exclusion from Jury Service of Persons with a Felony Conviction Constitute Systematic Exclusion?*

There are many reasons that *Lilly's* prong 3 focus on jury management practices is sound. One of those reasons is that examination of “run-of-the-mill” practices dealing with “undeliverable” summons, failures to respond, failure to appear, and excusals from jury service may be critical to appreciating the full racial impact of a policy or practice that, were you to examine only data as to its formal stage of the process, might fly under the radar and be overlooked. One such example in Iowa, which can only be described as the elephant in the room, is the application of Rule of Criminal Procedure 2.18(5)(a) governing felon-exclusion. The NAACP contends that Rule 2.18(5)(a),¹ despite text that appears to make disqualification for cause discretionary,² has in practice been construed by trial judges across the state as requiring automatic disqualification of ex-felons from jury service when requested by the prosecution. In addition, the NAACP’s anecdotal evidence and an informal November 2019 survey of members of the Iowa Criminal Defense Lawyers Association³ found judges in practice have not viewed the Vilsack-Culver Executive Orders that restored voting rights as an exception to Rule 2.18(5)’s prohibition.⁴ Given the dramatic racial disparities in

¹ See text, *supra* note 167.

² Professor Brian Kalt’s exhaustive state-by-state research of felon-exclusion laws includes Iowa among “[t]hree others [that] allow parties to challenge felons for cause for life at the discretion of the court, the effect of which obviously varies.” Kalt, *supra* at 58 (citation omitted). Kalt’s reading of Rule 2.18(5)(a) to allow discretion on the part of the trial judge as to whether to grant a challenge for cause, we agree, is consistent with the rule’s text; however, the preliminary evidence strongly suggests that, in practice, Iowa judges automatically exclude all persons with felony convictions from juries.

³ Emails from Professor Robert Rigg, 10/2/2019, with informal survey he posed to members of the Iowa Criminal Defense Lawyers Association: “These questions involve trials you have had over the past 10 years. 1. How many times, if ever, has a potential juror been seated on the jury despite a prior felony conviction and over objection by the prosecution or other counsel?” No one could recall any case in which a juror with a felony conviction had been seated when the prosecution or other counsel objected.

⁴ See, e.g., *Veal* transcript, Vol. III, p. 14. It appears that ex-felons are routinely disqualified by most judges without any consideration of whether a particular ex-felon may be among the large numbers of ex-offenders who had their civil rights restored by Governor Vilsack and Governor Culver’s Executive Orders or by individual petition by any Governor. Those judges apparently view the Vilsack-

Iowa's criminal justice system over the past thirty years, Rule 2.18(5)(a)'s lifetime felon exclusion rule has had a very substantial racial impact on African Americans.

We will first discuss the impact of the rule, which almost certainly extends far beyond the courtroom, and the available data that suggests the full racial impact of Iowa's felon-exclusion rule. Then, in the context of the remand of *State v. Veal*, we will demonstrate how *State v. Williams* requires that the Court's prong 3 determination of systematic exclusion be factored into the prong 2 determination of underrepresentation, in order to protect against an improper inflation of the Court System's jury count of African Americans (causing the Court to deny defendant's claim without considering the systematic exclusion of the system).

A. *Lockhart and Holland Confirm Systematic Exclusion Is Caused By the Felon-Exclusion Rule 2.18(5)(a) Which Operates, Not as a "Challenge for Cause" with an Individualized Inquiry as to Impartiality, But as a Qualification for Juror Eligibility*

Despite Rule 2.18(5)(a) listing previous conviction of a felony as the first ground for a challenge for cause under Rule 2.18(5)(a), its actual application by Iowa Judges is inconsistent with the normal processes for resolution of challenges for cause, which involve individualized inquiry through voir dire to determine a prospective juror's impartiality to serve in a particular case. The authors believe, in practice, the felon-exclusion rule operates as an unlisted but very real minimum qualification for juror service,⁵ albeit a negative one: that one must not have been convicted of a felony. Classifications are important, because they can influence the lens through which courts approach resolution of issues, and as we will demonstrate below, the authors contend it is a misnomer to characterize the felon-exclusion among the grounds of challenges for cause. Once a felony conviction has been confirmed, Rule 2.18(5)(a), in practice, operates as an absolute disqualification, and rarely is there any further individualized inquiry about the person's ability to be impartial in that case.

Culver civil rights restoration Orders as irrelevant, either because Rule 2.18(5) makes no exception for one whose rights have been restored or because the Vilsack-Culver Executive Orders specifically restored only ex-offenders' right to vote and to hold public office and were silent as to other rights such as the right to serve on juries. Black Hawk County Public Defender Andy Thalacker did indicate in January 2018 that a prospective juror who has been identified as a felon is transferred to Judge Dryer who checks to see if his rights have been restored. We observe that the issue of the exclusionary effect of Rule 2.18(5)(a) was a major concern of the NAACP during its presentation at the Jury Selection Process Committee's November 2017 meeting, and the Black Hawk County Attorney and Jury Manager were, as members of the Committee, present.

⁵ Iowa Code 607A.4.

The occasions in which a person with a felony conviction is actually struck for cause by the District Judge, as occurred in *State v. Veal*, are very few—they represent the proverbial tip of the ice berg as to Rule 2.18(5)(a)'s full impact. When juror summonses find their way to the doors of those who have served their sentences, the overwhelming percentage do not respond due to their awareness of the longstanding felon-exclusion practice and procedure and its unmistakable message that there is no place in the Iowa jury system for them. Only a small percentage actually report for service, and most of them drop out or are excused early on and are never included in a jury panel assigned to a courtroom.⁶ It is understandable that very few respond. Why would anyone go through the jury selection process knowing it is highly likely, if not certain, to result in prospective juror's disqualification and likely public humiliation?⁷ In sum, the authors submit that the primary impact of the felon-exclusion rule is not one's formal disqualification for cause in the courtroom, but its deterrence of those who have a felony conviction in their past from appearing for jury service—at the very outset of the juror selection process.

The juror questionnaire does nothing to allay those fears and arguably compounds the existing practice. The current juror questionnaire asks: "Have you ever been convicted of a crime other than a traffic offense? If yes, explain." Note the question's over-inclusive breadth in asking about any criminal conviction (other than a traffic offense). The intent of the question would seem to be benign, merely seeking to avoid confusion, as the authors know that persons convicted of a crime sometimes do not know or recall whether the crime is classified as a felony, aggravated or serious misdemeanor, or simple misdemeanor. Affirmative response to the question will prompt the jury manager and counsel to check for sure. However, the questionnaire provides no explanation that one whose crime was a misdemeanor, or even a serious or aggravated misdemeanor, is not subject to disqualification. Rule 2.18(5)(a) only authorizes disqualification for a "felony conviction." Likewise, there is no advice that even a person with a felony conviction can serve as a juror if his or her voting rights have been restored by the governor. The upshot of this, the authors

⁶ In 2018 the Black Hawk County Jury Manager testified that if an ex-felon were to call her and ask about serving, she would typically reply: "You can still get called for jury duty and have to go through the selection, but you will probably not get picked to sit on the jury. And you can request to be excused if you'd like." Treloar, Deposition, pp. 14-15.

⁷ State's Exhibit AAA on the remand of *State v. Plain* shows there were 7 African Americans who failed to appear. Search of Courts On Line revealed four, more than half, had criminal convictions. Two of the four had felony convictions; one had a serious misdemeanor (contempt) and another had a state traffic offense for operating without registration. The data is strongly suggestive of the strong deterrent effect of Rule 2.18(5)(a). The authors do not know if the contempt conviction was due to the juror's failure to respond to a jury summons, but it would be the cruelest of ironies if the State were to prosecute for contempt ex-felons who do not appear when all know they will be struck for cause.

believe, is that the questionnaire sweeps more broadly than felon exclusion and discourages those with any criminal conviction, even misdemeanors, from reporting for jury service.

In the context of systemic employment discrimination law, the Supreme Court has recognized that the most discriminatory system of all is one in which persons of color do not even apply because they know it would be futile.⁸ The authors believe that insight has equal application to the impact of Iowa's felon-exclusion rule. We note it was to the systemic employment discrimination law case of *Pippen v. State*⁹ that Justice Mansfield analogized in *Lilly* when he required proof of causation under *Duren/Plain* prong 3.

Duren and *Taylor* both stated that the fair cross-section requirement did not apply to the "petit jury" but it was not necessary in those cases to decide exactly where the line should be drawn. Does the inapplicability of fair cross-section principles to selection of the trial jurors require the conclusion that *Duren/Plain's* prong 3 cannot be applied to operation of Iowa's felon-exclusion rule as stated in Rule 2.18(5)(a)? The authors submit the answer is "no," as two cases subsequently authored by Chief Justice Rehnquist make clear.

Writing for the Court in *Lockhart v. McCree*¹⁰ and subsequently as the Chief Justice in *Holland v. Illinois*,¹¹ Justice Rehnquist provided notable clarification. In *Lockhart* the Court observed: "We have never invoked the fair-cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury

⁸ Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 365-367 (1977), held:

"A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection.

"If an employer should announce his policy of discrimination by a sign reading "Whites Only" on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs. The same message can be communicated to potential applicants more subtly but just as clearly by an employer's actual practices by his consistent discriminatory treatment of actual applicants, by the manner in which he publicizes vacancies, his recruitment techniques, his responses to casual or tentative inquiries, and even by the racial or ethnic composition of that part of his work force from which he has discriminatorily excluded members of minority groups. When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application."

⁹ 854 N.W.2d 1 (Iowa 2014).

¹⁰ 476 U.S. 162 (1986).

¹¹ 493 U.S. 474 (1990).

panels or venires, to reflect the composition of the community at large.”¹² While true, in holding that no fair cross-section violation occurred in the Arkansas challenge for cause process in a death penalty case, *Lockhart* did not hold that the fair cross-section principles could never apply to challenges for cause. Rather, Justice Rehnquist pointed to the individualized determination of each person struck for cause, and emphasized that those who oppose the death penalty in Arkansas can still serve “in other criminal cases”¹³ and even can serve in death penalty cases “so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.”¹⁴

Four years later in *Holland* Chief Justice Rehnquist reemphasized the core holding in *Lockhart* in deciding that the Sixth Amendment fair cross-section requirement would not be applied to alleged discriminatory peremptory challenges (which the Court had earlier held violated equal protection in *Batson v. Kentucky*). In *Holland* the defendant contended “the prosecutor intentionally used his peremptory challenges to strike all black prospective jurors solely on the basis of their race, thereby preventing a distinctive group in the community from being represented on his jury.”¹⁵ It was urged that “[t]he burden would then shift to the prosecutor to show that the exercise of his peremptory challenges was not based on intentional discrimination against the black potential jurors solely because of their race. Only if the prosecutor could then show nonracial grounds for the strikes would no Sixth Amendment violation be found.”¹⁶

The Chief Justice discussed the constitutional “text” and “central purpose” of the Sixth Amendment’s impartial jury requirement and the tradition and purposes that underlay peremptory challenges. In ruling against the defendant, the Court reemphasized the necessity of individualized juror inquiry in determination of the fair cross-section’s application to empanelment issues that arise between the jury panel stage and the petit or trial jury stage of the process:

The fundamental principle underlying today’s decision is the same principle that underlay *Lockhart*, which rejected the claim that allowing challenge for cause, in the guilt phase of a capital trial, to jurors unalterably opposed to the death penalty (so-called “*Witherspoon*-excludables”) violates the fair-cross-section requirement. It does not

¹² *Lockhart* at 173. The Court overruled the Eighth Circuit’s holding that disqualification of prospective jurors for cause, in a death penalty case, because of their opposition to the death penalty was a violation of defendant’s fair cross-section right. *Id.* at 165. The Court also stated an alternative ground, “unlike blacks, women, and Mexican-Americans,” jurors opposed to the death penalty did not constitute a “distinctive group” under the first prong of the Duren test. *Id.* at 175

¹³ *Lockhart*, *supra* at 176.

¹⁴ *Id.*

¹⁵ *Holland*, *supra* at 477-478.

¹⁶ *Id.*

violate that requirement, we said, to disqualify a group for a reason that is related “to the ability of members of the group to serve as jurors *in a particular case*.” The “representativeness” constitutionally required at the venire stage can be disrupted at the jury-panel stage to serve a State’s “legitimate interest.” In *Lockhart* the legitimate interest was “obtaining a single jury that can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases of a capital trial.” Here the legitimate interest is the assurance of impartiality that the system of peremptory challenges has traditionally provided.¹⁷

It is clear from *Holland* that there is no bright line rule that the fair cross-section principle does not apply to challenges for cause and peremptory challenges. More importantly, *Holland* and *Lockhart* embraced “[t]he fundamental principle” that the fair cross-section requirement is not violated by a jury selection process policy that “disqualify[ies] a group for a reason that is related ‘to the ability of members of the group to serve as jurors *in a particular case*.’”¹⁸ The authors submit that when a policy or practice, such as the blanket, life-time felon-exclusion, has a very substantial adverse impact in the disqualification of African Americans or other persons of color *and* the practice is unrelated to the ability of members of the group to serve as jurors in a particular case, the practice violates the fair cross-section principle of the Sixth Amendment, and, most certainly, of Article I, §10 of the Iowa Constitution.

The normal challenge for cause process is constructed upon individualized questioning as to a prospective juror’s impartiality in that particular case, such as was done in *Lockhart* and recently in *State v. Jonas*.¹⁹ The individualized juror inquiries into a prospective juror’s impartiality made in *Lockhart* and *Jonas* stand in stark contrast to the process that occurs under Rule 2.18(5)(a), where the only inquiry is whether the prospective juror has been convicted of a felony. Once that fact is established, the prospective juror is disqualified without any inquiry into his or her ability to be impartial in that particular case. The judge does not take into consideration how long it has been since the person was released from supervision, evidence of the person’s rehabilitation, the seriousness

¹⁷ Id. at 483 (emphasis was the Court’s)(citations omitted). *Lockhart* had cited earlier Eighth Circuit cases as precedent, and in its citation of *Pope v. United States*, 372 F.2d 701 (8th Cir. 1967), vacated on other grounds, 392 U.S. 651 (1968), it included in parentheses the following comment of then-Judge Blackmun “(The point at which an accused is entitled to a fair cross-section of the community is when the names are put in the box from which the panels are drawn.)” While *Holland* went on to hold peremptory challenges were not subject to fair cross-section challenge, *Holland* emphasized that the Court’s application of the fair cross-section requirement to challenges for cause in *Lockhart* was nuanced, and clearly did not adopt the bright line rule suggested by the Eighth Circuit in the *Pope* case.

¹⁸ Id. (emphasis in original).

¹⁹ 904 N.W.2d 566, 569-570 (Iowa 2017).

of the offense, its relevance to the charges in the instant case, or even whether the person's right to vote has been restored. His or her disqualification has nothing to do with the pending case, but rather constitutes an across-the-board bar on participation by the individual not only in the instant case but also in any future criminal cases for which he might in the future be summoned for service. Simply put, it is a serious misnomer to classify the felon disqualification process as a challenge for cause and not apply fair cross-section principles to it.

Iowa's felon-exclusion rule, as it operates in practice, is a wholesale, systematic exclusion. It is also a life-time bar. While the conduct that resulted in a conviction was the product of one's own bad choice, the conviction itself is immutable for the rest of one's life,²⁰ and, in that sense, bears undeniable similarity to the immutable characteristics of the traditionally defined distinctive groups.²¹ A ruling that Rule 2.18(5)(a) constitutes systematic exclusion under *Duren/Plain* prong 3—as it, in practice, results in automatic disqualification of every person with a felony conviction *without any examination of jurors' ability to serve impartially in a particular case*—is consistent with each of the three purposes served by the fair cross-section recognized in *Taylor* and *Lockhart*.²² That does *not* mean that a prospective juror previously convicted of a felony cannot be challenged for cause. Of course it does not. Such a juror might in fact

²⁰ Professor Michelle Alexander's best-selling book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (20012): "In the era of colorblindness, it is no longer socially permissible to use race explicitly, as a justification for discrimination, exclusion, and social contempt. So we don't. Rather than rely on race, we use our criminal justice system to label people of color 'criminals' and then engage in all the practices we supposedly left behind. Today is it perfectly legal to discriminate against criminals in nearly all the ways that it was once legal to discriminate against African Americans. Once you're labeled a felon the old forms of discrimination—employment discrimination, housing discrimination, . . . and exclusion from jury service—are suddenly legal. As a criminal, you have scarcely more rights, and arguably less respect, than a black man living in Alabama at the height of Jim Crow. We have not ended racial caste in American; we have merely redesigned it." *Id.* at 2.

²¹ "[A] lifetime label of 'felon' may be a matter of choice *ex ante*, but it is largely immutable *ex post*. Brian Kalt, *The Exclusion of Felons from Jury Service*, 53 *American U. L. Rev.* 65, 88 (2003). Professor Kalt, much like Professor Chernoff, found the caselaw in the lower courts hesitant to apply the full breadth of *Duren's* promise to felon-exclusion rules, but also instructed that the states can do better: "If instead the cross-section standard had continued to mean what it did at its inception—that exclusion should be an individualized matter—then felon exclusion would face much more serious scrutiny. The fact that it no longer means this does not, however, mean that individual jurisdictions cannot choose to include felons." *Id.* Just as *Plain* embraced the original understanding of *Duren*, the Iowa Court can and should do so again in its consideration of felon-exclusion.

²² See discussion of purposes, text accompanying nn. 22-26, *supra*.

bear ill will or be prejudiced against the prosecution or law enforcement. But it does mean that there must be individualized inquiry into the question of partiality because it is just as likely that the juror would admit that the crime, conceivably committed long ago, was a stupid, youthful mistake, for which he has long been repentant and attempted, successfully, to rehabilitate himself, and that he harbors no prejudice against the prosecution or the legal system.

Thus, we believe the purposes²³ that underlie the Sixth Amendment fair cross section principles fully support its application to the felon-exclusion rule, especially so because of its racial impact. Should there be any doubt, we submit that given the racial disparities caused by the felon-exclusion rule—disparities so exceptional that they threaten to thwart the Court's fair cross-section goals—the Iowa Supreme Court has two State constitutional options which it can and should utilize. It can exercise its supervisory authority over the district courts under Article V, as it is currently in the process of doing with its proposed amendment of Rule 2.18(5)(a), or it can, citing *Lilly*, invoke its independent authority under Article I, §10, and extend the fair cross-section principles and void Rule 2.18(5)(a), as its full sweep operates as systematic exclusion under *Duren/Plain* prong 3 contributing to the underrepresentation of African Americans in jury pools and panels.

B. *Proving the Sweeping Racial Impact of Iowa's Felon-Exclusion Rule*

In terms of proving that Rule 2.18(5)(a) is a primary cause of the underrepresentation of African Americans in the jury selection process, the authors believe wide spread community knowledge of the felon-exclusion rule deters felons in Iowa from even responding to juror summons. We are confident as the jury data collected by OSCA begins to identify those who are struck for cause (including those struck because of a felony conviction), those numbers will only be the tip of the iceberg in terms of the actual impact of Rule 2.18(5)(a). Most persons with a felony conviction will never enter into the jury selection process because they know it is futile to do so.

Although these systemic facts seem obvious, and appropriate for judicial notice, counsel best be prepared to develop proof as to that the felon-exclusion rule deters most from responding to summons for jury service. Thus, the authors recommend that defense counsel on remand obtain from the jury manager or Office of State Court Administration a list of those in the *Veal* jury selection process who failed to respond, who failed to appear, and who were excused, struck for cause, and struck by peremptory challenge, with the race of each person and the reason for any of these actions. Then defense counsel should obtain from the county attorney the criminal record, if any, of the African

²³ See discussion of purposes, text accompanying nn. 22-26, supra.

Americans on this list prepared by the Court System. The same information should be requested from the Court System aggregated for the six months preceding Veal's trial. Counsel then should seek to secure the testimony or affidavits of a few of the felons as to why each failed to respond or to appear. This evidence would be supplemented by the statistical reports of the Sentencing Project discussed below.

It is the authors' understanding that the Court System's jury data provides no aggregate data to establish the racial impact of challenges of cause based on Rule 2.18(5)(a) over time. Its recordkeeping did not include disqualifications for cause until 2019, and the 2019 jury data fails to identify the number of disqualifications and excusals based on a prior felony. Anecdotal reports gathered by the NAACP suggest that most former felons do not respond to juror summons because they are aware they will be struck because of their conviction. We note that the jury data that we have been provided by OSCA has typically been data on those who have responded to the summons by having filed their answers to the juror questionnaire. The OSCA reporting is consistent with the approach courts have taken in calculating the racial composition of jury pools and panels based only on those whose race is identifiable and also with the Iowa Code's definition of "jury pool" as "the sum total of prospective jurors *reporting for service.*"²⁴ However, by then the horse may already be out of the barn. To consider only prospective jurors who respond to the summons and questionnaire and who appear overlooks the potential racial impact that may have occurred from the summoning stage to actually reporting for jury service. Evidence presented on the remand in *State v. Plain* sheds considerable light on these realities.

On the *State v. Plain* remand, court-appointed expert Paula Hannaford-Agor obtained and reported on the aggregate jury data as to "undeliverables," failures to respond²⁵ and failures to appear and analyzed this data through a geocoding process. From the persons' addresses, she identified the zip code in which each lived and then, by reference to Census data correlated to Zip Code Tabulation Area (ZCTA), was able to project the race of the nonrespondents. More than half of the African Americans in Black Hawk County reside in zip code 50703 (Waterloo), and that was where the largest failure to respond rate occurred. Hannaford-Agor reported the overall Black Hawk County failure to

²⁴ 607A.3(6) (emphasis added).

²⁵ Hannaford-Agor's report and her testimony distinguished between "failures to respond" and "failures to appear" and provided data on both. The former are persons who were summonsed but never replied; the latter are persons who did answer the questionnaire but failed to appear on jury service day. It is the authors' understanding that, in 2015, jury managers lumped "failures to respond" and "failures to appear" under one category: failure to appear. Upon request, OSCA provided Hannaford-Agor with data "that documented the status (e.g., non-response, undeliverable, disqualified, excused, deferred/reassigned to a new term, or qualified) of each individual in the Jury Pool Dataset." P. 1.

respond rate was 8.9%; in contrast, the failure to respond rate for the 50703 zip code was 17.2%, nearly double. She concluded, both in her testimony and in her written report, that “it was the failure to respond rates specifically from 50703 that was likely contributing to the underrepresentation of African-Americans in the jury pool.”²⁶ From zip code 50703—in which, again, more than half of the African Americans in Black Hawk County lived—she further reported, of the 1,591 jurors who *did* respond, only 900 actually appeared; 691 of those 1,591 prospective jurors who had responded to the summons and jury questionnaire, or 43%, *failed to appear*. Yet enforcement proceedings against those who failed to appear were practically nonexistent and had been for years.²⁷

The State filed Exhibit AAA, which reported on all who were summoned in Plain’s case, including the 47 persons who did not appear. The county attorney’s office was able to confirm the race of the nonrespondents in Exhibit AAA from other records, including reference to their criminal history. Exhibit AAA identified seven additional African Americans out of the 47 nonrespondents, 4 of whom were listed as “FTA.”²⁸ The authors’ research assistant checked Courts on Line and determined that all four African Americans who did not appear had a criminal conviction, and at least two of whom had a felony conviction. The authors submit this showing, albeit a small sample, is convincing of the racial impact of the deterrent aspect of the felon-exclusion rule, especially when considered with Hannaford-Agor’s reported findings and the broad sweep of the questionnaire’s inquiry about prior criminal convictions. The jury manager testified that she advised ex-felons that they would be excused if requested.

Defendants should request any aggregate data the Court System may have as to the racial impact of Rule 2.18(5)(a)’s felon exclusion and disqualification for cause. It is the authors’ understanding that 2019 was the first year in which jury

²⁶ Exhibit 109 at p. 45, Transcript at p. 31.

²⁷ In her deposition taken in preparation for the hearing on remand in *State v. Plain*, the Black Hawk County Jury Manager testified that a summoned juror who *twice* failed to appear was simply rescheduled for another jury and no contempt or other enforcement hearing would be scheduled until the individual failed to appear a *third* time, and not even then if on one or more of the times the juror failed to appear, the case settled or was resolved without a jury actually being impaneled. She estimated that “approximately 10 people every six months” were actually being brought in before a judge for a contempt hearing—“That’s a guess. Ten might be high.” Even that minimal enforcement beginning in early 2015 when she took over was an improvement over prior practice. She testified that her predecessor “stopped doing this [sending failure to appear letters to juror who responded but failed to appear] at some point.” Plain’s attorney asked, so “she was not getting anybody for failure to appear,” and the Jury Manager answered, “Not in the couple of years prior to me taking over.” See n.150 and accompanying text. *Plain Remand Transcript* at pp. ____.

²⁸ See note 225 *supra*. In 2015, the FTA category included both “failures to respond” and “failures to appear.”

data on challenges for cause was collected, but the data does not identify which challenges for cause or which excusals were based on the felon-exclusion rule. The Court System's data that has been provided to us starts with those responding to the juror questionnaire. It does not provide information as to the reasons persons have failed to respond and failed to appear, but the authors submit that, together with excusals, these are the stages at which the felon-exclusion rules principally operates. Obtaining this data, or reconstructing it to the extent possible, will be important to proving causation. These are gaps in OSCA data collection that must be corrected to the extent possible, and must be taken into account when evaluating the existing non-Judicial Branch data defendants will offer as proof.

In addition to the above-described Iowa jury data that can be cobbled together on the racial impact of Rule 2.18(5)(a), a source of powerful and convincing statistical evidence is the Sentencing Project and its national research. The Sentencing Project's "State-by-State Data" Report "compiles state-level criminal justice data from a variety of sources."²⁹ The State-by-State Report provides direct evidence of the likely racial impact of Rule 2.18(5)(a) in a chart titled Iowa "Felony Disenfranchisement (2016)." As of 2016 52,012 Iowans were disenfranchised because of a felony conviction, or 2.17% of Iowa's total adult population, including 6,879 African American, or 9.84% of the adult African American population. In terms of racial impact, African Americans are excluded from jury service at a rate that is more than 450%— $9.84\%/2.17\%$ —of the population as a whole! Of the 52,012 disenfranchised Iowans, the 6,879 African Americans comprised 13.23% of the total—whereas African American comprise approximately 3% of the state's general population. Again, the racial disproportionality is obvious and huge.

These numbers would have been much higher but for the Executive Order of Governor Tom Vilsack on July 4, 2005, restoring civil rights to felons who had served their time. Vilsack's successor, Governor Chet Culver, also entered a subsequent Executive Order that restored civil rights of ex-felons. The total number of Iowans whose right to vote was restored between 2005-2015 is

²⁹<https://www.sentencingproject.org/the-facts/#map> (last visited on July 8, 2019). The textual part of the Sentencing Project chart on Iowa reports "Imprisonment by Race/Ethnicity (2014)": White imprisonment rate (per 100,000): 211; Black imprisonment rate (per 100,000): 2,349. The chart also reports "Racial/Ethnic Disparity in Imprisonment (2014): Black : White ratio, 11.1. Iowa's 11:1 Black : White racial disproportionality ratio is severe, in and of itself, and has been constant for at least the most recent decade. It becomes startling when the size of Iowa's prison population is considered—the Sentencing Project reports that, since 2003, total prison population in Iowa has never been less than 8,525, peaked in 2010 at 9,388, and was 8,998 in 2016, the most recent year on its chart. These numbers do not include those convicted of crimes who are on probation or parole, nor those in city jails.

115,325,³⁰ and the Executive Orders were responsible for almost all of the restorations. The restoration of civil rights by the Vilsack-Culver Executive Orders temporarily reduced the Black: White disenfranchisement racial disparity by more than half—compare the 11.1 Black : White racial disparity in Iowa’s prison population (which has largely been constant since 2006) to the Black: Total Population Felony Disenfranchisement ratio of 4.53 (.0984/.0217).³¹ Governor Branstad rescinded the Executive Orders on January 14, 2011, his first day in office, resulting in permanent disenfranchisement for persons released from supervision after that date unless an individual application for restoration of rights is submitted and approved by the Governor.

However, the racial impact of exclusion of ex-felons from participation as jurors is far more sweeping than the nearly 10% African American population disenfranchisement statistic—for two reasons. The first we discussed above. We believe the Iowa juror questionnaire’s question inquiring about every criminal conviction except traffic offenses sends a chilling message and works as a deterrent to juror participation by even those with misdemeanor convictions. The second reason is that in practice there appears to be an almost a total ban on jury service by ex-felons because Iowa courts do not consider the Vilsack-Culver Executive Orders that secure the right to vote to ex-felons as also allowing them to serve on Iowa’s juries. That is our understanding based on conversations with Iowa criminal defense lawyers, and contrary to the Federal Rule governing eligibility to serve on the jury, Iowa Rule 2.18(5)(a) says nothing about one whose civil rights have been restored. Thus, felon exclusion *from jury service* among African Americans is much, *much* higher than the 10% of African Americans, or the 6,879 African Americans who can’t vote because of a felony conviction. There are 114,000 or so ex-felons whose right to vote was restored by Vilsack and Culver and who therefore are not reflected in the Sentencing Project’s 10% disenfranchisement statistic, approximately 25% of whom are African Americans. Despite their restoration or rights, they continue to be excluded from consideration for jury service.

C. *Felon-Exclusion Rule: How Systematic Exclusion Impacts Determination of the Jury-Eligible Jury Pool Count*

An issue that was not before the Supreme Court in *Veal*, but which the authors submit should be a central factor in the resolution of *Veal*’s fair cross-

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³¹ Disenfranchisement, 2016 by Christopher Uggen, Ryan Larson, and Sarah Shannon (October 2016) <https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/>, Table 2, “Restoration of Voting Rights in States that Disenfranchise Residents Post-Sentence, p. 13 (last visited on November 29, 2019).

section claim on remand, is how proof of systematic exclusion under *Duren/Plain* prong 3 can and should affect calculation of underrepresentation when the Court makes its juror count in the first step in its underrepresentation analysis. Consistent with the Court's analysis in *State v. Williams*, we submit the automatic exclusion of all ex-felons from jury service forecloses the Court System from including ex-felons in its jury pool count in step 1 of *Duren/Plain* prong 2. Specifically, it puts in issue whether the three ex-felons in the Veal voir dire panel, two of whom were African American, were properly included in the District Court's jury pool count when they were struck for cause based on their felony convictions.³²

During voir dire the District Judge still had under consideration both the Defendant Veal's fair cross-section motion and the State's motion to disqualify the panel members who were felons. The Judge rejected the Defense objection that the two African Americans who were struck should not be included in the jury pool count. The Judge reasoned that in his view "the idea of a jury pool is to cast a wide net."³³ *State v. Williams* of course had not yet been decided, but the authors submit it provides the guiding principle on remand. When the exclusion of felons is systematic, the District Court cannot count those "excluded" as "in the jury pool" for purpose of its fair cross-section determination on underrepresentation and its ruling on whether the representation "is fair and reasonable in relation to the number of such persons in the community," especially given the exceptional racial disparity of the felon-exclusion rule in practice.

In *Williams*, there were two African Americans in the combined jury pool of 138, and one of the two was excused because she was a college student. The State wanted the excused college student counted as a member of the pool, while defendant argued that "she and other pre-excused jurors should not be counted in determining the percentage of the distinctive group in the jury pool, making the ratio 1/130 rather than 2/138."³⁴ The District Court adopted the State's position, and Justice Mansfield approved the trial court's reasoning: "there is no reason to omit persons who received a juror summons from the statistics, 'especially in the absence of any allegation that hardship excusals are granted in patterns that contribute to underrepresentation or exclusion.'"³⁵ However, Justice Mansfield determined that a practice of excusing jurors amounting to systematic exclusion warranted an exception to the rule stated in *Williams* that would otherwise include those excused from service as "in" the jury pool:

³² See n.141, *supra*, and accompanying text.

³³ *State v. Veal*, Transcript II, pp. 42-43: The judge stated he would count felons "even if the State has the right to strike them for cause because of their felony conviction." *Id.* at 43.

³⁴ *State v. Williams*, 929 N.W.2d 621, 630 (2019).

³⁵ *Id.* (emphasis added).

There is a potential problem with the State and the district court's position, at least under article I, section 10 of the Iowa Constitution. A policy or practice relating to excusing jurors might amount to systematic exclusion. * * * If a defendant wishes to try to prove that it does, the defendant should not be foreclosed from doing so by a rigid rule that calculates the pool based on who was summoned, rather than who actually appeared.³⁶

Williams holds that if the excusal practice or policy is found to constitute systematic exclusion for purposes of the *Duren-Plain* third prong, the court cannot include persons who were excused in its jury pool count when determining underrepresentation under the second prong. To do so, incorrectly and misleadingly results in inflating the distinctive group's representation in the jury pool, from 1/130 to 2/138. For the District Court to count felons as jurors in the pool when it automatically strikes them a few minutes later under Rule 2.18(5)(a), therefore, directly conflicts with the *Williams* holding and clearly distorts real underrepresentation.³⁷

The authors note that this same issue, although only indirectly raised, was implicated in the facts on the remand in *State v. Plain*. State's Exhibit AAA identified seven African Americans who were summonsed in Plain's case, four of whom failed to appear (and each of the four had a criminal conviction). Defendant argued that the African Americans who did not respond or appear should not be counted as "in" the jury pool for purposes of determining either the standing or the aggregate data components of the *Duren/Plain* prong 2; with regard to standing, the decision should be based on the African American percentage on Plain's jury panel. *Williams* is clear precedent for Plain's position.

If, as the authors propose, the *Veal* jury pool count does not include the 3 jurors struck because of their felony convictions, the African American percentage of the pool falls from 3.27% ($5/153 = .0327$) to 2% ($3/150 = .020$). The combined African American jury-eligible Census population of 3.20% (as calculated after all 3 adjustments) exceeds the 2% *Veal* jury pool, satisfying the standing component of the *Duren/Plain* prong 2. This same adjustment must be made on remand, of course, regarding the aggregate 6-months Webster County jury pool count from January – June 2017; all felons should be eliminated. We submit both of these adjustments are required by *Williams*.

³⁶ Id. (citation omitted).

³⁷ *Lilly* required the focus to be on the jury-eligible Census population, and thus *Lilly* likewise is consistent with the *Williams* ruling that persons who are ineligible for jury service should not be included in the count of a distinctive group in the pool. *Lilly* also held that prisoners must be excluded from the District Court's determination of the community's jury-eligible Census population.

However, if instead it is concluded that the *Veal* jury pool does include the jurors who were excluded for felonies, the 3.27% African American percentage of the jury pool ($5/153 = 3.27\%$) is 0.07% less than the adjusted, recalculated jury-eligible Census population of 3.20%,³⁸ the authors submit the determination of Defendant Veal's standing should not be done with tunnel vision. The fact remains that two of the five African Americans counted as "in" Defendant's jury pool were essentially phantoms who were abruptly, and without any serious inquiry into eligibility to serve, struck within hours, perhaps minutes, after the Court made its jury pool count. Under such circumstances, due regard for the Constitutional right at stake and its importance to the defendant demands that careful consideration should be given to the aggregate Webster County jury pool and panel data for January – June 2017. If the 2017 data even roughly approximates the 2016 Webster County aggregate jury pool data that showed racial disparities far, far greater than 2 standard deviations, the authors submit the public interest requires the Court to weigh the statistical significance of the aggregate data.

Just as *Veal* fleshed out the underrepresentation showings required by *Lilly's* prong 2, future cases will flesh out *Lilly's* prong 3's systematic exclusion requirement. Justice Appel saw the two as interconnected, and added a caution:

"Our laudable loosening of the absolute disparity requirement in step two will have very little impact if we erect insurmountable barriers in step three under *Duren* and *Plain*. * * * These questions await another day, but I do make the general point that erection of undue barriers to a fair-cross-section claim under step three of the *Duren* and *Plain* tests has the potential of undermining our holdings today with respect to the second step of those tests."³⁹

D. *Iowa's Blanket, Life-Time Felon Exclusion Rule Cannot Be Justified as It Does Not "Manifestly and Primarily Advance" Any Legitimate Governmental Interest*

The Court in *Plain*, *Lilly*, *Veal*, and *Williams* remanded the cases for hearings to determine whether the defendant in each could prove a prima facie fair cross-section violation; thus, the Iowa Supreme Court had no occasion to discuss the burden of proof on the State when the defendant has established a prima facie fair cross-section claim. Because, as we have shown above,⁴⁰ so many courts have applied constricted views of what constitutes systematic exclusion for prong 3 of the *Duren* prima facie case, there are very few decisions that have examined the final stage of the fair cross-section analysis,⁴¹ where the burden

³⁸ See text accompanying footnotes 177 - 185, *supra*.

³⁹ *Lilly* at 313 (Appel, Conc.).

⁴⁰ See text accompanying footnotes 124-142, *supra*.

⁴¹ Indeed, it appears that once the prima facie case is made, it is not unusual for the government to concede that no governmental interest exists for the exclusion

shifts to the State to justify its practice or policy. The authors will suggest how they believe this analysis should be done when defendant's proof has identified Rule 2.18(5)(a) as contributing cause of the underrepresentation of African Americans in a particular Iowa county.

Again, it is wise to begin with first principles. In *Duren* Justice White explained: "The demonstration of a prima facie fair-cross-section violation by the defendant is not the end of the inquiry into whether a constitutional violation has occurred."⁴² However, once the prima facie case has been proven, the burden of justification shifts to the State:

[O]nce the defendant has made a prima facie showing of an infringement of his constitutional right to a jury drawn from a fair cross section of the community, it is the State that bears the burden of justifying this infringement by showing attainment of a fair cross section to be incompatible with a significant state interest.⁴³

The Court emphasized the heavy burden the State must carry: "[t]he right to a proper jury cannot be overcome on merely rational grounds.' Rather, it requires that a significant state interest be manifestly and primarily advanced by those aspects of the jury-selection process, such as exemption criteria, that result in the disproportionate exclusion of a distinctive group."⁴⁴

Duren was decided during the decade when the Supreme Court was fashioning its initial intermediate scrutiny test,⁴⁵ under which the Court "will not uphold a classification unless it finds that the classification has a 'substantial relationship' to an 'important' government interest."⁴⁶ The intermediate test is not as difficult for the government to meet as the strict scrutiny test used principally in case involving racial classification; the latter requires a compelling

of the jurors of color. E.g., *U.S. v. Osorio*, supra at 980 ; *U.S. v. Jackman*, supra at 1248. *United States v. Benmuhar*, 658 F.2d 14 (1st Cir. 1981), is a notable exception. There, the First Circuit upheld "Puerto Rico's exclusion of potential jurors who cannot 'read, write, or understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form' or who cannot 'speak the English language.' 28 U.S.C. s 1865(b)(2) & (3)." *Id.* at 19. The interest of having "the national court system operate in the national language" was found to be substantial and that this interest was "precisely tailored to the jury exclusion criterion, so there is no question that the interest 'manifestly and primarily advanced' by the requirement." *Id.*

⁴² *Duren*, supra at 367. Louisiana and Missouri attempted to do so in *Taylor* and *Duren*, but both failed.

⁴³ *Id.* at 367-368 (citation omitted).

⁴⁴ *Id.* at 367 (citation omitted).

⁴⁵ E.g., *Reed v. Reed*, 404 U.S. 71 (1971); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Craig v. Boren*, 429 U.S. 190 (1976);

⁴⁶ Nowak and Rotunda, *Principles of Constitutional Law* 641 (3d ed. 2007).

governmental interest and narrowly tailored means in order to pass constitutional muster. But the intermediate scrutiny test involves far less deference to the legislature than does the rational relationship test.⁴⁷ It is yet to be determined whether the *Duren* test will evolve and become as rigorous as the most recent articulation of the intermediate test for gender classification set out in the VMI case, *United States v. Virginia*.⁴⁸ But the language in *Duren* plainly suggests that while the State may have an interest at stake, it must take care not to advance that interest in a way incompatible with the accused's constitutional right to an "impartial jury" drawn from a fair cross-section of the community. If it can do so in a way that does not infringe upon the accused's fair cross-section right, failure to do so—for example, the substantial exclusions in *Taylor* and *Duren*, let alone a *blanket* exclusion—will be found to fall short of meeting its burden of justification under *Duren*.

Let's examine the Court's application of its test in *Duren*. The governmental interest proffered by the State of Missouri was post-hoc, without any legislative history to support it:

Neither the Missouri Supreme Court nor respondent in its brief has offered any substantial justification for this exemption. In response to questioning at oral argument, counsel for respondent ventured that the only state interest advanced by the exemption [of any woman requesting not to serve] is safeguarding the important role played by women in home and family life.⁴⁹

Justice White didn't reject this post-hoc state interest as unimportant, but rather found it insufficient to satisfy the state's burden of justification because the sweeping gender-based exemption was not tailored and could not be justified by supposed administrative convenience: "[E]xempting *all* women because of the preclusive domestic responsibilities of some women is insufficient justification for their disproportionate exclusion on jury venires."⁵⁰ The Court then, concluding that its reasoning in *Taylor* was fully applicable to the Missouri statute, quoted *Taylor*'s holding:

It is untenable to suggest these days that it would be a special hardship for each and every woman to perform jury service or that society cannot spare any women from their present duties. This may be the case with many, and it may be burdensome to sort out those who should be exempted from those who should serve. But that task is performed in the case of men and the administrative convenience in dealing with women as a class is

⁴⁷ Id.

⁴⁸ 518 U.S. 515 (1996).

⁴⁹ *Duren* at 369.

⁵⁰ Id. (emphasis added).

insufficient justification for diluting the quality of community judgment represented by the jury in criminal trials.⁵¹

While the *Duren* Court didn't closely scrutinize the alleged governmental interest as to whether it was a post-hoc rationalization or a reflection of the government's actual intended purpose, it wasn't necessary to do so as it was patently clear that the means chosen by the State was over-inclusive and ill-defined to accomplishing any governmental interest. It was apparent the Court was concerned that the exemption for women was rooted in a gender stereotype—that women were generally “not up to the task” of making the hard and difficult decisions that jurors often have to make, or that those women who are mothers may have the primary responsibility for child care and will prefer to avoid jury service to stay at home.

Justice White went on to explain what the Court envisioned in the way of its requirement that exemptions and other jury selection process classifications had to be “appropriately tailored” to survive fair cross-section analysis. The Court gave the State an assist, suggesting a plausible “important [governmental] interest in assuring that those members of the family responsible for the care of children are available to do so.”⁵² But it explained that this “important governmental interest” would “survive a fair cross-section challenge” only if the “exemption [was] appropriately tailored to this interest. . . .” The Court made very clear, indeed, “stress[ed] States [must] exercise proper caution in exempting broad categories of persons from jury service.”⁵³

Congress enacted a felon-exclusion rule that governs jury trials in Federal Court: 28 U.S.C. §1865(b)(5) “deem[s] any person qualified to serve on grand and petit juries in the district court unless he . . . (5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored.” The exclusion required by the Federal statute is slightly more expansive than Iowa Rule of Criminal Procedure 2.18(5)(a) in that its prohibition is not limited to felonies; it applies to any crime “punishable by imprisonment for more than one year” and to persons who have been charged with such a crime. For example, a person charged with or convicted of an aggravated misdemeanor in Iowa would fall under the Federal Court prohibition because such offenses are punishable with imprisonment up to two years.⁵⁴ However, the scope of the exclusion in the Federal statute is considerably narrower than that of the Iowa rule as it does not exclude persons whose civil rights have been restored.

⁵¹ Id.

⁵² Id. at 370.

⁵³ Id.

⁵⁴ Although its sweep is slightly broader than felonies, for simplicities sake, we will nonetheless refer to the Federal bar as a felon-exclusion rule.

The Federal statute has been challenged as violating defendants' equal protection rights under the Fifth Amendment and fair cross-section rights under the Sixth Amendment. Examination of the caselaw upholding the Federal statute is helpful to an analysis of the fair cross-section issues related to Iowa Rule 2.18(5)(a), as applied. The Eighth Circuit decision in *United States v. Greene*⁵⁵ and the Seventh Circuit decision in *United States v. Barry*⁵⁶ are the leading federal cases involving equal protection and fair cross-section challenges to the felon-exclusion rule in Federal Courts. Indeed, the Seventh Circuit's analysis in *Barry*, specifically relied upon and closely tracked the Eighth Circuit's analysis in *Greene*; the courts' reasoning is essentially identical, allowing our analysis to treat the cases together.

In both *Greene* and *Barry* defendants put on evidence that suggested African Americans were disproportionately excluded from juror service, and it was argued that the felon-exclusion rule was a contributing factor. Both Courts first analyzed the equal protection challenge to the constitutionality of the felon-exclusion rule, which each court disposed of with dispatch. Both courts found that the Federal statute was "race-neutral" and that there was no evidence of discriminatory intent; and as a result, both courts determined that exclusion of felons from juror service had to be measured by the deferential rational relationship standard. *Greene* upheld the felon-exclusion rule as "rationally related to the legitimate governmental purpose of creating a pool of jurors likely to give unbiased consideration to the evidence presented."⁵⁷ *Barry* found that felon-exclusion was rationally related to the government's interests in juror probity and the confidence of the public in the integrity of the justice system.⁵⁸

Both courts began their analysis of the fair cross-section claim by seeking to determine whether felons were a distinctive class for purposes of *Duren* prong 1. *Green* straddled the fence on this issue, leaving it undecided, and *Barry* concluded that felons were not a distinctive group. Nonetheless, both the Seventh Circuit and the Eighth Circuit went on to decide the case on the alternative ground that, assuming defendants had made out a prima facie case, the government met its burden of justification under *Duren*. The *Greene* Court concluded:

Since we accept the proposition that the exclusion is *rationally related* to the legitimate governmental purpose of assuring the unquestionable integrity of jurors and selecting jurors who are likely to be unbiased, it is only a small step to accepting the proposition that the significant governmental interest in having jurors who can be relied upon to perform their duties conscientiously and in accordance with the law, is an 'adequate justification,'

⁵⁵ 995 F.2d 793 (8th Cir. 1993).

⁵⁶ 71 F.3d 1269 (7th Cir. 1995).

⁵⁷ *Id.* at 796.

⁵⁸ *Barry*, *supra* at 1273.

for the 'infringement of the community cross section.'⁵⁹

defendant's interest in a jury chosen from a fair

The *Barry* Court found the purposes of the fair cross-section requirement would not be furthered as "exclusion [of felons], more than their inclusion, would be likely to preserve public confidence in the criminal justice system."⁶⁰ The Seventh Circuit then held: "Even were the prima facie case made, we would find, as did the court in *Greene*, that the governmental interest in juror probity outweighs a defendant's interest in having a jury which could include someone accused of a felony."⁶¹

We submit that, in *U.S. v. Greene* and *U.S. v. Barry*, the Eighth and Seventh Circuits erroneously disregarded the Supreme Court's admonition in *Duren* that "[t]he right to a proper jury cannot be overcome on merely rational grounds" and further disregarded its command "that a significant state interest be manifestly and primarily advanced by those aspects of the jury-selection process, such as exemption criteria, that result in the disproportionate exclusion of a distinctive group." In conclusorily finding that the felon exclusion was "rationally related to a legitimate governmental interest," the *Greene* and *Barry* Courts not only failed to apply *Duren* properly but also ignored *Lockhart's* concern that prospective jurors not be eliminated by broad categorical stereotypes when problem jurors can be identified and struck for cause during voir dire. Neither Court of Appeals acknowledged that, once a prima facie fair cross-section claim has been made out, *Duren* mandated a demanding standard.⁶² The authors are prepared to assume *arguendo* the "probity/unbiased-juror" rationale qualifies as an important governmental interest, but the *Greene* and *Barry* Courts erroneously applied the "rational relationship" standard used in their Fifth Amendment equal protection analyses to the Sixth Amendment fair cross-section claims, rather than the much tighter intermediate scrutiny's "manifestly and primarily advanced" means-ends standard of *Duren*.

We submit that both Courts began their analysis on the wrong path. Both erred in not recognizing the *Duren* prong 1 "distinctive group" was the African Americans who were underrepresented on juries; instead they focused on whether or not felons might constitute a distinctive group under *Duren* prong 1, causing much confusion.⁶³ The felon-exclusion rule, indeed, was very relevant,

⁵⁹ Id. at 798 (quoting *Duren*, 439 U.S. at 368 n. 26) (citation omitted).

⁶⁰ Id. at 1273.

⁶¹ Id. at 1274.

⁶² *Duren*, supra at 367-68.

⁶³ We are aware that Professor Kalt sought to make the case that "felons" should qualify as a "distinctive class" under the *Duren* prong 1, enabling them to raise a fair cross-section independent of the racial disproportionalities of a state's criminal justice system. The authors' argument is not that persons previously convicted of a felony constitute a distinctive class. Our argument is that African Americans as a distinctive class are not fairly represented in the jury pools and

as it was a primary cause of the underrepresentation of African Americans on Federal Court juries pursuant to a policy enacted by Congress, and of their systematic exclusion within the meaning of *Duren*. The *Greene* and *Barry* Courts' misguided focus is reminiscent of so many federal and state courts that mistakenly melded discrimination proof concepts under the Fourteenth Amendment into the fair cross-section analysis required by the Sixth Amendment prior to *State v. Plain*.⁶⁴ For present purposes, it is important to keep in mind that defendants need *not* prove felons are a distinctive group within the meaning of *Duren/Plain* prong 1 when they are proving Iowa's felon-exclusion rule contributed to underrepresentation of African Americans under prong 2 and was a cause of their systematic exclusion under prong 3.

As noted, the *Greene* and *Barry* Courts' both erroneously applied a rational relationship lens to their determination that the government had carried its burden of justification to rebut defendants' fair cross-section claims. We submit it is constructive to our analysis of Iowa Rule 2.18(5)(a) to first apply the correct lens, the intermediate scrutiny *Duren* test, to 28 U.S.C. §1865. Importantly, a court should start with recognition that the federal felon-exclusion rule does not disqualify or exclude those felons whose civil rights have been restored. Congress recognized that when a high governmental authority, such as a Governor, a President, or a State or Federal legislative body, has restored one's civil rights after serving one's sentence, any concerns about probity or the integrity of the justice system are eliminated, or, to the extent some doubts may linger, those can surely be addressed through the individualized voir dire and a strike for cause, as in *Lockhart*. Thus, we submit this key component of the federal felon-exclusion rule should be upheld under the much tighter means-ends relationship that *Duren* requires to be employed.

panels from which jurors are selected, and that Rule 2.18(5)(a)'s blanket, life-time exclusion of all convicted felons from jury service regardless of individual circumstances has a disproportionate impact upon African Americans and significantly contributes to their underrepresentation in jury pools and jury panels. As one of the principal causes of underrepresentation of African Americans on Iowa's juries, Iowa's blanket, life-time felon-exclusion rule represents an independent cause of the underrepresentation that is "inherent in the particular jury-selection process utilized," *Duren v. Missouri*, 439 U.S. 357, 366 (1979), by the State of Iowa and thus helps to establish systematic exclusion as required by *Duren/Plain's* prong 3.

⁶⁴ See text accompanying footnotes ____ - ____, *supra*. See also *United States v. Arce*, 997 F.2d 1123, 1127 (5th Cir. 1993) (§1865(b)(5) is constitutional, rejecting equal protection challenge, citing *U.S. v. Greene*); *United States v. Foxworth*, 599 F.2d 1, 4 (1st Cir. 1979)(§1865(b)(5) is intended to assure the probity of the jury and is "rationally related," therefore, not unconstitutional); *United States v. Test*, 550 F.2d 577 (10th Cir. 1976) (§1865(b)(5) is intended to assure probity of jury, defendants' argument "beyond our comprehension).

However, the authors submit the life-time exclusion that 28 U.S.C. § 1865(b)(5) imposes on those who have not had their rights restored does not survive intermediate scrutiny. Such a conclusory, blanket exclusion is constitutionally suspect under *Duren*, *Lockhart*, and *Holland*, which demand an individualized inquiry of the prospective juror. Many former offenders do successfully rehabilitate themselves, yet do not seek to navigate through the bureaucratic processes involved to secure restoration of civil rights. Although Governors Branstad and Reynolds have modified the form application so it is less onerous, the process remains intimidating to most; and in terms it requires that one seeking restoration of rights have paid all fees, costs, fines, surcharges, and restitution—a daunting barrier for those who have difficulty in finding any employment.⁶⁵ Only a couple of hundred applications have been filed annually. Would a sunset provision that ends the exclusion after a period of years pass constitutional muster? We think not, as such a legislative modification implicitly recognizes that former offenders “age out” of crime. *Duren*’s intermediate scrutiny tailoring test demands individualized assessment as to juror bias or any other factor that would be the basis for disqualification, just as *Duren* concluded the State of Missouri would have to conduct with women and as *Lockhart* concluded the State of Arkansas had satisfied through its individualized voir dire and strikes for cause.

In contrast to the federal rule, the Iowa rule, in practice, has excluded all felons for life, *including those whose rights have been restored*.⁶⁶ The shortest sentence for a felony under current Iowa law would be probation from two to five years.⁶⁷ Thus, Iowa Criminal Procedure Rule 2.18(5)(a)’s limitation of its exclusion to felonies means a few persons convicted of minor offenses, such as the aggravated misdemeanor crime, might be treated more favorably for juror service in the Iowa courts than in the federal courts in Iowa. However, in the big picture, the Iowa Rule is much harsher than the federal rule because, unlike the latter, Iowa, in practice, does not recognize an exception for persons whose civil rights have been restored. In refusing to recognize that the restoration of felons’ civil rights satisfies the governmental interests in juror probity and the integrity of the jury system, the Iowa courts’ practice clearly runs afoul of *Duren*’s intermediate scrutiny standard—as each will still be subject to voir dire questioning, challenge for cause, and peremptory strike, as would any juror.

⁶⁵ National Employment Law Project

⁶⁶ Kalt argues that “shutting out felons from civic participation is plainly inconsistent with any notion of restoring them to a productive place in the social order. In addition to conflicting with the penal goal of rehabilitation, he further contends: “It serves no other penological purpose—deterrence, incapacitation, punishment, or retribution—very robustly either, if at all. Kalt favors”[t]he simplest approach . . . allow[ing] felons to serve on juries after they have been released from prison or completed their sentences.”

⁶⁷ Robert Rigg, email, May 14, 2020.

The State of Iowa's valid governmental interests can be accomplished through a nuanced, individualized screening out of individual jurors who have anti-government or anti-law enforcement bias through the voir dire process, as recommended in *Lockhart* and by respected commentators such as the American Bar Association Jurors and Jury Trial Principles⁶⁸ and the 1967 Presidential Task Force on Criminal Justice. The authors submit that Iowa's felon-exclusion, in practice, is not "appropriately tailored" as it does not "manifestly and primarily advance" the state's interests in probity and public confidence in the jury's integrity and, further, conflicts with important penal goals.⁶⁹ Attainment of a fair cross-section is not "incompatible with a significant state interest"⁷⁰ as the state's interests can be implemented through voir dire questioning, challenges for cause, and peremptory strikes.

Some persons "previously convicted of a felony" may carry a bias against the prosecution or law enforcement, *but not everyone*. People change. People grow. They may freely admit the wrong of their prior conduct and regret it for the harm it did; it may have been years in the past, and in the meantime the individual can amply demonstrate return to the community, rehabilitation, and good citizenship. Without any individualized evaluation of ex-offenders, Rule 2.18(5)(a)'s prohibition is simply overinclusive—automatically excluding large numbers of former felons, many of whom, if given the opportunity, would welcome jury service as a member of the community, and whose life experiences would enable them to contribute to "the community" deliberation that the jury represents. No less than the defendant, the prosecution has a significant interest in the trial jury being free of persons who may be biased against the prosecutor or law enforcement on account of having been previously convicted of a serious crime for which the individual presumably paid a significant price, including, likely as not, incarceration and more. This approach relies upon traditional voir dire to distinguish between persons previously convicted of a felony who are *and who are not* biased against law enforcement or the prosecution. The former can

⁶⁸ American Bar Association Principles for Jurors and Jury Trials, Principle 2.A(5): "All persons should be eligible for jury service except those who . . . 5. Have been convicted of a felony and are in actual confinement or on probation, parole or other court supervision." The authors are aware that some will argue that the "for cause" disqualification is necessary and proper because a person's felony conviction demonstrates hostility to the rule of law and even animosity toward prosecutors. However, those who do harbor hostility or animus toward prosecutors, or who are inherently biased against the government, can be identified through voir dire and would remain subject, like any other juror, to disqualification for cause based on their bias. Kalt, *supra* note 193, at 105-108.

⁶⁹ Duren, *supra* at 367-368. Kalt captures the distinction between rational relationship and intermediate scrutiny in lay person terminology, fully applicable to the Iowa rule: "The problem is that the typical state statute makes no effort to distinguish between good and bad felon jurors. The solution is to avoid blanket exclusion in favor of a more nuanced system." Kalt, *supra* note 193, at [].

⁷⁰ Duren, *supra* at 368.

be challenged for cause, like any other prospective juror, and of course are subject to peremptory strike as well. To paraphrase *Duren*, "it may be burdensome to sort out those who should be [disqualified for cause] from those who should serve. But that task is performed in the case of [all prospective jurors] and the administrative convenience in dealing with [felons] as a class is insufficient justification for diluting the quality of community judgment represented by the jury in criminal trials."⁷¹

Professor James Binnall has done considerable study on the issue of anti-prosecution bias on the part of felons. One Binnall study concludes that a majority of felons did have such a bias, but this study also found that, "as a group, law students appear to harbor a prodefense/antiprosecution bias as severe as that of convicted felons."⁷² Binnall observes that "while convicted felons are banished, law students and other potentially biased groups of nonfelony jurors take part in the jury selection process (voir dire)." Indeed, Binnall reaches the very conclusion for which the authors advocate:

This study does, however, call into question the need to exclude convicted felons from the jury pool. As law professor Brian Kalt notes, "Only if every, or almost every, felon is irretrievably biased against the government might it make sense to have a blanket exclusion of felons from criminal juries on these grounds" (Kalt 2003, 106). Kalt contends that excluding convicted felons from the jury process is an overinclusive measure that does little to ensure the impartiality of the jury process (2003).⁷³

Binnall's continuing research has only reinforced the findings of his 2014 study, and his research has gained increasing credibility through its recognition by the National Center for State Courts.⁷⁴ One recent Binnall study has garnered considerable attention. Using the same parameters and methodology as on his 2014 study, Binnall has studied the biases of law enforcement personnel and concluded:

The inherent bias rationale for felon-juror exclusion, while ostensibly the codification of logic, instead rests on irrational presumptions about convicted felons and the threat of their pre-trial biases. Data from this field study suggests that law enforcement personnel are as pro-prosecution as convicted felons are pro-defense. As interpreted by courts and lawmakers, the inherent bias rationale therefore demands that pre-trial biases, in either direction, warrant exclusion from the venire. Under that view, law enforcement personnel merit banishment. Yet, such an approach, like felon-juror exclusion statutes themselves, contradicts

⁷¹ *Duren* at 369.

⁷² *Id.* at 15.

⁷³ *Id.* at 17, citing Brian Kalt, *The Exclusion of Felons from Jury Service*, 53 *American U. L. Rev.* 65, 106 (2003).

⁷⁴ http://www.ncsc-jurystudies.org/_data/assets/pdf_file/0023/6836/jurynews31-1_convictedfelons.pdf

over a century of Supreme Court precedent weighing in favor of broad participation in the jury process. Rather than exclude law enforcement personnel, jurisdictions ought to embrace their distinctive perspectives, along with those of their convicted counterparts.⁷⁵

In contrast to felon-exclusion, Binnall's comparative chart shows only a handful of states, including our neighboring states of Kansas and Nebraska, that exclude law enforcement personnel from juries. Binnall's point is worthy of reiteration: "Rather than exclude law enforcement personnel, jurisdictions ought to embrace their distinctive perspectives, along with those of their convicted counterparts."⁷⁶ Like Binnall, the NAACP contends that the more diverse juries that will be brought about by inclusion of persons previously convicted of a felony will be more deliberative than the current homogeneous juries, and inclusion will significantly further the felons' "community engagement[,] a necessary precursor to successful reintegration and criminal desistance."⁷⁷ "Finally, by excluding convicted felons from jury service, a majority of U.S. jurisdictions risk delegitimizing verdicts. Research demonstrates that traditionally marginalized populations question the legitimacy of verdicts when a jury appears unrepresentative of their community."⁷⁸

Any doubt as to whether Rule 2.18(5)(a) can survive this Sixth Amendment *Duren* analysis is removed when the Iowa Rule is analyzed under the *Lilly* standard crafted under the Iowa Supreme Court's independent authority granted by Article I, §10, of the Iowa Constitution. In holding that systematic exclusion can be proven with evidence that jury management practices caused the underrepresentation, *Lilly* held that the causes of systematic exclusion are not limited to a formal policy in which race or gender is expressly set forth: "run-of-the-mill jury management *practices* such as the updating of address lists, the granting of excuses, and the enforcement of jury summonses can support a systematic exclusion claim where the evidence shows one or more of those practices have produced underrepresentation of a minority group."⁷⁹ "Practices" is the operative word. The blanket, life-time exclusion construction of Rule 2.18(b)(5) is not compelled by its text, but it is the pattern and practice of Iowa courts that is at issue, and not a challenge to the Rule's facial validity.

Finally, the longstanding canon of constitutional avoidance, a "cardinal principle" of statutory interpretation that applies whenever there is serious doubt about the constitutionality of a particular reading of the statute,⁸⁰ could also be

⁷⁵ James Binnall, *Cops and Convicts: An Exploratory Field Study*, 16 Ohio St. J.Crim. L. 221, 232 (2018) (footnote omitted).

⁷⁶ *Id.*

⁷⁷ *Id.* at 233.

⁷⁸ *Id.* (footnote omitted).

⁷⁹ 930 N.W.2d at 307-08.

⁸⁰ *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-47 (Brandeis Conc.) (Where an otherwise acceptable construction of a statute would raise

invoked by the Court. This principle counsels that when there is another reasonable interpretation of a statute that would avoid the constitutional question, the “doctrine of constitutional avoidance counsels us to construe statutes to avoid constitutional issues when possible.”⁸¹ The Iowa Supreme adheres to this rule, with precedent dating back to at least 1967.⁸² The Court conceivably could “save” Rule 2.18(5)(a) by construing it to allow either party to conduct individualized voir dire of ex-felons whose right to vote had not been restored, but a felon would be subject to disqualification for cause only upon the same showing of bias or other Rule 2.18(5) ground that would be necessary to sustain a challenge for cause as to any juror. It would necessarily end the current practice of automatically disqualifying a person because of a past felony conviction.

As noted earlier, an amendment to Rule 2.18(5)(a) is pending before the Iowa Supreme Court as we write. It is the product of the research and deliberations of the Supreme Court’s Criminal Rules of Procedure Review Committee chaired by Justice Mansfield. The proposed Amendment to 2.18(5)(a) provides: “A challenge may be made on an individual juror for any of the following causes: (a) A previous conviction of the juror of a felony unless it can be established through the juror’s testimony or otherwise that either the juror’s voting rights have been restored or more than ten years have passed since the juror’s conviction or release from confinement for that felony, whichever is later.” The Public Comment period on the Rule is through June 30, 2020. As the Amendment is presently under consideration by Court, and the authors, on behalf of the NAACP, will be submitting Comments, we have elected not to comment upon the Amendment in this Article.

If, and when the Court System modifies or eliminates Rule 2.18(5)(a), it is incumbent upon the Judicial Branch to take affirmative steps to welcome those who have been excluded into the group of citizens who are offered this opportunity, and the responsibility, to participate. Otherwise, we fear this effort will largely go for naught due to the lingering effects of their longstanding exclusion. The outreach of course should extend to ex-felons of all races and ethnicities. This will take thought and preparation, and extensive outreach to those who have been ostracized for so long. The Court’s Jury Selection

serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress).

⁸¹ State v. Dahl, 874 N.W.2d 348, 351 (Iowa 2016), citing the Brandeis Concurrence I Ashwander.

⁸² State v. Ramos, 149 N.W.2d 862, 865 (Iowa 1967): “The general rule that all statutes must be so construed as to avoid unconstitutionality if that can reasonably be done is adhered to in this state. Thus where a statute is fairly open to two constructions one of which will render it constitutional and the other unconstitutional or of doubtful constitutionality, the construction by which it may be upheld will be adopted.”

Committee recommended that “[t]he Supreme Court should establish a public awareness campaign to highlight the importance of the civic duty of jury service.”⁸³ While the Committee did not specifically have ex-felons in mind, its Comment concluded: “Every effort should be made to reach out to all Iowans about the importance of the civic duty of jury service.” Affirmatively reaching out and welcoming this group as part of a broader campaign would help significantly to reduce the risk of lingering stigma.

⁸³ Recommendation XIII, p. 26. A recent article in the New York Times reports that large number of ex-felons in Florida have not registered vote—even though the electorate voted overwhelmingly to restore their voting rights through a constitutional amendment in a highly publicized recent election. “Does Florida Really Want Felons to Vote?” <https://www.nytimes.com/2020/03/16/us/politics/florida-felons-voting-rights.html>. Concerns about whether their vote will make a difference and possible disqualification if they haven’t paid fines and court costs have discouraged large numbers from registering.

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JUL 01 2020



[EXTERNAL] Chapter 2 Amendments

Lucas Catherine to: rules.comments@iowacourts.gov

Cc: Bayens Stephan

CLERK SUPREME COURT

07/01/2020 10:13 AM

History: This message has been forwarded.

2 attachments



20200701100033726.pdf DPS Comment to Chapter 2 Amendments.docx

Please find attached the comment of the Iowa Department of Public Safety to the proposed amendments to the Iowa Rules of Criminal Procedure.

Catherine

Catherine M. Lucas, General Counsel

Iowa Department of Public Safety

Oran Pape State Office Building

215 East 7th Street

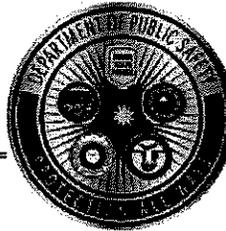
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Kim Reynolds
Governor
Adam Gregg
Lt. Governor



Department of Public Safety

Stephan K. Bayens
Commissioner

FILED

JUL 01 2020

July 6, 2020

Dear Chief Justice Christiansen and Honorable Members of the Iowa Supreme Court:

CLERK SUPREME COURT

Thank you for the opportunity to provide comment on the proposed revisions to the rules of criminal procedure. Upon review of the proposed rules, the Department of Public Safety noted one discrepancy from current practice and statutory grant of authority.

Currently, Iowa Rule of Criminal Procedure 2.21(5) provides:

2.21(5) *Disposition of exhibits.* In all criminal cases other than class "A" felonies, the clerk may dispose of all exhibits within 60 days after the first to occur of:

- a. Expiration of all sentences imposed in the case.
- b. Order of the court after at least 30 days written notice to all counsel of record including the last counsel or record for the defense, and to the defendant, if incarcerated, granting the right to be heard on the question.

Disposal of firearms and ammunition shall be by delivery to the Department of Public Safety for disposition as provided by law. **Disposal of controlled substances shall be by delivery to the Department of Public Safety for disposal under Iowa Code section 124.506.**

(emphasis added).

Proposed rule 2.21(5) (lines 8 through 17) provides:

2.21(5) *Disposition of exhibits.*

- a. In all criminal cases other than class "A" felonies, the clerk may dispose of all exhibits when 60 days have elapsed after the expiration of all sentences imposed in the case.
- b. In no event shall the clerk dispose of exhibits when there is a pending appeal or post conviction relief action.

c. Disposal of firearms and ammunition shall be by delivery to the Department of Public Safety for disposition as provided by law. **Disposal of controlled substances shall be by delivery to the Department of Public Safety for disposal under Iowa Code section 124.506.**

(emphasis added).

While the current and proposed rule indicate the Department of Public Safety should be responsible for the disposal of controlled substances, Iowa Code provides all law enforcement agencies have the authority to dispose of controlled substances under that agency's control:

All controlled substances, the lawful possession of which is not established or the title to which cannot be ascertained, or excess or undesired controlled substances, which have come into the custody of the board [of pharmacy], the department [of public safety], or any peace officer, shall be disposed of as follows:

1. Except as otherwise provided in this section, the court having jurisdiction shall order such controlled substances forfeited and destroyed. A record of the place where the controlled substances were seized, of the kinds and quantities of controlled substances so destroyed, and of the time, place, and manner of destruction, shall be kept for not less than ten years after destruction, and a return under oath, reporting said destruction, shall be made to the court.

Iowa Code § 124.506.

The current practice commonly employed by many district courts and law enforcement agencies throughout Iowa is consistent with the authority vested in Iowa Code section 124.506. As a result, the most common practice is for the seizing law enforcement agency to make an application to the Court for destruction orders when appropriate, and then destroy the controlled substances pursuant to their statutory authority. Currently, there is no structure in place for local agencies to send the controlled substances to the Department of Public Safety for destruction.

Accordingly, in a typical investigation the DCI lab will return the controlled substances to the submitting law enforcement agency after testing and the submitting agency will retain custody of the controlled substances throughout the criminal prosecution. The limited exceptions are those cases involving the Division of Narcotics Enforcement, the Iowa State Patrol, and hazardous materials involved with the clandestine manufacture of methamphetamine. The Department of Public Safety only destroys those controlled substances they have seized and does not perform this service for other law enforcement agencies. The Department of Public Safety currently contracts with a third party for destruction. Current budgetary and logistical constraints will prevent the Department from destroying all controlled substances admitted to into evidence.

The Department respectfully requests the Court take this opportunity to align its rules with the statutory authority of Iowa Code section 124.506 and current practice by amending the language as follows:

2.21(5) *Disposition of exhibits.*

- a. In all criminal cases other than class "A" felonies, the clerk may dispose of all exhibits when 60 days have elapsed after the expiration of all sentences imposed in the case.
- b. In no event shall the clerk dispose of exhibits when there is a pending appeal or post conviction relief action.
- c. Disposal of firearms and ammunition shall be by delivery to the Department of Public Safety for disposition as provided by law. **Disposal of controlled substances shall be by delivery to the Department of Public Safety the seizing law enforcement agency for disposal under Iowa Code section 124.506.**

This amendment will align the Rule with current practice and Iowa Code section 124.506, which permits any seizing law enforcement agency to seek destruction.

Thank you for your time and consideration.

FILED

JUL 02 2020

CLERK SUPREME COURT

07/02/2020 09:15 AM



[EXTERNAL] Chapter 2 Amendments

Michael Brennan to: 'rules.comments@iowacourts.gov'

1 attachment



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JUL 02 2020

Chapter 2 Amendments

CLERK SUPREME COURT

Rule 2.13 *Depositions* should be clarified to state that Rules 1.701(5) *Place of Deposition* and 1.701(7) *Depositions by Telephone* apply in criminal cases.

Rule 1.701(5) *Place of Deposition* should be clarified regarding the “place” of a telephone deposition.

Personal experience has been that attorneys are in Iowa while the deponent may be anywhere in the country (or world, today). Though I have had attorneys suggest they wish to travel to be in the presence of the deponent, which seems to violate the 150-mile rule.

Rule 1.701(7) *Depositions by Telephone* *Telecommunications* should be clarified to include modern developments in videoconferencing.

Michael D. Brennan
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FILED

JUL 06 2020

CLERK SUPREME COURT

April 20, 2015

Clerk of Supreme Court
1111E. Court Avenue
Des Moines, Iowa 50319

RE: IRCP comments

To Whom It May Concern:

I would like a black and white rule regarding which party is responsible to subpoena witnesses listed by the State of Iowa in trial informations when depositions are held. Right now, each county attorney has their own policy for civilian witnesses, and some guidance is warranted and appropriate. It is pretty much accepted that the State will get law enforcement witnesses to appear sans a subpoena.

Sincerely,



Michael Sean Russell
Attorney at Law



[EXTERNAL] Chapter 2 Amendments
Mark Bennett to: rules.comments@iowacourts.gov

07/10/2020 09:47 AM

1 attachment



Dear Chief Justice Susan Christensen and Members of the Iowa Supreme Court.docx

Please find my comments attached. Thank you

Hon. Mark W. Bennett (Ret. U.S. district judge)
Drake Univ. Law School
Director, Institute for Justice Reform & Innovation
Cartwright Hall, 146
2507 University Ave.
Des Moines, Iowa 50311-4205
515-271-2908

“The arc of the moral universe is long but it bends towards justice.”-MLK, Jr. & Rev. Theodore Parker
But the thing of it is – it does not bend on its own.

FILED

JUL 10 2020

CLERK SUPREME COURT



FILED

JUL 10 2020

CLERK SUPREME COURT

■ Hon. Mark W. Bennett (Ret.)
Director, Institute for Justice
Reform and Innovation
mark.bennett@drake.edu
515-271-2908

July 10, 2020

Dear Chief Justice Susan Christensen and Members of the Iowa Supreme Court,

Re: Observations and Comments on the Proposed Amendments to the Iowa Rules of Criminal Procedure, chapter 2.

I greatly appreciate this opportunity to share some big picture observations and comments on the proposed amendments to the Iowa Rules of Criminal Procedure. I have been authorized by Dean Anderson to provide these comments in my official capacity as Director of the Drake Law School's Institute for Justice Reform & Innovation. Unlike most of the others, who will be commenting, I am not an expert on the Iowa Rules of Criminal Procedure. I do have a strong grasp of the general elements that make criminal procedure rules fair to both the parties, the courts, and the fair administration of justice. Also, in these unique times, I think we all agree that it is important that the public perceives that the administration of Iowa's criminal justice system values and promotes fairness and equity. Thus, my hope is that I can be most helpful to this process by limiting my comments to some of the larger themes that I observe to enhance the proposed rules.

I. The Proposed Rules Unfairly Limit the Accused's Ability to Discover Testimony and Evidence from Potential Witnesses Not Listed in the Minutes of Testimony

Current Rule 2.13(2)(a) *Special circumstances* provides procedures for the discovery and deposition, subject to court approval, for witnesses not listed in the minutes by the State or by the defense in their written list of witnesses. **Proposed Rule 2.13(6)** *Special circumstances* only provides for the depositions and discovery of witnesses "where a witness will be unavailable at trial." P. 23, lines 27-34. On its face, the rule does not allow for discovery and depositions of witnesses not listed in the minutes unless the witness is unavailable for trial.

Proposed Rule 2.15 Subpoenas, p.26, lines 22-30 fails to indicate that witness and documents may be secured by subpoena for the defense in pre-trial hearings like hearings on motions to suppress, etc.

Proposed Rule 2.13 Depositions, page 22, lines 23-28, makes clear a defendant may only take the deposition of witnesses listed in the minutes of testimony. However, **Proposed Rule 2.13(b) Continuation of the prosecuting attorney's investigation** p.23-24, lines 35, 1-4 provide the state with subpoenas duces tecum and for virtually any witnesses. This prevents the defense from using subpoenas and depositions to find a plethora of potentially exculpatory information like: business records; telephone and cell phone records; social media records; emails; and video and surveillance, etc. The proposed rules should be amended to provide the defense with a reasonable opportunity to use the court processes to find exculpatory information. Potential fishing expeditions could be minimized by requiring court approval or perhaps with a good cause requirement.

II. Other Comments

Proposed Rule 2.8(2) Pleas to the indictment, pp.13-14, all lines, does not provide for the withdrawal of a guilty plea for “good cause” or “extraordinary cause” or “when justice requires” or some other guidepost. Situations arise, albeit very infrequently, when justice requires a defendant to be able to withdraw a plea.

Proposed Rule 2.22(1) Form of verdicts, p.39, lines 20-24 should be revised to require each juror to sign the verdict form. This adds important solemnity to the jurors reaching a unanimous verdict. This is one of the first things I did as a new judge and found that when jurors were told in jury selection that they were required to sign their name to the verdict form they took the process more seriously. It provides additional proof to both the State and the defendant that the verdict is unanimous. It does not affect the right of a party to poll the juries per **Proposed Rule 2.25(5)(a)**, p 40.

Propose Rule 2.13(5) Presence of Defendant, p.23, lines 20-26. I agree with the position of prosecutors Tyler J. Butler, et al., in their comments filed May 10, 2020, that because it is a longstanding practice, defendants should be allowed to file a written waiver to not attend a given deposition.

Proposed Rule 2.8(2)(c) *Manner and method of plea colloquy*, p. 14, lines 15-18 allows for the prosecutor to question the defendant, “if necessary.” The problem is that until the court accepts the defendant’s plea, she/he has a 5th Amendment right to remain silent. Of course, a defendant has the same right regarding questions from the judge and it’s impossible to take a plea without questioning the defendant. I respectfully suggest that it is inappropriate to allow for the prosecutor to question a defendant because the defendant may make an admission unrelated to the plea that may harm the defendant at sentencing or implicate the defendant in other crimes. Of course, defense counsel should object but they may not. The risk/benefit analysis would seem to way in favor of not allowing a prosecutor to ask the defendant questions in a plea. As an alternative, the rule could be limited to questions related to the factual basis - but it is better for the judge or defense lawyer to do this to avoid serious problems.

Additionally, the elimination of current **Rule 2.35(2)** *Procedures not specified* as being “removed as unnecessary,” P. 53, lines 22-23, could be interpreted to mean that judges do not have the authority to act lawfully to fill in the inevitable gaps where no procedure is specifically authorized by the rules. This has the potential to be unfair to both the State and the accused.

Thank you very much for the opportunity to provide these comments.

Sincerely,

A handwritten signature in black ink that reads "Mark W. Bennett". The signature is written in a cursive, slightly slanted style.

Hon. Mark W. Bennett (Ret. U.S. District Judge)
Director, Drake University Law School
Institute for Justice Reform & Innovation
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mark.bennett@drake.edu
Bennett’s SSRN page: <https://ssrn.com/author=703083>

“*The arc of the moral universe is long, but it bends towards justice.*” –
MLK, Jr. & Rev. Theodore Parker. The thing of it is it does not bend on its own.

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JUL 11 2020



[EXTERNAL] Chapter 2 Amendments

Jones, Derek to: rules.comments

Cc: Jeff Wright, Kurt Swaim, "Hawbaker, Aaron [SPD]", Mary Conroy

CLERK SUPREME COURT

07/11/2020 09:37 AM

History: This message has been forwarded.

1 attachment



Comments on Proposed Amendments to Rules of Criminal Procedure.docx

I am attaching comments on the proposed amendments to Chapter 2 of the Iowa Rules of Court on behalf of the Davenport Public Defender's Office. Please let me know if you have any questions or concerns.

- Derek

Derek G. Jones

Chief Public Defender, Davenport Public Defender's Office

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Comments on Proposed Amendments to Rules of Criminal Procedure

By Derek G. Jones, Chief Attorney, on behalf of the Davenport Public
Defender's Office

Rule 2.2(3)(e), lines 16-19 re deadline for holding preliminary hearings:

The wording is vague with respect to the start date for the 10 and 20 day deadlines. Sometimes, there are multiple initial appearances. For example, a defendant may appear for the first time before a judge on June 1st. The judge appoints counsel and resets the case for a new initial appearance on June 2nd so the defendant can consult with counsel and be represented at the initial appearance. Does the 10/20 day deadline run from June 1st or June 2nd?

Rule 2.2(4), lines 25-28 re preliminary hearings:

The rule requires (and has always required) the State to show probable cause to believe *an* offense has been committed, not necessarily the charged offense or greatest charged offense. This could result in someone being held on a murder charge even though the judge only believed there was probable cause to believe a simple assault occurred. There should be a provision requiring the judge to automatically reconsider release conditions if the judge believes there is probable cause to believe the defendant only committed an offense less serious than the charged offense. A defendant shouldn't have to file a motion for bond reduction and wait for a hearing in such circumstances. The judge should also have to specify what charge the State has shown probable cause for rather than just reciting that probable cause exists to believe an unspecified offense was committed. Arguably, the judge should also amend the complaint to reflect the actual charge demonstrated if it does not match the charged offense.

Rule 27(1), lines 26-31, and Rule 2.7(2)(b), lines 3-4, re summonses:

The term "summons" is not defined in Rule 2.7, nor is it defined in Chapter 804 which is where the reader is directed to look to learn the proper form of a summons. I don't believe Chapter 804 even uses the term "summons" anywhere. I assume a summons is an order requiring a defendant to appear for an initial appearance without having to be arrested, but this should be defined for clarity.

Rule 2.8(2)(c), lines 15-16 re requiring Defendant to be placed under oath for guilty plea:

What is the point of this? Do prosecutors really want to charge defendants with perjury for pleading guilty when it later turns out there isn't a factual basis for the charge? If the concern is locking in a defendant's story when they are going to later testify against a co-defendant, why not just require the defendant to provide a sworn statement in advance of the plea? Why require pleas under oath in every case to accommodate this rare situation? If the concern is preventing defendants from pleading guilty when they are in fact innocent, I don't think this approach is going to work. Defendants plead guilty when they are in fact innocent because they believe they do not have a better option. Threatening them with potential perjury charges is not going to make them believe they will somehow be better off by going to trial or otherwise contesting the charges. These defendants have already decided they will only be hurt by contesting their charges. All threatening them with perjury charges will do is deter them from seeking postconviction relief in the event evidence of actual innocence is later discovered. This rule essentially insulates false guilty pleas. If people are actually innocent, our system of justice should not threaten them with criminal penalties in retaliation for seeking to have their convictions overturned later.

Also, the Rules are unclear as to whether written pleas to serious misdemeanors and aggravated misdemeanors must also be under oath.

Rule 2.8(2)(c), lines 16-18 re defense counsel questioning the defendant if *necessary*:

The necessity requirement should be eliminated so that defense counsel may question defendants to establish a factual basis at the discretion of the judge. Allowing defense counsel to question defendants to establish a factual basis is considerably more efficient than forcing a defendant to flounder and reduces the chances of defendants balking at the factual basis statement so pleas can go through.

Rule 2.8(4)(b), lines 3-4 re requiring written guilty pleas to contain the terms of any plea agreement and requiring the prosecutor to presumably sign the guilty plea form in order to acknowledge the terms of the plea agreement:

The rule should allow for a separate plea agreement to be filed. What is the point of requiring the plea agreement to be embedded in the written guilty plea? It is much easier to modify a written plea agreement from the courthouse than it is to modify a written plea of guilty. The plea agreement is typically prepared by the prosecutor who can usually more easily modify it from the courthouse (where the prosecutor typically has an office and access to a printer) than defense counsel who will not have an office or printing equipment at the courthouse. If the concern is getting plea agreements reduced to writing, this concern can be addressed adequately in a separate document. I may be taking too literal of a reading of the rule (requiring a document that includes the required information), but the rule would not suffer for being clearer.

Rule 2.8(4)(b), lines 3-4 requiring misdemeanor pleas agreements be reduced to writing:

Barring oral plea agreements will cause substantial problems in processing high volumes of misdemeanor cases at a time as required in the larger counties. We have to be able to move quickly at these appearances. Oral plea agreements should be allowed so long as they are disclosed to the judge. This rule also appears to conflict with Rule 2.10(2) which appears to allow for oral plea agreements so long as they are made part of the record. I am assuming the distinction is "on the record" means there will be a stenographer reporting the plea proceeding in the Rule 2.10(2) situation whereas there is not a court reporter for written pleas to misdemeanors under Rule 2.8(4)(b). For misdemeanors, requiring written plea agreements in all situations feels like a solution for a problem that doesn't exist. I can't think of a single instance in almost 23 years of practice where I have done a written plea with an oral plea agreement where there was a problem later. I think efficiency is a more important goal in the case of misdemeanors. If the commission doesn't want to make a blanket allowance for oral plea agreements with written misdemeanor pleas, maybe the rule could allow a judge to approve the use of an oral plea agreement for a written misdemeanor plea so that judicial discretion can weigh the circumstances on a case by case basis.

Rule 2.11(1), lines 23-24 requiring defenses to be raised by motion:

The requirement to raise an affirmative defense by motion doesn't make sense. Are we really supposed to file a document saying the defendant moves to assert a defense of justification? This is contradicted by Rule 2.11(11) which sensibly requires affirmative defenses to be asserted by filing a notice. Rule 2.11(1) could be rewritten to state:

Pleadings in criminal proceedings shall be the indictment and the pleas entered pursuant to rule 2.8. Defenses (other than affirmative defenses) and objections raised before trial shall be raised by motion.

Affirmative defenses would then be covered exclusively by Rule 2.11(11).

Rule 2.11(11)(b)(2), lines 21-24, and 2.11(11)(c), lines 29-36, re disclosing names of experts, but not addresses:

If a party is required to disclose the name of an expert, they should be required to disclose that expert's work address. The rule as written assumes the identity of an expert is readily apparent simply from the name. However, if the expert's name is common (e.g., "David Smith"), disclosure of the name may not give any sort of realistic notice of who the expert actually is. Please note the State is not required to disclose addresses under Rule 2.11(12) for rebuttal witnesses (their experts as to insanity defenses will almost always be rebuttal witnesses since the defendant has the burden of proof).

Rule 2.11(11)(e), lines 6-9 restricting a defendant's ability to offer evidence of undisclosed affirmative defenses:

A defendant should be allowed to cross-examine a witness called by the State concerning undisclosed affirmative defenses assuming the testimony is otherwise admissible. For example, such evidence may be inadmissible because it goes beyond the scope of the State's direct examination and is not related to witness credibility. That is a risk the defense takes by not giving notice of the affirmative defense. But, if the prosecutor opens the door by broaching the topic, the defense should be allowed to follow up. In some cases, the defense may have had no idea the State's witness would have favorable information concerning an affirmative defense, so the defense would have no idea filing a notice before trial would be necessary. If the State gets to amend its trial information and minutes in the middle of trial based on the actual trial testimony of witnesses, the defense should be allowed the freedom to cross-examine the State's witnesses based on what comes out on direct.

Rule 2.14(2)(a), lines 32-35 re disclosure of witness statements:

The rules about reciprocal discovery have always been vague concerning disclosure of witness "statements" and writings about witness statements. I have always interpreted this rule to mean that if I receive a typed or hand-written statement made by a witness, then I have to turn it over to the State as part of reciprocal discovery. However, my notes or my investigator's notes from interviewing a witness do not have to be turned over. I think this is the correct interpretation, but an argument could be made that these must be disclosed under the wording of the rule. I don't believe these writings are privileged, but they are work product and should not be subject to disclosure. The rule does limit disclosure to writings "which the defendant intends to introduce in evidence at trial." A strict reading of this clause would suggest we have no obligation to turn over even a written statement drafted by a witness since we would not intend to offer the document itself at trial (it would almost always be inadmissible hearsay). A looser reading would suggest any recording made by a witness, attorney, or investigator about the substance of what a witness would say while testifying at trial must be disclosed. These ambiguities should be resolved with a clear rule establishing what documents must be disclosed and explicitly addressing work product (not just privilege).

Rule 2.17(1), lines 35-1 re the deadline to waive jury without prosecutor's consent:

The rule now requires jury trial waivers to be made on the record as opposed to in writing. What happens when a defendant decides more than 10 days before trial that they want a bench trial, but the defendant cannot get court time to do a waiver on the record until 9 days before trial? The defendant should be able to satisfy the 10 day requirement by filing a written waiver at least 10 days before trial and then doing a waiver on the record when practicable.

Rule 2.17(2)(a), lines 5-7 basing trial on the minutes verdict on the complete minutes of testimony:

Is it possible to have the rule allow for submission of the case based on only a portion of the minutes of testimony filed by the State? This is a little theoretical, but I can imagine a situation where both sides would agree to a trial on the minutes where a portion of the minutes are excised (e.g., instructing the judge to ignore a particular officer's report).

Rule 2.19(1)(g), lines 16-18 re closings:

The defendant should be allowed a surrebuttal argument concerning insanity if insanity is submitted as a defense. If the defendant has the burden of proof, why does the State get the last word on that issue?

Rule 2.19(3), lines 33-35 re reporting of trials:

The rule should allow waiver of reporting of the reading of the jury instructions. Reporting of the reading of the instructions appears mandatory pursuant to Rule 1.903(2)(a). We already have a written record of the instructions being given (the instructions themselves). Having the court reporter transcribe the judge reading the instructions seems like a waste of time and paper unless someone requests it.

Rule 2.19(4)(f), lines 36-1 re depositions:

This is pedantic and fussy, but the rule should prohibit giving the jury deposition transcripts, not depositions. A deposition is an event, not a document.

Rule 2.19(4)(i), lines 13-15 re allowing jurors to separate:

The rule should be changed to allow the judge to permit the jurors to separate even when sequestered. The rule as written seems to be saying sequestered jurors have to stay in their deliberation room until they reach a verdict no matter the circumstances. Sequestered jurors should be allowed to separate (but still be sequestered) to sleep or in emergencies.

Rule 2.22(8)(e)(1), lines 31-2, and 2.22(8)(e)(3), lines 13-17, re holding Defendant after verdict of not guilty by reason of insanity:

These rules dictate when a defendant is to be released from custody following a not guilty by reason of insanity (NGRI) verdict. The rules utilize a false dichotomy. There are four relevant possibilities. The rules only address two:

1. The defendant is not mentally ill and no longer dangerous to the defendant's self or to others; and
2. The defendant is mentally ill and dangerous to the defendant's self and others.

The rules fail to address what happens when:

3. The defendant is not mentally ill, but is still dangerous to the defendant's self or to others (presumably dangerous due to something other than mental illness); and
4. The defendant is still mentally ill, but is no longer dangerous to the defendant's self or to others.

The defendant should presumably be released if either (3) or (4) apply, but the rules are silent. Possibility (4) is especially problematic. Many mental illnesses are lifelong, but can be controlled and safely treated. How would a defendant with schizophrenia ever be released? What about a defendant who is somehow "cured" of the serious mental illness that led to the insanity defense applying, but who still suffers from another mental illness that is wholly unrelated to criminal activity (e.g, depression)? Tying the rules to a defendant simply being mentally ill is overbroad, especially since "mentally ill" is not defined. The rules should require the judge to release a defendant if conditions (1), (3), or (4) apply. The defendant should only continue to be held and treated if they remain both mentally ill and dangerous to themselves or others.

Rule 2.23(2)(c)(5), lines 16-19 allowing prosecutors to speak after defendants and allowing victims to speak last:

Defendant and/or Defendant's attorney should be given an opportunity to address things stated by prosecutors and victims. How can there be due process if the defense can't respond? Rule 2.23(2)(d) does allow the defense to present additional evidence after the prosecutor's statement, but it doesn't allow the defendant to speak again or for defense counsel to make additional arguments in response to the prosecutor's statements, and it doesn't even allow additional evidence after a victim speaks.

Rule 2.27(4), line 9 allowing a judge to order the search of anyone in the courtroom without probable cause or reasonable suspicion:

This provision seems unconstitutional under Article I, §8 of the Iowa Constitution and the 4th and 14th Amendments to the United States Constitution. I have no problem with a courthouse requiring all people to go through a metal detector at the entrance, but judges can't just order the search of a specific person for any (or no) reason at all.

Rule 2.29(5), lines 3-4 concerning appellate counsel:

Rule 2.29(5) provides trial counsel may withdraw from appellate proceedings pursuant to rule 6.109(5). However, Rule 6.109(5) requires counsel to comply with Rule 2.29(6) which no longer exists under the proposed amended rules. If I am interpreting things correctly, Rule 6.109(5) needs to be amended to require trial counsel to comply with Rule 2.29(4) before withdrawing.

Rule 2.33(2)(a), lines 32-35 re speedy indictment:

I like this change, but want to point out that it deviates from the holding in *State v. Williams*, 895 N.W.2d 856 (Iowa 2017) rather than implementing it. Under *Williams*, the 45 day deadline begins running at the time of the arrest (although you don't know it was an arrest until the defendant is later taken before a magistrate for initial appearance). *Id.*, 895 N.W.2d at 867 ("The rule is triggered from the time a person is taken into custody, but only when the arrest is completed by taking the person before a magistrate for an initial appearance."). I've seen people misinterpret *Williams* to hold that the 45 day clock starts at the time of the initial appearance (what the amended rule does). The proposed amendment is much cleaner than the older rule as interpreted by *Williams*, but the commission should be aware it is not implementing the rule announced in *Williams*.

Rule 2.37--Form 8 (no line numbers are provided): Waiver of Initial Appearance for Indictable Offense:

Why is this form being submitted under penalty of perjury?

Rule 2.37--Form 9 (no line numbers are provided): Waiver of Speedy Trial:

The form has an error in Paragraph 1(c). The form assumes and requires the defendant to admit she waived 90 day speedy trial. That will not always be the case when a defendant is waiving 1 year speedy trial. For example, the district court may authorize the State to go beyond 90 days over the defendant's objection if good cause is shown. Paragraph 1(c) should be deleted altogether. Not only is it possibly inapplicable, it isn't relevant to whether a defendant is waiving one year speedy.

Also, why is this form being submitted under penalty of perjury?

Rule 2.59, lines 26-28 concerning defendant verifying their name/address:

The summary chart for the changes to this rule says defendants must verify their address. However, the amended rule is botched. It requires the defendant to verify whether the address shown in the complaint is the defendant's true and correct name. Assuming we care whether the complaint states the defendant's correct address, the amended rule should be rewritten to state something like:

The defendant must inform the magistrate whether the name in the complaint is the defendant's true and correct name. If the defendant gives no other name, the defendant is thereafter precluded from objecting to the complaint on the ground of being improperly named. The defendant must also inform the magistrate whether their address as shown in the complaint is their correct address.

Rule 2.69(1), line 13 setting the jury pool for a simple misdemeanor at 14:

The math doesn't work out if more than two defendants are tried together. For example, if there are 3 defendants, each will get 2 strikes, for a total of 12 strikes altogether (6 for the defendants collectively and 6 for the State pursuant to Rule 2.18(12)). You can't get to a 4 person jury if 12 are stricken from a 14 person jury pool. Rule 2.69(2) provides Rule 2.18 is applicable except where inconsistent with Rule 2.69. Since the rules are inconsistent in the event of 3 or more codefendants, Rule 2.18(12) does not control how many strikes each side gets. However, there is no rule to fill the gap. To fix this, the amended rule 2.69(1) should simply mimic the rule for indictables:

2.69(1) Selection of panel. If a jury trial is demanded, the magistrate shall notify the clerk of the district court of the time and place of trial. To create the jury panel for voir dire, the clerk shall randomly select a number of prospective jurors equal to six plus the prescribed number of strikes. The clerk may randomly select additional prospective jurors for the panel to allow for possible challenges for cause.

Rule 2.73(2), lines 7-8 concerning new simple misdemeanor trials based on newly discovered evidence:

There should be an escape clause allowing for a motion for new trial based on newly discovered evidence more than 6 months after the final judgment like there is for indictable misdemeanors. While I can appreciate a desire for finality, particularly for relatively minor charges, due process should allow for a procedure to correct an injustice even if it takes a while.

Rule 2.76--Form 5 (no line numbers are provided): Waiver of initial Appearance for Simple Misdemeanors and Entry of Plea:

Why is this form being submitted under penalty of perjury?

Requirement for Defendant to sign forms under penalty of perjury in general (See Rule 2.37 – Form 8; Rule 2.38 – Form 9; and Rule 2.76 – Form 5):

As noted above, the amended rules require defendants to sign several forms subject to penalties for perjury. I cannot fathom a useful purpose. If we are going to start requiring written submissions from defendants to be subject to penalties for perjury, why aren't we requiring the same for:

- a. PSI reports (i.e., make the PSI author sign subject to penalties for perjury)
- b. Victim impact statements
- c. DHS reports
- d. Evaluation reports (e.g., competency reports)?

Each of those seem to carry at least as much weight and necessity for truth as a defendant's waiver of initial appearance.

Conclusion

Thank you very much for your consideration. Please let me know if you have any questions or concern.

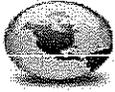
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07/13/2020 10:47 AM



[EXTERNAL] Chapter Two Amendments
Bob Rigg to: rules.comments@iowacourts.gov

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1 attachment



Rigg V Comments.docx

Please find attached comments regarding the proposed changes to the Iowa Rules of Criminal Procedure

***A Comment regarding the proposed revisions of the Iowa Rules of Criminal Procedure:
Defense Counsels Constitutional and Ethical obligation to Investigate a case.***

CLERK SUPREME COURT

A lawyer shall not handle a matter without adequate preparation in the circumstances. See Iowa Rules of Professional Responsibility 32:1.1.

The ABA, Standards for Criminal Justice, Prosecution Function and Defense Function, (3rd Edition 1993) 4-4.1(a) provide:

Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to the facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

The current revision of the ABA Standards further amplify defense counsel obligations to investigate and provide:

- (a) Defense counsel has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges.
- (b) The duty to investigate is not terminated by factors such as the apparent force of the prosecution's evidence, a client's alleged admissions to others of facts suggesting guilt, a client's expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt.
- (c) Defense counsel's investigative efforts should commence promptly and should explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter, consequences of the criminal proceedings, and potential dispositions and penalties. Although investigation will vary depending on the circumstances, it should always be shaped by what is in the client's best interests, after consultation with the client. Defense counsel's investigation of the merits of the criminal charges should include efforts to secure relevant information in the possession of the prosecution, law enforcement authorities, and others, as well as independent investigation. Counsel's investigation should also include evaluation of the prosecution's evidence (including possible re-testing or re-evaluation of physical, forensic, and expert evidence) and consideration of inconsistencies, potential avenues of impeachment of prosecution witnesses, and other possible suspects and alternative theories that the evidence may raise.
- (d) Defense counsel should determine whether the client's interests would be served by engaging fact investigators, forensic, accounting or other experts, or other professional witnesses such as sentencing specialists or social workers, and if so, consider, in consultation with the client, whether to engage them. Counsel should regularly re-evaluate the need for such services throughout the representation.

- (e) If the client lacks sufficient resources to pay for necessary investigation, counsel should seek resources from the court, the government, or donors. Application to the court should be made *ex parte* if appropriate to protect the client's confidentiality. Publicly funded defense offices should advocate for resources sufficient to fund such investigative expert services on a regular basis. If adequate investigative funding is not provided, counsel may advise the court that the lack of resources for investigation may render legal representation ineffective. *See* ABA Criminal Justice Standards for the Defense Function Fourth Edition (2017) Standard 4-4.1.

The United States Supreme Court holds that, "a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command [of effective assistance of counsel]." *See Strickland v. Washington*, 466 U.S.668, 685 (1984). There are a number of United States Supreme Court case where defense counsel was held ineffective for failure to investigate in violation of the ABA Standards. *See Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524–25 (2003); *Williams v. Taylor*, 529 U.S. 362, 395 (2000); *see generally The T-Rex Without Teeth: Evolving Strickland v. Washington and the Test for Ineffective Assistance of Counsel*, 35 PEPP. L. REV., 77 (2007).

The Iowa Rules of Criminal Procedure provide for discovery by way of a motion practice, subpoenas, and depositions. *See* Iowa R. Crim. P. 2.13; 2.14; 2.15 et al. *See generally Investigation, Discovery and Disclosure in Criminal Cases: An Iowa Perspective*, 52 DRAKE L. REV. 739 (2004). Those rules are currently under review.

From the decisions of the Supreme Court, the disciplinary rules and the pertinent discovery rules it is obvious the role of the defense counsel is to explore, discover, and otherwise test the strengths of the state's case. This fundamental role of defense counsel is being called into question by the suggested rule revisions prohibiting or encouraging forbearance by defense counsel to perform an essential duty to conduct a thorough pretrial investigation.

The revisions appear to miss the point—the object of the procedure we adopt is not merely for the convenience of the lawyers and judges but to promote confidence in the criminal justice system and the results it produces.

Many arguments promoting these changes are that of costs. By limiting pretrial investigation, the rules promote a quick resolution of the case. Thereby preserving both prosecution and defense resources. These suggested rule changes render counsel's representation ineffective by reducing defense lawyers to become merely a conduit to communicate the state's offer in order to secure a plea of guilty. *See* Iowa R. Crim. P. 2.8.

A related justification is the other side of the same coin. It is that allowing defense attorneys expanded discovery needlessly escalates the cost of the case. This is equally flawed. To allow defense counsel to proceed to trial without adequate investigation, almost ensures a conviction and does nothing to promote confidence in the justice system.

A differing argument is that of privacy of third parties and or the burden it places on third parties. It is hard to imagine that a request to reveal digital recordings or other typical

discoverable material (electronic or otherwise) in the possession of a corporation, business or governmental entity, in order to investigate the strengths of the state's case or establish a defense, is somehow so burdensome that the rules cannot be drafted in order to accommodate its discovery.

An older and more cynical justification is the negative view of the presumption of innocence, obsession to control facts, and a basic distrust of our adversarial process. *See State v. Eads*, 166 N.W.2d 766 (Iowa 1969).

A critical set of questions are posed to this committee. They are illustrated by two situations.

In the first case, does a plea of guilty secured under the proposed rules result in a voluntary, intelligent, and knowing waiver of constitutional and statutory rights?

The second case poses an equally troubling set of questions. By allowing a lawyer to proceed to trial unequipped to confront the power and resources of the state, virtually assuring a conviction of the accused will attain a just result? Will that conviction so obtained survive subsequent challenges? In both situations the result is both constitutional and ethically unpalatable. Especially when the result is undercut by sources of information that have denied to counsel intentionally, unintentionally or by operation of a set of procedural rules. Such are the sources of wrongful convictions which we all seek to avoid.

In either case counsel neglects to perform an essential duty to the client. The procedure we adopt should do its best to ensure the production of a "just result." Not merely a "result" born of convenience and expedience without regard for facts. *See Strickland*, 466 U.S. at 686. A conviction otherwise obtained promotes corruption and undercuts faith in the results obtained by the criminal justice system.

Respectfully

Robert R. Rigg
Professor & Director of the Criminal Defense Program
Drake University Law School

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JUL 13 2020



[EXTERNAL] Chapter 2 Amendments
Brad Lint to: rules.comments
Cc: IAJ Staff

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07/13/2020 02:41 PM

History: This message has been forwarded.

1 attachment



IAJ Comments to Proposed Amendments to Rules for Criminal Procedure - Final.docx

Attached please find comments from the Iowa Association for Justice regarding Chapter 2 Amendments.

Thank you for your attention and consideration.

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Remember to "LIKE" the Iowa Association for Justice on Facebook: <http://on.fb.me/e6UdU7>



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JUL 13 2020

Comments on Proposed Amendments to the Iowa Rules of Criminal Procedure

CLERK SUPREME COURT

The following comments are submitted on behalf of the Iowa Association for Justice (IAJ), and were prepared by IAJ Criminal Defense Trial Lawyers Core Group members Tom Farnsworth, Grant Gangestad, Matt Lindholm, Robert Rehkemper, Nick Sarcone, and Molly Spellman. After a careful review and consideration of the Committee's proposed rules, the practical implications on the fair and equal administration of justice, as well as the overall truth finding process and judicial efficiency, IAJ cannot support the proposed rules as currently submitted for consideration. IAJ herein identifies the following most pressing concerns with the proposed changes: 1) Removing crucial protections to the accused; 2) Interference with the truth finding process by removing and precluding the accused's access to investigative tools necessary to present a defense; and 3) decreasing judicial efficiency.

Below, under Division I, are the most pressing concerns with the proposed rules, as identified by IAJ. We have attempted to offer suggestions to correct each identified deficiency. Under Division II, IAJ has provided additional comments regarding the remaining proposed rules that are more thoroughly addressed by other criminal defense related organizations. Under Division III, IAJ has proposed additions to the rules to address significant issues not adequately addressed in the proposed rules. Finally, under Division IV, IAJ concludes with additional notes and comments regarding the proposed rules.

I. THE MOST PRESSING CONCERNS WITH THE PROPOSED RULES.

A. REMOVAL AND PRECLUSION OF DEFENDANT'S ABILITY TO DISCOVER AND OBTAIN EVIDENCE FROM NON-MINUTED WITNESSES PRIOR TO TRIAL.

1. The proposed rules significantly interfere with a criminal defendant's constitutional right to conduct a full and fair investigation; preserve evidence in their own defense; and otherwise present a defense that is independent of the investigation (or lack thereof) performed by law enforcement.

a. The proposed rules eliminate the protections to an accused in existing rule 2.13(2)(a) to secure testimony of non-minuted witnesses. The existing rule provides a specific procedure to obtain the testimony via a deposition of a non-minuted witness prior to trial. The existing rule does not limit the purpose for which the deposition may be conducted and permits the court to order production of evidence within that person's possession pursuant to those depositions. The proposed rules completely eliminate the ability of the defendant to secure this testimony and production of evidence.

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- b. **Proposed rule 2.13(6) limits the protections to an accused to secure the testimony of witnesses.** The proposed rule only identifies “special circumstances” for the limited purpose of perpetuating testimony of trial for a “prospective witness” who will be unavailable at trial. The proposed rule does not define whom a “prospective witness” is and does not provide any procedure for securing the testimony of a “prospective witness” for purposes of a discovery deposition or pretrial hearing. Thus, if a “prospective witness” is different than a “witness” it should be clarified whom that includes and the rule should provide a procedure for securing their presence for a discovery deposition or pretrial hearing. Failure to do so hinders the truth finding process and, in turn, hinders the ability for an accused to defend themselves.
- c. **Proposed rule 2.15(1) limits the protections to an accused to secure the testimony of witnesses and/or potential witnesses.** The plain language of the proposed rule precludes issuance of subpoenas for witnesses to attend and testify at pre-trial hearings. Additionally, as discussed in subparagraph (f) of this section, the term “witness” is not defined so it is unclear if this proposed rule is limited to minuted witnesses. Failure to provide a procedure for an accused to secure the attendance of a person who is not a minuted witness and/or for purposes of a pretrial hearing hinders the truth finding process and hinders the ability for an accused to defend themselves.
- d. **Proposed rule 2.15(2) limits the protections to an accused to secure evidence in the possession of non-minuted witnesses.** The proposed rule eliminates the phrase “subpoenas duces tecum” and the procedure for the issuance of a subpoena duces tecum. The reasoning behind this is unclear, but it appears that the only plausible explanation would be to preclude a defendant from issuing a subpoena to a non-minuted witness for the production of evidence not previously gathered by the investigative agency or prosecution. This rationale is consistent with the elimination of the procedures in existing rule 2.13(2)(a) as discussed in subparagraph (a) above. The failure to provide a procedure for an accused to access evidence in possession of a third party who is not a minuted witness hinders the truth finding process and hinders the ability for an accused to defend themselves. See *State v. Russell*, 897 N.W.2d 717, 731 (Iowa 2017) (“[D]efense counsel certainly has a duty to conduct a reasonable pretrial investigation, which may extend to the duty to subpoena certain records and documents.”).



- e. **The proposed rules eliminate the protections to an accused by eliminating existing Rule 2.35(2) which allows the court to proceed in any lawful manner when the rules are silent.** As with anything new, there will be bugs that need to be worked out. It seems as though existing rule 2.35(2) is fashioned as a catch-all for situations where there may be an oversight in the rules. This provision should remain for that reason. If it were not to remain, it seems plausible and likely that an argument will likely be made that the elimination of this rules means that there can be no procedure created by a court to address an oversight or discrepancy.
 - f. **Neither the existing rules nor proposed rules define the word “witness” as used in rules 2.13, 2.14 and 2.15.** This deficiency results in District Courts routinely interpreting that term to only include minuted witnesses. In fact, the Iowa Supreme Court has distinguished the term “witness” as used in the Iowa Rules of Criminal Procedure from the term “person” as used in the Civil Rules of Criminal Procedure. See *Russell*, 897 N.W.2d at 724. Such an interpretation results in precluding defendants from being able to issue subpoenas duces tecum, seeking potentially exculpatory evidence within the possession or control of non-minuted witnesses or entities. This hinders the truth finding process and hinders the ability of an accused to defend themselves. See *Id.* at 730 (recognizing situations where a defendant may need and be able to seek an *ex-parte* subpoena duces tecum under our existing rules).
 - g. **Proposed Rule 2.13(6)(a) [p.23, lines 30, 34] uses the phrase “prospective witnesses,” but that term is not defined.** An argument certainly could be presented that the decision to use the word “prospective” in this section to the exclusion of it in other sections was intentional and therefore lending support to the conclusion that the term “witness” only should apply to minuted witnesses. Moreover, the term “prospective” could be interpreted to mean a future witness that will not be available to trial. This is especially true when read in conjunction with the title of this rule. However, it also could be interpreted to mean someone who may or may not have information relevant to the criminal charge. The language is ambiguous.
2. **Disparate Investigative Abilities.** The proposed changes to the existing rules and failure to address the above-identified issues has the practical effect of granting disparate investigative abilities in favor of the prosecution. The lack of procedures available to an accused as outlined above leave little to no resources to compel the production of testimony and/or crucial evidence within the knowledge and possession of persons whom the prosecution has



declined to list in the Minutes of Testimony. This has a dramatic adverse impact on the truth finding process.

- a. This concern is best exemplified in **Proposed Rule 2.13(6)(b)** (previously, existing Rule 2.5(6)), which is now titled "*Continuation of the prosecuting attorney's investigation*" which grants the prosecution the ability to depose *any* person and issue subpoenas duces tecum without restriction, even during the pendency of a case ("after a complaint or indictment has been filed" [See proposed Rule 2.13(6)(b), p. 23, lines 35-36]. A criminal defendant, however, whose liberty is at stake, has absolutely no ability to compel the production of testimony or evidence from non-listed witnesses, even if that evidence may be exculpatory. (*Note, the State has no obligation to seek, obtain, preserve or otherwise produce to a defendant, exculpatory evidence not in its possession.*)
- b. The most common and prevalent evidence that a defendant may wish to obtain, but if not requested and preserved by the prosecution would go undiscoverable, would be the following:
 - i. Surveillance footage from a business that would capture the offense or portion of the investigation on video. Such video recordings may also establish a concrete alibi defense. Such evidence is more credible than testimony of an alibi witness.
 - ii. Cell phone records that could establish timing, location of individuals, or exculpatory statements (i.e. "I'm sorry I lied to the police"), including the defendant's own cell phone records, which providers refuse to produce absent a court order or a subpoena duces tecum.
 - iii. Emails and digital messaging (i.e. Facebook, Twitter, Snapchat, and other social networks) between witnesses, co-defendants, the accused, or any other person with relevant information related to a particular accusation, which providers will not produce without a court order or subpoena duces tecum.
 - iv. Business records which reveal a host of information including time and dates of purchases, proof of ownership, accounting information, and the like, which providers will not produce without a court order or subpoena duces tecum.



- c. These deficiencies permit the prosecution to dictate what persons a criminal defendant has access to by inclusion or exclusion of those persons from the Minutes of Testimony.
 - i. For example, assume the following: an officer conducts a traffic stop of a citizen and subsequently believes the citizen was operating his vehicle while intoxicated. The officer, however, is not certified to invoke implied consent and calls another officer who later invokes implied consent. The officer who conducted the traffic stop is not listed by the State as a minuted witness. Thus, the defendant has no ability to examine the stopping officer for purposes of determining the merits of any suppression motion or for any other purpose. This requires the defendant to file a motion to suppress without any ability to properly assess its merits in order to examine the stopping officer for the first time, on the stand, during the motion.
 - ii. Another example, taken in part from a real case an IAJ member had, occurred where an undercover officer was used to set-up several drug transactions. That officer was not listed as a witness in the subsequent prosecution. It was the defendant's position that he was entrapped because the undercover officer repeatedly asked for drugs even when the defendant initially, and on several subsequent occasions, refused to sell, provide, or otherwise engage in any drug transactions. Thus, under these rules, defense counsel would have no ability to investigate these claims if the officer is not listed as a witness. Moreover, in that actual case, the State included almost no information within the minutes of testimony regarding the set-up of the transactions and refused to provide discretionary discovery (which included audio recordings of the officer badgering the defendant into the drug transaction). By not listing the officer, the State precludes deposition and investigation into an entrapment defense, among other defenses.
 - iii. Finally, in another example taken in part from a real case, an alleged victim of a shooting, initially claims that she did not see the shooter. After, repeated badgering by the county sheriff, the witness changes course and identifies the defendant. The defendant denies having committed the offense and claims his cell phone records and bank transactions prove he was not in the area at the time of the shooting. Defense counsel has absolutely no ability to obtain either the defendant's detailed cell phone records nor his detailed bank transaction records absent a subpoena. The county sheriff is not listed as a witness



in the minutes, as he was not the investigating officer; therefore, the defendant has no right to examine, pre-trial, the Sheriff.

3. Other Practical Considerations

- a. The proposed rules inhibit prompt resolutions of cases by limiting pretrial discovery methods of the defense.
- b. The proposals create a more cumbersome trial process. Since compulsory process of non-minuted witnesses would only exist at trial, the defense, seeking to obtain and review the available evidence within the possession of non-minuted witnesses, would be needlessly forced to subpoena those witnesses to trial as the defendant's witnesses. The requested evidence within that witness' possession would only be produced on the day the witness is scheduled to provide testimony, resulting in unnecessary delays and interference with a smooth trial process. Moreover, the defense has a right to effectively cross-examine the State's witnesses and that information may be necessary for that purpose. The defense also has the right to enter evidence during the State's case-in-chief and those documents may be entered during the State's case. In conjunction, the defendant has the right to remain silent and a right to not present a case-in-chief. Requiring the documents to be produced by a witness at trial, unnecessarily requires the defendant to put on a case and prevents those evidentiary admissions during the State's case-in-chief.
- c. The proposed amendments prevent adequate preparation prior to trial by the defense, especially when forced to review testimony and evidence produced for the first time on the day of trial.
- d. Criminal defendants currently have more rights to compel production of evidence in a corresponding concurrent civil action, as compared to the criminal prosecution where their liberty is at stake. See *Russell*, 897 N.W.2d at 725, recognizing the broader ability to issue subpoenas under the civil rules.

4. Suggested Amendments

- a. Authorize the pretrial use of subpoenas duces tecum, by both parties equally, with notice, and an opportunity to object by the State, just as set forth in *Russell*. This procedure, however, should include the ability to issue those subpoenas to "persons" not just "witnesses." Additionally, the rule should contain a clause that gives the court discretion to quash the subpoena if compliance would be



“unreasonable or oppressive,” as currently used in existing rule 2.15(2). This promotes the truth-finding process, provides the accused the ability to defend themselves, and ensures that the subpoena power will not be abused.

- b. Preserve and clarify a defendant’s ability to seek court authorization to depose non-minuted witnesses, preferably with the ability of the State to seek intervention of the court upon the belief that it is oppressive or unreasonable, but at the least by requiring a showing of just cause as currently exists in rule 2.13(2)(a).
- c. Specifically authorize the issuance of subpoenas for “persons,” including issuance of subpoenas by the defense and issuance for attendance at pre-trial hearings.
- d. IAJ recognizes the concern the State may have over the production of medical and/or other records of victims, and the procedures for obtaining those records should remain. However, the proposed rules now provide an incentive for an accused to civilly sue a victim in criminal matter, as a defendant could have more of an ability to conduct discovery through a civil action than through the proposed rule changes mentioned above.
- e. In short, provide equal access to evidence and equal access to persons who may have evidence to both the State and the Defendant.

B. ELIMINATION OF DEFENDANT’S ABILITY TO REQUEST THE COURT TO ORDER A MORE SPECIFIC STATEMENT TO AID IN DEFENDANT’S PREPARATION OF A COMPETENT DEFENSE - BILL OF PARTICULARS.

1. **Proposed Rules eliminate existing Rule 2.11(5).** A motion for the prosecution to provide a defendant with a Bill of Particulars provides a defendant the right to request a more specific statement of the accusations when necessary to adequately prepare a defense. This change is an elimination of another procedural protection in place for an accused and has been made without any sufficient justification.

- a. **Unnecessary elimination of another procedural safeguard of an accused.** This procedure has an important role, especially in situations where there may be multiple defendants, the alleged criminal conduct of each person charged is not readily apparent from the charging documents, or when multiple counts of the same offense are charged, but it is unclear what the prosecution is alleging within each offense.



- b. **Inability to adequately prepare.** Removal of this procedure implicates a criminal defendant's constitutional right to effective assistance of counsel and to adequately prepare for trial. Many offenses such as conspiracy may be plead generically and generally. Absent identification of specific time periods, co-conspirators or more specifics as to the alleged offense, pre-trial preparation, affirmative defenses, and defense witnesses cannot adequately be identified, further impairing a defendant's ability to adequately defend themselves.
 - c. **Judicial Efficiency.** Overbroad allegations preclude effective pretrial discovery and precise presentation of evidence from both sides at trial.
 - d. **Cumulative Impact.** The cumulative impact of the elimination of the above-mentioned changes, coupled with the removal of a procedure to request a more specific statement of the allegations, provides an incentive for the State to minimize and muddy accusations as much as possible, putting an accused in a position with nothing more than a blind "shotgun approach" at trial.
2. **Suggestion.** Leave the existing version of rule 2.11(5) in any new rules revision.

C. ELIMINATION OF JUDGES' DISCRETION TO PERMIT A DEFENDANT TO WITHDRAW A GUILTY PLEA.

1. **Existing Rule 2.8(2)(a)** provides that "at any time before judgment, the court may permit a guilty plea to be withdrawn and a not guilty plea substituted."
2. **Existing Rule 2.8(2)(a)** is the "catch-all" rule that gives the court discretion to allow a defendant to withdraw a guilty plea.
3. **Special circumstances** may exist which only become apparent after the time has run for a Motion in Arrest of Judgment or the legal requirements of a Motion in Arrest in Judgment are not met, but justice would necessitate permitting a defendant to withdraw the guilty plea. Examples include:
 - a. A defendant being inadequately advised by counsel of sentencing implications or collateral consequences of a guilty plea – i.e. sex offender registry requirements, immigration consequences, etc. Situations have occurred where defendants have obtained second opinions from other counsel, post-plea but prior to sentencing, and have learned of other implications of their plea.



- b. Evidence establishing the defendant's actual innocence is discovered after the plea has been entered and accepted and the time for a motion in arrest of judgment has expired.
4. **Judicial efficiency.** If accepted, the new rules would require that the examples identified in subsection three (3) above, may only be addressed in a post-conviction relief proceeding when they otherwise could have been promptly addressed in the substantive criminal proceedings. This delaying of the inevitable subjects the defendant to prolonged, illegal, or improper punishment and requires additional court resources to wade through the post-conviction process, when a judge, exercising the court's discretion in the substantive criminal case, could remedy the injustice immediately.
5. **Suggestion.** Leave the current version of existing rule 2.8(2)(a) in any new rule revision.

D. REMOVAL OF BENEFIT TO THE DEFENDANT ARISING OUT OF INCONSISTENT OR INFORMAL VERDICT.

1. **Proposed Rule 2.22(6) eliminates** the benefit of the doubt in favor of a defendant upon an inconsistent or informal verdict currently contained in existing rule 2.22(6).
2. **Acquittals Must Stand.** A formal or informal verdict of acquittal, whether consistent or inconsistent, presented to the Court, must stand upon the juries' finding. Otherwise, once acquitted, a defendant, is placed back in jeopardy. A jury should not be permitted nor required to reconsider an acquittal.
3. **Juries' Reconsideration of Acquitted Counts Will Have Disparate Effect on Defendant.** If a court sends the jury back to reconsider charges where the jury had previously found a defendant not guilty, the jury is effectively encouraged to change its mind as to the acquittal and enter a finding of guilt.
4. **Current Caselaw.** Current caselaw protects the acquittal and if the acquittal of an offense undermines a verdict of guilty on another offense, the benefit of the doubt goes to the defendant on that offense. See *State v. Halstead*, 791 N.W.2d 805 (Iowa 2010).
 - a. Example: if a defendant is acquitted of an underlying predicate felony offense but the jury convicts the defendant of the greater



offense of Assault While Participating in a Felony, existing law mandates acquittal of the greater offense as well.

- b. The proposed amendment appears to permit a judge in this situation to require the jury to go back and re-deliberate even as to the acquitted offense.

E. AUTHORIZING THE STATE'S EXAMINATION OF DEFENDANT THROUGH AN EXPERT WITNESS.

1. **Proposed Rule 2.11(11)(c)** requires disclosure by the defense and the ability of the State, to examine a defendant when a defendant's expert is expected to testify at trial relating to those examinations of the defendant for reasons other than insanity or diminished capacity.
 - a. "Examine" is not defined nor restrained. Does the word "examine" mean that an expert for the State has the right to question the defendant and attempt to solicit incriminating statements? If so, this would pose Fifth Amendment issues.
 - b. Does the attorney for the Defendant have the right to be present when the examination by the State expert is conducted?
 - c. Does the Defendant have the ability to examine a witness that has been examined by a State expert? It does not appear there is any corresponding provision. This results in unequal and disparate treatment of the Defendant.
 - d. What type of examinations are included within this proposed rule? Does this proposed rule extend to all defense witnesses who will offer an expert opinion at trial relating to an issue which is not specifically an affirmative defense?
2. **Elimination of "Good Cause" for Filing Disclosure after 40 Days from Arraignment.** The proposed rule also eliminates "good cause" for late filing of this disclosure. The timetable for the disclosure being forty (40) days from arraignment is unrealistic in many situations.
 - a. Moreover, the failure to comply with the timing in this rule precludes the ability to offer this testimony. This is despite the fact that the State is able to amend a trial information and add any witness they like ten days prior to trial. See existing Rule 2.4(8)(e) relating to amendment of the minutes as well as existing Rule 2.19(2). This creates yet another unjust disparity of treatment between the State and the accused.



3. **PROPOSED SOLUTION.** Remove the section of the proposed rule which grants the State the ability to examine the defendant except in cases where the defendant intends to rely on the defense of insanity or diminished capacity. At the very least, provide for the disclosure and examination of a State's witness who has been examined by an expert expected to testify at trial (necessary for equality between the State and the accused). Additionally, a "good cause" clause needs to be inserted into any proposed rule relating to late filing on this issue. Finally, there needs to be clarification of the term "examination."

F. AUTHORIZING STATE'S UNCONSTRAINED QUESTIONING OF THE DEFENDANT AT TIME OF GUILTY PLEA.

1. **Proposed Rule 2.8(2)(c) [p. 14, lines 15-18]** requires that the Defendant be placed under oath for purposes of tendering a guilty plea and allows questioning by both the court and the State without limitation.
 - a. A guilty plea should not be an opportunity for the prosecution to question the defendant. The prosecution is always free to comment on whether they believe a factual basis has been adequately established but they should not have the ability to question the accused during these proceedings as it creates a situation that is ripe for abuse without any legitimate purpose.
 - b. To the extent that additional information is needed to support a factual basis, it is the court's obligation to question the defendant as to the specific facts comprising the essential elements of the offense. See existing Rule 2.8(2)(b).
2. **PROPOSED SOLUTION.** Remove language for proposed rule 2.8(2)(c) which allows for questioning by the State of the accused during plea proceedings. If such is necessary, then the questioning should be explicitly limited by rule to simply establishing a factual basis for the offense for which the guilty plea is being taken.

II. ADDITIONAL NOTES AND COMMENTS ON REMAINING PROPOSED RULES.

- A. **Proposed Rule 2.11(7)(a) [p. 17, lines 22-26].** Eliminates the defendant's ability to move to dismiss a trial information on the grounds that the person charged was not the person who committed the offense (removal of existing rule 2.11(6)(a) language "or that the defendant did not commit that offense"). This should not be removed. Situations have arisen where there has been mistaken identity. To foreclose the ability to move to dismiss the charge on this basis may provide an



incentive for the prosecution to continue to drag a case out in hopes of financially or emotionally wearing an accused down in order to secure some type of plea.

- B. **Proposed Rule 2.11(10) [p. 18, lines 24-32].** Eliminates the ability to impanel a jury from another county which currently exists in existing rule 2.11(10)(b). In some circumstances it may make more sense to bring in a jury from another county, rather than transfer an action across the State. Generally, a defense attorney will be located nearer to the county in which the action arose than a transferred county. Moreover, the prosecutor surely is located in the county in which the action arose, and the Court is likely nearer as well. For the sake of judicial economy this should at least remain an option.
- C. **Proposed Rule 2.27.** Relating to the presence of a defendant at court proceedings and regulation of conduct by the court. Existing rule 2.27(1) provides that in all felony cases, a defendant shall be personally present at all stages of the proceedings. That rule then provides that “in other cases the Defendant may appear by counsel” which suggests that defendants may appear by counsel for misdemeanors including simple misdemeanors. Pursuant to the proposed Rule 2.27, it is unclear when and what type of presence is required of a defendant charged with a misdemeanor. Does this mean that defense counsel can no longer enter a guilty plea to a simple misdemeanor on behalf of their client? Does this mean that the defendant charged with a serious misdemeanor or aggravated misdemeanor has the same obligations to be present for all stages of the criminal proceedings including any depositions as a person charged with a felony? If so, that would appear to run afoul of proposed Rule 2.13(5) which seems to suggest that a criminal defendant in a serious or aggravated misdemeanor case does not need to be present for depositions. IAJ believes the Rule needs clarification as to Misdemeanor cases.
- D. **Proposed Rule 2.57.** Relating to the procedure following the filing of a complaint for a simple misdemeanor, this proposed rule removes the option of issuing a summons to appear, in lieu of issuing an arrest warrant, so that issuance of an arrest warrant is the only option following the filing of a complaint. Issuance of a summons to appear for simple misdemeanors which requires a subsequent court appearance has historically worked and has been effective. It is unknown what the impetus was for this rule change. IAJ proposes leaving existing Rule 2.57 as is.
- E. **Proposed Rule 2.33(1) [p. 52, lines 17-18].** Removes the Court’s discretion to dismiss a case in furtherance of justice on the Court’s own motion. While, in practice, the Court may rarely dismiss a case on its own motion, the Court should be allowed to retain the ability to do so, such as in a case involving prosecutorial misconduct or repeated violations of discovery or other court rulings. IAJ proposes the existing rule remain as is.



- F. **Existing Rule 2.11(9).** The proposed rules remove this provision relating to a motion for change of judge. There are ethical and other situations in which a change of judge may well be warranted. This is not a disputed issue and is recognized in caselaw. A provision under the rules related to this is necessary to avoid a party suggesting that its removal from the rules precludes asking for a new judge.
- G. **Proposed Rule 2.11(11)(d).** This proposed rule removes the “good cause” language for late filing relating to affirmative defenses. While proposed Rule 2.11(11)(e) contains “good cause” language, the existing rules had “good cause” language in both 2.11(11)(c) and 2.11(11)(d) (corresponding to new rules 2.11(11)(d) & 2.11(11)(e)). In either case, the language in old Rule 2.11(11)(c) is a further safeguard for both parties, and assures the smooth administration of trial, by giving the defendant the opportunity to file an untimely notice, with leave of court, in advance of trial. The “good cause” language of existing Rule 2.11(11)(c) should be incorporated into new Rule 2.11(11)(d).
- H. **Proposed Rule 2.17(2).** This new Rule, which clarifies procedures relating to a Trial on the Minutes should incorporate and reference existing Rule 2.4(8)(e) relating to amendment of the minutes of testimony, as well as existing Rule 2.19(2) relating to advance notice of evidence supporting indictments or information, which references the ten-day notice rule relating to witnesses. References to both of these rules would ensure fair notice to the defendant of both the evidence that the court may consider, as well as witnesses whose written testimony the court may consider, so that new information or evidence is not provided to the court at the last minute or on the day that the Trial on the Minutes is to be held. IAJ proposes that the proposed rule strike the addition of the language that the Court shall render a verdict based not only on the Minutes, but also on “any other material that the parties have agreed should be included in the trial record.” Removing the above language further ensures that both parties are on notice regarding what evidence the court will consider, as there sometimes may exist a dispute on what the parties had previously agreed to if it was not previously made a part of the record.
- I. **Proposed Rules 2.22(1) and 2.22(8).** This rule removes “not guilty by reason of diminished responsibility” from jury verdict forms. It is unknown why the Committee proposed to remove this from the jury verdict forms. “Diminished responsibility” is still recognized as an affirmative defense and is still incorporated and referenced throughout the new, proposed rules including as an affirmative defense. IAJ requests that the “not guilty by reason of diminished responsibility” remain on the jury verdict forms.
- J. **Proposed Rule 2.19(7)(c) [p. 36, lines 1-2].** Relating to a motion for judgment of acquittal and when the court may reserve decision on the motion, this proposed rule has removed the ability for the Court to consider or grant a motion for



judgment of acquittal "before jury returns verdict" (after it has been submitted to the jury). It is unknown why this was deleted from the proposed rule. The Court should have the ability to consider and act on the motion at any time. IAJ requests that the Court retain the discretion and ability to rule on a motion for judgment of acquittal before the jury verdict.

III. ISSUES LEFT UNADDRESSED BY PROPOSED RULES.

A. Proposed Rule 2.18 – Juries. A rule should be adopted which requires the clerk to provide the parties with juror lists and juror questionnaires no later than two business days prior to trial. The experience of firms within IAJ is that juror questionnaires and juror lists are routinely not being provided until the morning of trial. This provides little time to vet the jurors by the parties, and, more importantly, often delays the start of trial, which is unfair to the jurors.

B. Conditional Plea Rule

1. Conditional Pleas permit a defendant to plead guilty without the time and expense of a Trial on the Minutes of Testimony (stipulated bench trial).
2. The purpose of a conditional plea is to plead guilty, thereby taking advantage of a favorable plea offer, while preserving the right to appeal a dispositive motion, such as a motion to suppress a traffic stop.
3. Conditional Pleas are available under the Federal Rules of Criminal Procedure and in other states.
4. The State must consent to a conditional plea.
5. See our footnote¹ for a proposed change to the existing Rule 2.8(2), which can easily be incorporated into the new proposed Rule 2.8(2).
6. Although the legislature removed the ability of a defendant to appeal after a plea of guilty, they did so with exception – upon good cause shown. The rule, as drafted, states that such reservation of a right to have an appellate court review an adverse determination of a pre-trial motion always constitutes good cause for appeal. Good cause is not defined in statute, and the Supreme Court has authority to interpret good cause. The adoption of rules indicating a conditional plea is good cause is equivalent thereto.

C. Discovery Rules 2.14

1. Iowa has one of the most regressive criminal discovery rules in the entire nation. Forty-six (46) states have rules which mandate more liberal disclosure and discovery to accused citizens than Iowa. See our footnote² for a listing of those states and their Rules.

¹ Available online at: <https://www.iowajustice.org/conditionalplea2020>

² Available online at <https://www.iowajustice.org/discoverybystate>



2. All of the listed states mandate disclosure of the evidence and information described in proposed Rule 2.14(1)(b) (existing Rule 2.14(2)(b)), although many states go much further requiring additional disclosures of information to the defendant. Thus, Iowa has fallen behind almost every other state in enacting a fair and just discovery rule.
3. See our footnote³ for a new proposed Rule 2.14, which brings Iowa's discovery rule in line with the majority of states, though it does not go nearly as far as many states do in granting disclosure to the defendant.
 - a. The key changes are as follows:
 - i. Requires disclosures within 14 days of a filed request by defendant of all information now contained in Rule 2.14.
 - ii. Requires reciprocal discovery in similar fashion.
 - iii. Requires additional disclosure of witness statements and investigative reports, warrant applications and investigatory subpoenas.
 - iv. Obligates the parties to act in good faith.
 - v. Prohibits conditioning of a plea offer on refusal to seek disclosures (this is commonplace in some jurisdictions and in certain types of cases).
4. If Iowa truly seeks a fair and just criminal court system, disclosure should be mandated. In most rural counties this is routine practice. Many rural district courts already order disclosure in their orders on arraignment. However, some jurisdictions, like Polk County, enter routine orders denying discovery requests under rule 2.14(2)(b) for disclosure of information material to defense preparation and justify this denial by claiming the Defendant has not made a "showing" by which discretionary discovery can be granted. What constitutes that "showing" is entirely unclear, as the defense bar generally requests disclosure of information material to preparation of their cases. In any case, the rules should be updated to reflect general practices in place in many counties throughout Iowa and to bring Iowa in line with national standards already in place in 46 other states.

IV. ADDITIONAL NOTES AND COMMENTS ON REMAINING PROPOSED RULES

- A. Failure to address these concerns or amend the rules to incorporate these proposals would be antithetical to a defense counsel's ethical and professional duty to investigate and prepare a defense and would contradict standard

³ Available online at <https://www.iowajustice.org/discoveryrule2020>



procedures set forth by the American Bar Association (ABA). The current ABA Standards highlight and amplify defense counsel's obligations to investigate.

1. ABA Standard 4-4.1, "Duty to Investigate and Engage Investigators"⁴ states:

"(a) Defense counsel has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges.

(b) The duty to investigate is not terminated by factors such as the apparent force of the prosecution's evidence, a client's alleged admissions to others of facts suggesting guilt, a client's expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt.

(c) Defense counsel's investigative efforts should commence promptly and should explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter, consequences of the criminal proceedings, and potential dispositions and penalties. Although investigation will vary depending on the circumstances, it should always be shaped by what is in the client's best interests, after consultation with the client. Defense counsel's investigation of the merits of the criminal charges should include efforts to secure relevant information in the possession of the prosecution, law enforcement authorities, and others, as well as independent investigation. Counsel's investigation should also include evaluation of the prosecution's evidence (including possible re-testing or re-evaluation of physical, forensic, and expert evidence) and consideration of inconsistencies, potential avenues of impeachment of prosecution witnesses, and other possible suspects and alternative theories that the evidence may raise.

(d) Defense counsel should determine whether the client's interests would be served by engaging fact investigators, forensic, accounting or other experts, or other professional witnesses such as sentencing specialists or social workers, and if so, consider, in consultation with the client, whether to engage them. Counsel should regularly re-evaluate the need for such services throughout the representation.

(e) If the client lacks sufficient resources to pay for necessary investigation, counsel should seek resources from the court, the government, or donors. Application to the court should be made *ex parte* if

⁴ Available online at https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/



appropriate to protect the client's confidentiality. Publicly funded defense offices should advocate for resources sufficient to fund such investigative expert services on a regular basis. If adequate investigative funding is not provided, counsel may advise the court that the lack of resources for investigation may render legal representation ineffective."

2. The Iowa Rules of Professional Responsibility 32:1.1 further require that "[a] lawyer shall not handle a matter without adequate preparation in the circumstances." Failure to address the above-listed considerations places defense counsel in a position where they must consider their ethical and professional obligations while being hindered by the existing and proposed rules to provide effective assistance of counsel to their clients.
3. Further, defense counsel is often threatened by the State that should the defendant choose to conduct discovery, or upon the taking of depositions, all potential plea negotiations will be withdrawn. The fundamental role of defense counsel, which includes exploring, discovering and testing the strengths of the State's case, is being called into question by the practice of some prosecutors who condition their plea offer on the forbearance of defense counsel to perform a basic and essential duty of conducting pretrial discovery. This practice arguably renders defense counsel's representation ineffective, whereby defense counsel will communicate a plea offer to a defendant but must note that the plea offer will be withdrawn upon defense counsel's conducting of discovery.
4. The above "plea bargain without discovery or offer is withdrawn" practice employed by the State calls into question whether any subsequent plea is actually voluntarily and intelligently given. Further, the question of whether defense counsel has performed its essential duty to the client remains when such a threat has been imposed on the defense, paired with the disparate abilities to conduct discovery which currently exist between the State and the defendant, which existed in the old rules but which has been exacerbated by the proposed amendments to the rules. It is IAJ's hope, in the furtherance of the administration of equal justice under the law, that the Supreme Court will consider the above proposals outlined by IAJ.
5. Consideration should be given to providing comments to the rules similar to comments in the ethical rules which provides reasoning as to why changes and eliminations to rules were made.

Comments respectfully submitted by the Iowa Association for Justice on July 13, 2020.

FILED

JUL 14 2020

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07/14/2020 09:14 AM



[EXTERNAL] Chapter 2 Amendments
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July 15, 2020

Dear Supreme Court and Rules Committee,

Thank you for the opportunity to comment on the proposed revisions to the Iowa Rules of Criminal Procedure. We write to express our concern about the proposed changes to the rules. Many of the proposed changes work to further disadvantage the accused and shift the balance of power even more toward the prosecution. In addition, clarification is needed in several areas that the proposed amendments did not address.

Rule 2.2(4) [page 2-3, lines 21-12] governs **preliminary hearings**. As amended it would eliminate the current provision in rule 2.2(4)(a) that does not require a preliminary hearing when a trial information is filed or grand jury indictment is found. This provision should not be eliminated. Once a trial information is approved, a preliminary hearing serves no useful purpose. Further the current provision encourages the prompt filing of trial informations, and it should be retained.

Rule 2.8(2)(c) [page 13, lines 15-18] would require that **the defendant be placed under oath during the guilty plea colloquy**. This provision adds nothing positive to the guilty plea procedure that has existed for decades. It does, however, give the State a tool to punish any defendant who attempts to withdraw their guilty plea. The threat of a perjury charge will deter many defendants with a legitimate basis to withdraw the guilty plea from proceeding for fear of being charged with perjury. This could increase the request for *Alford* pleas, which can then be used against defendants in sentencing. Further, the provision that would allow the prosecutor to question defendants under oath at the guilty plea will needlessly subject defendants to liability with limited protections. For example, there are lots of facts that can be admitted that are not necessary to prove the offense but are aggravating. If they are elicited by a prosecutor at the plea then they would be deemed admitted/proven even if not necessary to establish a factual basis for the crime. That means the judge could then consider those facts at sentencing. I think this is extremely problematic. This provision will make guilty plea hearings more adversarial with no offsetting benefit.

Rule 2.11(10) [page 18, lines 24-28] governs **change of venue**. The proposed rule does not have a provision for when it becomes apparent during jury selection that a fair jury cannot be seated in the county. Within the last year this exact situation occurred. For reasons that were not apparent to either party prior to voir dire, it became very clear that a fair and impartial jury could not be seated. The trial was then moved to another county.

Rule 2.11(5) [eliminated] provided for the filing of a **motion for a bill of particulars**. The proposed change eliminates this provision. The use of this provision, or at least the threatened use of this provision, is essential to defendants receiving fair notice of the charges against them. Too often the charging language in the trial information is so generic that in a multicount information it is impossible to distinguish one count from another. I strongly urge you not to remove this provision.

Rule 2.11(6) [page 17, lines 16-20] requires that **pretrial motions be filed within 40 days of arraignment**. Although the proposed rule changes do not change this provision, they do change the deadline for depositions. The proposed change to **rule 2.13(4)** [page 23, lines 15-19] extends **the timeline for taking depositions** in cases where speedy trial is waived. Although reasons for pretrial motions are sometimes immediately apparent, the full parameters of the motion and related issues are often not clear until discovery is completed. If the court chooses to extend the deadline for taking depositions, it should also extend the deadline for filing pretrial motions. To do otherwise is to require the defense to file motions without a full understanding of the facts. I urge the court to better align the provisions of rule 2.11(6) with the amended rule 2.13(4).

Rule 2.11(11)(c) [page 19, lines 29-36] expands the **access the state's experts have to defendants**. Granting additional access to defendants by state agents will further erode the defendant's right to remain silent and right to counsel. This is particularly true in the case of low functioning defendants. Even under the current rules, prosecution experts frequently ask questions that have more to do with establishing the elements of the offense rather than evaluating the affirmative defense. Given Iowa's liberal view on expert testimony, it will only be a matter of time before detectives will be conducting additional interviews of the defendant under the guise of expert evaluation of the defendant's affirmative defense. I strongly urge you to reject this provision.

Rule 2.11(11)(d) [page 20, lines 1-5] expands the requirement to **notice additional affirmative defenses**. I oppose this change to the rule on three grounds. First, as defense counsel your role is often that of a counterpuncher. This is particularly true in cases where depositions have not been taken. The final parameters of the defense strategy are often not decided until after key witnesses for the State have testified. The new rule will severely restrain the defendant's ability to put the State to its burden prior to finalizing a strategy. It is also likely that this increased notice requirement will increase the number of depositions and the time and costs associated with them by encouraging defense counsel to lock prosecution witnesses in before they have an opportunity to shape their testimony based upon the defense notice. My second concern is the current rule is already being used to shift the burden, by arguing that the notice concedes certain elements of the offense. If the court expands the notice requirement, there should be a clear provision in the rule that prohibits the prosecution or its witnesses from commenting on defense notices. Finally, the rules should clearly list what defenses are covered by this provision. I urge the court to reconsider the amended provision as written.

Rule 2.11(12)(H) [page 22, lines 3-7] was added to reduce **the need for the State to provide home addresses for law enforcement and other professionals**. This rule needs to be clarified.

Its intent at the time it was adopted was to allow the defense or the State to serve law enforcement and other professionals by serving their department or their office. This reduced the need for home addresses. The apparent contradiction between this and the personal service requirement in rule 2.15(3) has led some judges to conclude this provision is meaningless. Before this rule was adopted I could always personally serve witnesses at any location. If personal service is still required, this provision is meaningless and home addresses are still needed. Please clarify this rule so it better achieves its goal by eliminating the need for personal service of this protected class of witnesses.

Rule 2.13(3) [page 23, lines 9-11] adds a provision to allow an **objection to depositions in the interest of justice**. This vague and overly broad term is ripe for abuse. It will easily be used to delay depositions and manipulate the sequence in which depositions are taken. These delays will allow for more witness coaching. There will be no effective remedy to undo the harm caused by the use of this language to delay depositions.

Rule 2.13(6)(c)(2) [page 24, lines 13-18] governs the **depositions of minors** in certain cases. In addition to the confrontation clause issues that have been and will continue to be litigated, this rule needs to be strengthened to make it clear that real-time and private communication between defense counsel and the accused must be provided by the party making the request under this provision.

Rule 2.14(1) [pages 25-26 lines 29-28] governs **discovery**. The court should take this opportunity to modernize the discovery rules. I strongly urge you to make the disclosure of law enforcement video, including interview, body cam, and car, mandatory, or at least mandatory when a request is filed under 2.14(1)(b). If this a search for truth, should not both sides be able to see what actually happened?

Rule 2.15(2) [page 26, lines 26-30] governs **subpoena duces tecum** provisions. The court's ruling has limited the defendant's ability to subpoena and review materials critical to the preparation of a defense. It is obvious from the ruling that the court is unwilling to put the defense and prosecution on equal footing. At a minimum this rule should be revised to allow defendants to subpoena materials after giving notice to the State and allowing time for them to object.

Rule 2.15(3) [page 26, lines 31-32] governs the **service of subpoenas**. It prohibits parties from serving the subpoenas. The rule should be clarified to limit the "party thereto" language to the defendant and counsel of record. Other members of the office, including investigators and support staff, should be allowed to serve subpoenas.

Rule 2.17(2)(c)(3) [page 28, lines 19-21] **limits objections when there is a trial on the minutes**. This rule is likely to increase the number of actual trials. The minutes are far too often written by support staff that have no understanding of the rules of evidence. The minutes often have references to clearly inadmissible evidence such as hearsay and prior bad acts. The trial judge is perfectly capable of ruling on objections to specific parts of the minutes. As currently written, this provision will allow the court to sidestep the appealed issue by upholding

convictions based upon items in the minutes that would never be admissible in an actual trial. I strongly urge you to reject this change in the rules.

Rule 2.25 [page 46, lines 1-5] governs the use of a **bill of exceptions**. Admittedly this rule is cumbersome and rarely used, but that should not result in its elimination. This provision amounts to a failsafe when the court is unwilling or unable to allow proper record to be made. I urge the court to keep this provision.

Rule 2.27(4)(b) [page 50, lines 9-11] **allows the court to search** anyone at any time without even a showing of reasonable belief. This provision is offensive and an affront to the Fourth Amendment and article 1, section 8. At a minimum it should be revised to only allow for a weapons pat-down upon a showing or reasonable suspicion and even then, the person should have the right to refuse the pat-down if they are willing to leave the courthouse. Neither I nor any other member of the public should forfeit our rights every time I step into a courtroom to do my job or observe a public trial. I strongly urge the court to reject this new provision.

Rule 2.29(4) and (5) [pages 51-52, lines 31-4] requires **court appointed trial counsel to remain appellate counsel** until relieved by court order. Court appointed counsel should not be placed in a worse position than private counsel. Too often the defendant agrees that they do not wish to appeal, but later files some handwritten notice from jail or prison. I urge the court to amend this provision.

Rule 2.33(2)(a) [page 52, lines 32-35] limits the **right to a speedy indictment**. The new provision basically eliminates arrest as the triggering mechanism. It goes much further than *Williams*. In addition to all of the valid reasons outlined in *Wing*, this change will be particularly problematic in cases with co-defendants where one bonded out before the initial. They will be on completely different timelines, and a speedy trial for an incarcerated defendant can be denied because the codefendant was indicted at a much later date and has a much later speedy trial deadline.

Overall the amended rules shift the balance in favor of the prosecution, and it is our hope that the court will take a more evenhanded approach if it chooses to amend the rules.

Respectfully Submitted,

/s/ Paul W. Rounds

Paul W. Rounds
Public Defender

/s/ Katherine N. Flickinger

Katherine N. Flickinger
Assistant Public Defender

/s/ Michelle K. Wolf

Michelle K. Wolf
Assistant Public Defender

/s/ Alessandra E. Marcucci

Alessandra E Marcucci
Assistant Public Defender

/s/ Natalie J. Hedberg

Natalie J. Hedberg
Assistant Public Defender

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JUL 14 2020

CLERK SUPREME COURT



[EXTERNAL] Chapter 2 Amendments
Wright, Jeff to: rules.comments

07/14/2020 10:53 AM

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Attached are the comments to the Rules of Criminal Procedure of the State Public Defender.

Thank you,
Jeff Wright



Comments on Proposed Amendments to Iowa Rules of Criminal Procedure.docx

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JUL 14 2020



OFFICE OF THE

STATE PUBLIC DEFENDER CLERK SUPREME COURT

KIM REYNOLDS, GOVERNOR
ADAM GREGG, LT. GOVERNOR
JEFF WRIGHT, STATE PUBLIC DEFENDER

**COMMENTS
PROPOSED AMENDMENTS TO IOWA RULES OF CRIMINAL
PROCEDURE**

On behalf of the Office of the State Public Defender, thank you for the opportunity to comment on the proposed amendments to the Iowa Rules of Criminal Procedure under consideration by the Court. My only comments relate to certain administrative aspects of the new proposed rules which will have an impact on the Central Administrative Office. It is my understanding the State Appellate Defender and other public defenders will be submitting comments separately. Due to the utmost importance this Office attaches to the proposed rule changes being contemplated, as well as the practical knowledge, unique perspective and unwavering commitment to our indigent defense justice system our public defenders possess, this Office respectfully urges the Iowa Supreme Court and the Iowa Rules of Criminal Procedure Review Task Force to give high regard to the separate comments being submitted by our public defenders.

Rule 2.15 Subpoenas.

[P26, L21-P27, L12]

Under proposed Rule 2.15(3) [P 26, LL31-32], a subpoena may be served by any adult person who is not a party thereto. The Office of the State Public Defender has an interest in making sure this proposed provision is not construed to create an unnecessary, adverse fiscal impact on the Office of State Public Defender. If this provision were construed to prohibit the now common practice of having a public defender investigator serve a subpoena for a public defender employed in the same

public defender office having the subpoena issued, it will have a major adverse financial impact on this Office's budget, with no corresponding benefit to the criminal and juvenile justice systems. I am not aware of any problems or complaints with the current procedures which allow a public defender investigator to serve a subpoena for the public defender office in which the investigator is employed. This concern could be addressed in a number of ways. One possible way would be to add an additional subparagraph "g" to Rule 2.15(3) to state: "g. Nothing in this Rule shall be construed to prohibit a public defender investigator from serving a subpoena on behalf of the public defender office employing the investigator."

Rule 2.28 Right to appointed counsel.

[P50, LL15-26]

Iowa Code Section 908.2A pertains to the appointment of an attorney to represent an alleged parole violator in a parole revocation proceeding. Of course, in a parole revocation proceeding, the alleged violator always faces the possibility of incarceration. However, in the case of a parole revocation proceeding, the Iowa Legislature has decided to require additional findings before an attorney is entitled to a court appointed attorney. This Central Administrative Office is concerned regarding the conflict or potential conflict between the proposed rule and Iowa Code Section 908.2A. This conflict could be resolved by amending Lines 20-22 on Page 50 of the proposed rules to read: "...the court through appeal, including motions to correct illegal sentences, probation revocation hearings, and parole revocation hearings in which the additional conditions of Iowa Code Section 908.2A are met, unless the defendant waives such appointment." Other than this needed clarification, I see all the changes proposed in Rule 2.28 to be positive.

Rule 2.29 Withdrawal and duty of continuing representation.

[P50, L28-P52, L4]

My only comment is to point to the need for a conforming change to Iowa Rule of Appellate Procedure 6.109(5) which makes reference to Iowa Rule of Criminal Procedure 2.29(6) when there will be no subsection 6 if the proposed amended Rule 2.29 is adopted.

Rule 2.72(6) Review by supreme court.

[P.64, L 32-P65, L2]

Proposed Rule 2.72(6) requires the defendant to complete an appeal in the district court prior to seeking discretionary review with the Supreme Court. [P. 64 L32-33]. This requirement is likely to increase indigent defense costs and waste judicial resources. Under Iowa Code Section 814.6(2)(d) (Supp. 2020), a defendant may seek discretionary review of a simple misdemeanor conviction without pursuing an appeal in the district court. The current process conserves resources, especially when the defendant has other indictable offenses under review as an appeal of right. When a discretionary review is granted and related convictions are pending on direct appeal, the cases can be consolidated for appellate review which saves time and resources.

Additionally, it is not uncommon for an appeal from a simple misdemeanor conviction to be mistakenly filed. Iowa Code Section Iowa Code Section 814.6(2)(d) allows appellate counsel to seek discretionary review pursuant to Iowa Rule of Appellate Procedure 6.108. This discretionary review process conserves resources. Often the mistake is not discovered within the 10-day time period for filing the appeal in the district court. If the defendant is precluded from seeking discretionary review, the defendant will then be limited to postconviction relief and an appeal, if postconviction relief is denied in the district court. Allowing a discretionary review is preferable, conserves judicial and indigent defense resources, and is consistent with Iowa Code Section 814.6(2) (d).

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J. Wright', with a long horizontal stroke extending to the right.

Jeff Wright
State Public Defender
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515-242-6158
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JUL 14 2020

CLERK SUPREME COURT



[EXTERNAL] Letter re: Chapter 2 Amendments
Klinefeldt, Nicholas A. to: rules.comments@iowacourts.gov

07/14/2020 11:44 AM

History: This message has been forwarded.

1 attachment



Klinefeldt Letter re chapter 2 amendments.docx

Attached please find my letter regarding chapter 2 amendments. Thank you.

Nick

Nicholas A. Klinefeldt

Partner

nick.klinefeldt@faegredrinker.com

Connect: vCard

+1 515 447 4717 direct / +1 515 321 3850 mobile

Faegre Drinker Biddle & Reath LLP

801 Grand Avenue, 33rd Floor

Des Moines, Iowa 50309, USA

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Nicholas A. Klinefeldt
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CLERK SUPREME COURT
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July 14, 2020

VIA EMAIL

Clerk of the Iowa Supreme Court
1111 East Court Avenue
Des Moines, IA 50319
Email: rules.comments@iowacourts.gov

Re: Chapter 2 Amendments

To Whom it May Concern:

I write concerning the proposed amendments to chapter 2 of the Iowa Court Rules.

I write not on behalf of my firm but in my individual capacity as both a criminal defense attorney and former United States Attorney. By way of background, I have represented clients in criminal matters across the country and in both federal and state court. I am currently the co-leader of the White Collar Defense & Investigations practice at an Am Law 50 law firm. Prior to my current role, I served for six years as the presidentially-appointed United States Attorney for the Southern District of Iowa. In that role, I served as the chief law enforcement official and oversaw the entire criminal docket for the Southern District of Iowa. My duties included not only reviewing and approving every criminal charge brought by the U.S. Attorney's Office, but also developing and implementing a new discovery policy in that office as well as personally prosecuting cases. On a national level, I also served as the co-chair of the Attorney General's Advisory Subcommittee on Criminal Practice – which advised the Attorney General of the United States on discovery and sentencing matters. In that capacity, I served as the point person for the U.S. Attorney community in developing a newly-revised national policy concerning a federal prosecutor's duty to produce to a criminal defendant potentially exculpatory information.

I am greatly concerned about the proposed amendments and their impact on the rights of criminal defendants and our system of justice. In particular, I am concerned about the amendments that would (1) limit depositions to minuted witnesses (Rule 2.13(2)(a)); (2) get rid of the ability of criminal defendants to subpoena witnesses at pre-trial hearings (Rule 2.15(1)); (3) eliminate the ability of criminal defendants to issue subpoenas duces tecum (Rule 2.15(2)); and, (4) eliminate the ability of criminal defendants to request a bill of particulars to find out exactly what they are being charged with before being taken to trial (Rule 2.11(5)). These are all rights that are important to our justice process in Iowa.

The adoption of any amendments that would reduce the ability of criminal defendants to defend themselves would be very dangerous. Our criminal justice system is built upon the presumption of an adversarial system – and that requires that each side be fully equipped to perform his or her duties. While a prosecutor is legally obligated to produce to a defendant any exculpatory information in his or her possession, custody or control, a prosecutor is not legally bound to

investigate and discover exculpatory information. Accordingly, criminal defendants must be fully equipped to investigate and discover that information themselves. Our justice system depends on it.

Moreover, we would be remissed as a legal community not to consider current events. The Black Lives Matter movement raises important issues that still need to be addressed. My expectation is that criminal justice reform will continue to be a topic of discussion. In the meantime, I would respectfully submit that this is the wrong time to restrict a criminal defendant's rights to obtain potentially exculpatory information.

In conclusion, I urge that any amendments that would restrict the rights of criminal defendants be rejected at this time.

Thank you for your consideration.

Very truly yours,

A handwritten signature in black ink, appearing to read "N. Klinefeldt". The signature is fluid and cursive, with a large initial "N" and a long, sweeping underline.

Nicholas A. Klinefeldt

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JUL 14 2020



[EXTERNAL] Chapter 2 Amendments
Nick Sarcone to: rules.comments@iowacourts.gov

CLERK SUPREME COURT
07/14/2020 01:07 PM

History: This message has been forwarded.

1 attachment



comment rules.docx

Thank you!

Nick

Nicholas A. Sarcone

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CLERK SUPREME COURT

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Dean Stowers, Attorney at Law
Nicholas A. Sarcone, Attorney at Law
Peter Ickes, Attorney at Law
Amy Pille, Legal Assistant

July 14, 2020

VIA EMAIL

Clerk of the Iowa Supreme Court
1111 East Court Avenue
Des Moines, IA 50319
Email: rules.comments@iowacourts.gov

Re: Chapter 2 Amendments

Dear Justices of the Iowa Supreme Court and Rules Committee Members:

I write in regards to the proposed changes to the Rules of Criminal Procedure. I fully support and endorse the comments made by the Iowa Association for Justice, which I helped draft. I also support the comments and concerns raised by the likes of Robert Rigg, Nicholas Klinefeldt, and Erica Nichols, among many others. I write separately to explain how we arrived at this point and why, therefore, the result is so disappointing.

In late 2017, I requested that Lisa Davis-Cook, Iowa Association for Justice Director of Government Affairs, ask Justice Cady for a meeting with myself and other members of the Iowa Association for Justice Criminal Core Group. At the time, I had been mulling over some proposed changes to the Iowa Rules of Criminal Procedure, including changes to the Subpoena Rule (2.15), Discovery Rule (2.14) and a new rule for conditional pleas. I believed the Rules needed updating. I had previously practiced in the State of Florida and Florida's Rules were much different and, in my opinion, much fairer to each side. I had also canvassed the discovery and subpoena rules in every other state and found that almost every state provided for more mandatory disclosures and many explicitly contained procedures for defense subpoenas. Thus, I felt that Iowa had fallen behind the national norms and I anticipated Justice Cady might be interested in what we had to say about it.

Justice Cady graciously agreed to meet with myself, Lisa, and a number of other IAJ Criminal Core Group members. I presented for about thirty minutes on the rules issues and Justice Cady

asked excellent questions. We also discussed various topics we felt were inhibiting our abilities as criminal defense attorneys to do our jobs. Justice Cady listened intently. The entire presentation was an effort to modernize and level the playing field between the State and the Defendant. In short, we point out the deficiencies and suggested remedies. It seemed at the time Justice Cady was in general agreement something should be done. He closed by telling us he would discuss the matter with the Court.

A few weeks (or months I cannot specifically recall) later, the Court announced the Criminal Rules Committee. Naturally, at the time I was pleased although I was concerned that a committee would get bogged down in conflict between prosecutors, defense lawyers and judges and ultimately not be able to do much of anything. Shortly after the announcement, I ran into Justice Cady in the Capitol. He reached out his hand, shook mine and told me that I should be very proud of myself and that I was the reason the Criminal Rules Committee had been formed. It goes without saying I was proud, proud to be complimented by Justice Cady whom I admired greatly.

That was then, and of course this in now. I need not get into detail about these proposed rules as I believe the other comments I referenced above, do that. I simply want to note that I do not believe these proposed rules have any relationship to the spirit or purpose for which this committee was formed. The proposed rules widen the playing field between the defendant and the State, they are less fair and they do not reflect changes to any of the items discussed in the meeting with Justice Cady several years ago; changes which were the impetus for the creation of this committee (note* several of those documents presented at that meeting are footnoted in the IAJ Comments). The result is not an overhaul of the Rules. It is an updating of syntax and reflects the fact that the prosecutors and judges on the committee were of like mind on issues. What I feared about using the committee process ultimately came true.

I believe that the only way to update the Rules and bring them in line with current national trends and standards of fairness, is for the Court¹ to consider the issues raised in the various comments and make its own changes. A committee composed of practicing prosecutors, judges (who may have been prosecutors) and defense lawyers will never get there. If a committee is necessary then it should be composed largely of academic minds with a few practitioners. I understand the committee worked hard and certainly do not mean to denigrate any person on the committee. Many members are my friends, but the results are not good, are not in line with the purposes for which the committee was created, do not reflect current national standards and are ultimately unjust.

Sincerely,

Nicholas A. Sarcone

¹ I would not that while I understand Justice Mansfield chaired the committee, I also realize it was a largely figurehead role and I don't ascribe any fault I find in these proposed to rules, to his leadership.

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JUL 14 2020

CLERK SUPREME COURT



[EXTERNAL] Chapter 2 Amendments

Ben Bergmann to: rules.comments@iowacourts.gov

07/14/2020 02:03 PM

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1 attachment



07.14.2020 Comments on Changes to Iowa Rules of Criminal Procedure.docx

I attach my comments on the proposed changes to the Iowa Rules of Criminal Procedure. Please confirm that you have received it. Thank you!

BENJAMIN D. BERGMANN

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515-284-5737



www.parrishlaw.com

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JUL 14 2020

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ROBERT P. MONTGOMERY
R. BEN STONE
OF COUNSEL

ELIZABETH KRUIDENIER
(1926-2011)

July 14, 2020

Sent via email (rules.comments@iowacourts.gov) ONLY

Justices of the Iowa Supreme Court
1111 E. Court Avenue
Des Moines, IA 50319

Re: Proposed Amendments to Iowa Court Rules of Criminal Procedure Ch. 2

Dear Honorable Justices:

I write you today to lodge my personal objection to the proposed changes to the rules of criminal procedure. I join the specific objections listed by my colleagues Nick Kleinfeldt and Erica Nichols Cook in their letters, and by this express reference incorporate them herein.

I would like to address some general concerns that I have with proposed changes. First, the proposed changes further allow the fox to guard the hen house. It places the power of discovery by a criminal defendant in the hands of the attorney trying to convict him, the prosecutor. No other area of the law conceives of such silliness – why would it be acceptable in criminal cases? Instead of the proposed rules, this Court should enable and encourage defense attorneys to zealously defend their clients by seeking out any and all discovery that would give rise to just one reasonable doubt, doubt sufficient to earn their client a verdict of not guilty. Such liberal discovery will undoubtedly create a more fair and just Iowa, where sunshine will bring to light both the evidence that suggests a conviction, but also evidence that suggests reasonable doubt.

I am also concerned with the idea of white-washing possible errors and ineffective assistance of counsel. Requiring pleas to be taken under oath and allowing for the destruction of evidence simply seeks to avoid necessary and constitutional reviews of the constitutionality of a conviction. It works against those that seek post-conviction relief, and against undoubtedly the most noble of attorneys, attorneys that free those who have been wrongly convicted. There are wrongly convicted defendants in Iowa.

PARRISH KRUIDENIER DUNN BOLES
GRIBBLE GENTRY BROWN & BERGMANN L.L.P
LAWYERS

July 15, 2020

Page 2

Too many Iowans suffer ineffective assistance of counsel. Even more Iowans suffer having mediocre to poor counsel, counsel that could have done better, but met the bare minimum definition of effectiveness. Rather than do what we can and should do to root out both poor counsel and ineffective counsel, these efforts seek to put a white coat of paint on growing wet brown spot on the ceiling of justice. Hiding such injustice does not improve the society of the State of Iowa, it merely breeds contempt for its justice system.

A recent example shows the dangers of these proposed rules. A Des Moines Register reporter was recently arrested at a Black Lives Matter protest near Merle Hay Mall in Des Moines. She has requested video of her arrest. The Polk County Attorney's Office is resisting her request, claiming it is too expensive. Under these new rules, prosecutors would be able to make these same arguments for more serious crimes.¹

These changes smack of convenience to prosecutors and money-saving for the State. I shed no tears for either. If the State wishes to file charges against an Iowan and prove their guilt beyond a reasonable doubt, they should do that with an open-file policy, where the entire discovery file of the prosecutor is available to defense counsel. That file should be available electronically to defense counsel. Furthermore, defense counsel should have equal subpoena power, not more, not less, than the prosecutor. In a trial in which a defendant must be proven guilty beyond a reasonable doubt, it would make more sense to give the *defendant* an advantage when it comes to discovery. These rules mindlessly do the opposite.

Perhaps it is because I have recently turned forty years old, and I have noticed that the years go by faster and faster, but I have been thinking about what I would want people to think and know about me when I am gone. I want the record to be clear that I stand on the side of fairness and justice. I stand on the side of letting an Iowan and her attorney get the evidence she needs to fight her case when the weight and power of the entire state government comes down upon her. I encourage you all to think about what rules would be fair and just, and what rules move justice forward. Are you all going to be proud to have signed your name to these rules? Or, would you be worried that, as

¹ <https://www.desmoinesregister.com/story/news/crime-and-courts/2020/07/14/andrea-sahouri-register-reporter-charged-covering-protests-prosecutors-debate-evidence-george-floyd/5383150002/>

PARRISH KRUIDENIER DUNN BOLES
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LAWYERS

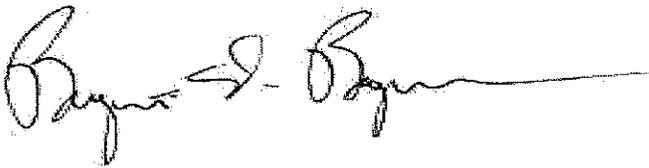
July 15, 2020
Page 3

these years pass by faster and faster, your time might be known as “the bad old days?” History judges us all, and “the arc of the moral universe is long, but it bends toward justice.” You all have an opportunity to shorten the curve, or lengthen it, because the just and right thing to do here is obvious, either to you now, or to others in the future.

I thank you in advance for your consideration. Should you have any questions, please do not hesitate to contact me.

Very truly yours,

PARRISH KRUIDENIER DUNN BOLES GRIBBLE
GENTRY BROWN & BERGMANN, LLP

A handwritten signature in black ink, appearing to read "Benjamin D. Bergmann", with a long horizontal flourish extending to the right.

BY: _____

BENJAMIN D. BERGMANN
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JUL 14 2020

CLERK SUPREME COURT

07/14/2020 02:18 PM



[EXTERNAL] Chapter 2 Amendments
Lucey, Martha to: rules.comments

History: This message has been forwarded.

1 attachment



Appellate Defender Comments to Proposed Rules of Criminal Procedure.docx

Good afternoon -

Attached are the comments submitted on behalf of the State Appellate Defender's Office. If I can be of further assistance, please contact me.

Martha Lucey

State Appellate Defender

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321 E. 12th Street

Des Moines, IA 50319

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JUL 14 2020

OFFICE OF THE STATE APPELLATE DEFENDER
Martha J. Lucey, State Appellate Defender

CLERK SUPREME COURT

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July 14, 2020

Iowa Supreme Court
Clerk of the Iowa Supreme Court
1111 East Court Avenue
Des Moines, IA 50319
via email: rules.comments@iowacourts.gov

Re: Comments on Proposed Amendments to the Rules of Criminal Procedure (Chapter 2)

Dear Chief Justice Christensen, Justices, and members of the Task Force:

The following comments are offered on behalf of the State Appellate Defender's Office. Thank you for the opportunity to comment on the proposed amendments to the Rules of Criminal Procedure under consideration by the Supreme Court, and we appreciate the extension of the comment period. We acknowledge the significant endeavor of the Task Force in the years-long process to submit the Proposed Rules.

INDICTABLE OFFENSES

Rule 2.2 Proceedings before the magistrate. (p. 1 L11-p. 3 L12)

Rule 2.2(3) *Events to occur at the initial appearance.* (p. 1 L30-p. 2 L20)

We ask the Court to consider adding a provision in **Proposed Rule 2.2(3)** which requires the magistrate to include any codefendant name(s) in the initial appearance order. This would allow court-appointed counsel to quickly determine a conflict and, if a conflict exists, to promptly return the appointment to the district court for appointment of substitute counsel. Such a requirement may necessitate law enforcement to include this information in the complaint. Law enforcement generally knows this information and includes details of codefendant involvement in police reports which allows the county attorney to charge multiple defendants in the Trial Information. See **Proposed Rule 2.6(2)** (p. 10 L29-p. 11L7). **Rule 2.2(3)(e)** (p. 2 L14-20).

Consistent with **Proposed Rule 2.2(4)(a)** (p. 2 L21-p. 3 L12), **Proposed Rule 2.2(3)(e)** (p. 2 L14-20) provides the timelines for the magistrate at the initial appearance to schedule a preliminary hearing. Current Rule 2.2(4) clarifies a preliminary hearing will not

be held when the defendant is indicted by a grand jury or the Trial Information is filed against the defendant or the preliminary hearing is waived. **Proposed Rule 2.2(3)(e)** only retains the waiver of a preliminary hearing as an exception to the scheduling of a preliminary hearing. While it may be a rare occurrence where a defendant is indicted by grand jury or a Trial Information is filed prior to formal arrest or citation, the Court should retain the current language for such circumstances.

Rule 2.2(4) Preliminary hearing. (p. 2 L21-p. 3 L12)

We suggest **Proposed Rule 2.2(4)** (p. 2 L21-p. 3 L12) contain a provision for the cancellation of a scheduled preliminary hearing if the Trial Information is filed prior to the commencement of the hearing. This clarification would be consistent with practice that once the Trial Information is approved by a judge, the purpose of a preliminary hearing has been achieved.

Rule 2.2(4)(d) Discharge of defendant. (p. 3 L1-6)

We are supportive of the addition in **Proposed Rule 2.2(4)(d)** (p. 3 L4-6) that if probable cause is not found, the State cannot institute a subsequent prosecution for a serious misdemeanor.

Rule 2.2(4)(e) *Preliminary hearing testimony preserved by stenographer or electronic recording equipment; production prior to trial.* (p. 3 L7-12).

We are supportive of **Proposed Rule 2.2(4)(e)** (p. 3 L10-12) which requires the transcript be made available to the defendant upon request.

Rule 2.3 *The grand jury.* (p. 3 L14-p. 7 L23).

We are supportive of the modification to Rule 2.3. However, there appears to be conflict between **Proposed Rule 2.3(6)(b)** (p. 4 L31-p. 5 L2) and **Proposed Rule 2.3(6)(d)(3)** (p. 6 L1-4). **Proposed Rule 2.3(6)(b)** (p. 4 L31-35) provides that the court may appoint a person who is not a member of the grand jury as clerk. If the court makes no such appointment, the grand jury shall appoint as its clerk a member who is not the foreperson. **Proposed Rule 2.3(d)(3)** (p. 6 L2-4) provides that “any clerk” is barred from the grand jury’s deliberation. It is unclear if the intent is to bar a grand jury member clerk from deliberations or only bar the court-appointed clerk(s). **Proposed Rule 2.3(d)(3)** should be clarified.

Rule 2.6 Multiple offenses or defendants; pleading special matters. (p. 10 L21-p. 11 L23)

Rule 2.6(4) Other enhancements. (p. 11 L 13-19).

We are supportive of **Proposed Rule 2.6(4)** (p. 11 L13-19) which requires the prosecution to plead all sentencing enhancements in the Trial Information. This requirement will provide the defendant notice of all possible penalties. It will also prohibit the State from seeking and/or the district court from imposing minimum sentences or enhanced penalties without proper notice and pleading.

Rule 2.7 Warrants and summonses. (p. 11 L25-p. 12 L19)

Rule 2.7(2) Form. (p. 11 L32-p. 12L2).

We are supportive of **Proposed Rule 2.7(2)** (p. 11 L33) which authorizes only a judge to sign a warrant. *Compare* Current Rule 2.7(2)(a) (warrant shall be signed by the judge or clerk”).

Rule 2.7(4) Forfeiture of bail; warrant of arrest. (p. 12 L16-19)

Proposed Rule 2.7(4) (p. 13 L17-18) retains the language that the court may direct the clerk to issue a warrant for the defendant’s arrest. This is consistent with Current Rule 2.23(2) (“[] the court, in addition to the forfeiture of the undertaking of bail or money

deposited, may make an order directing the clerk, [], to issue a warrant ["]"). **Proposed Rules 2.7(2)** (p. 11 L33) and **2.7(4)** (p. 13 L17-18) are inconsistent. We suggest that **Proposed Rule 2.7(4)** be modified to conform with the intent that only a judge may sign a warrant.

Rule 2.8 Arraignment and plea. (p. 12 L21-p. 15 L8)

Rule 2.8(2) Pleas to the indictment. (p. 13 L6-p. 14 L30)

Rule 2.8(2)(a) In general. (p. 13 L7-10).

Proposed Rule 2.8(2)(a) eliminated the language “At any time before judgment, the court may permit a guilty plea to be withdrawn and a not guilty plea substituted.” The Summary of Proposed Changes to the Iowa Criminal Rules of Procedure (Summary) states the court’s discretionary authority to allow a guilty plea to be withdrawn is contrary to other provisions in the rules. Summary p. 4. We disagree that the provision is contrary to another Rule and request the Court retain this language.

This Court has recognized that the district court’s discretionary authority to permit a defendant to withdraw a guilty plea as provided in Current Rule 2.8(2)(a) is different than Rule 2.24(3)(Motion in arrest of judgment). Ryan v. Iowa State

Penitentiary, 218 N.W.2d 616, 620 (Iowa 1974) (challenging court's refusal to allow Ryan to withdraw his guilty plea was an aside to his challenge to lack of factual basis.); State v. Ramirez, 400 N.W.2d 586, 588 (Iowa 1987) (internal citations omitted) (“[Former Iowa Code] section 777.15 held that it was discretionary with the trial court whether to grant or deny a withdrawal of a plea of guilty. We apply the same interpretation to rule 8(2)(a). Defendant concedes there was no errors in the plea proceeding . . .”).

Rule 2.8(2)(b) *Pleas of guilty*. (p. 13 L11-p. 14L30)

We ask the Court to take this opportunity to authorize conditional guilty pleas and develop a procedural rule to implement conditional guilty pleas and *Alford* pleas. Most Trials on the Minutes are done merely to preserve error. Conditional guilty pleas and *Alford* pleas would save judicial resources by eliminating the need for a waiver of jury trial, a trial, even if only on the Minutes, and a finding of fact, conclusions of law, and verdict. The Rule authorizing a conditional guilty plea and *Alford* plea could be modeled after Federal Rule of Criminal Procedure 11(a)(2).

Additionally, if the Court adopts **Proposed Rule 2.8(2)(b)(6)** (p. 14 L1-2), in addition to the comments below, we suggest the Court

include a provision that an appeal from a conditional guilty plea or *Alford* plea to challenge the specified pretrial ruling is “good cause” to appeal from a guilty plea. We propose:

Conditional Guilty Plea. With the consent of the court and the state, a defendant may enter a conditional plea of guilty or *Alford* plea, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. The written notice establishes “good cause” to appeal. A defendant who prevails on appeal may then withdraw the plea.

Rule 2.8(2)(b)(1) (p. 13 L16)

Proposed Rule 2.8(2)(b)(1) (p. 13 L16) substitutes “elements” from the Current Rule 2.8(2)(b)(1)’s use of “nature.” We suggest that the Rule state: “The nature and elements of the offense to which the plea is offered.” See ABA Standard 14-1.4(a)(i)¹ (“nature and elements of the offense”). The “nature” of the offense includes the name of the offense (i.e. Theft in the second degree) and the level of the offense (a Class C felony). This suggestion recognizes that Rule 2.8(2)(b)(2) requires the court inform the defendant of the

¹ Unless otherwise noted, ABA Standards cited herein are available at https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_guiltypleas_blk/#1.4

maximum and minimum penalty. But that does not necessarily include the level or classification of the offense and the defendant may not be informed that the offense is a felony.

Rule 2.8(2)(b)(2) (p. 13 L17-19)

While generally supportive of **Proposed Rule 2.8(2)(b)(2)** (p. 13 L17-19), we suggest the Court expand the rule to require advisement of the automatic consequences of a conviction. The Court has held that the defendant need not be informed of collateral consequences. State v. Carney, 584 N.W.2d 907, 908 (Iowa 1998) (“[T]he court is not required to inform the defendant of all indirect and collateral consequences of a guilty plea.”). However, there are some consequences that while not currently considered punitive are mandatory and automatic. The defendant should be fully informed of all automatic consequences of his/her plea. These consequences may include, but are not limited to: victim restitution, including the amount; suspension or revocation of driving privileges; requirement to register as a sex offender; the special parole provisions in Iowa Code Chapter 903B; disqualification from certain government benefits; loss of certain civil rights (right to vote, hold public office, serve on a jury, own

and/or possess a firearm); the forfeiture of property; and enhanced punishment if the defendant is convicted of another crime in the future. See ABA Standard 14-1.4(c) (recommending the defendant be advised of additional consequences); see also Fed. R. Crim. P. 11(b)(1)(H)-(M) (requiring the court to inform the defendant of the term of supervised release, any applicable forfeiture, the court’s authority to order restitution, the obligation to impose a special assessment, the obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors).

Rule 2.8(2)(b)(3) (p. 13 L20-26)

In State v. Diaz, the Court endorsed language from the ABA that counsel should advise defendants of “adverse consequences to the client’s immediate family.” State v. Diaz, 896 N.W.2d 723, 732 (Iowa 2017). We suggest the Court expand **Proposed Rule 2.8(2)(b)(3)** to be consistent with Diaz. Additionally, we suggest the Court specifically state the district court should not inquire into the defendant’s citizenship or immigration status. Lastly, we suggest that Rule 2.8(2)(b)(3) use the same terms as used in Immigration and Nationality Act, i.e. “removal” instead of “deportation”;

“inadmissibility” instead of “inability to reenter the United States.”

We propose the following language (changes in italics):

(3) That a criminal conviction, deferred judgment, or deferred sentence may affect a defendant’s status under federal immigration laws. The court shall inform the defendant, *without inquiring about the defendant's immigration status*, that if the defendant is not a citizen of the United States, the effects may include *removal, bars to relief from removal, inadmissibility*, mandatory detention in immigration custody, ineligibility for release on bond during immigration proceedings, *denial of citizenship, adverse consequences to immediate family*, and increased penalties for unauthorized reentry into the United States.

Rule 2.8(2)(b)(6) (p. 14 L1-2)

Proposed Rule 2.8(2)(b)(6) (p. 14 L1-2) is in response to Iowa Code section 814.6(1)(a)(3) (Supp. 2020)(amended by 2019 Iowa Acts, ch. 140, § 28). It is premature to include this subsection in Rule 2.8(2)(b). The meaning and validity of the statute is unsettled. The Court has defined “good cause” in only one context. State v. Damme, 944 N.W.2d 98, 100 (Iowa 2020)(concluding that in the context of sentencing error “good cause” means a “legally sufficient reason.”). Until the validity and meaning of amended Iowa Code section 814.6(1)(a)(3) is settled by the Court, the inclusion of this

language will only cause confusion and discourage appellate review. We ask the Court not adopt **Proposed Rule 2.8(2)(b)(6)** (p. 14 L1-2).

If the Court determines **Proposed Rule 2.8(2)(b)(6)** should be included, we suggest that the language specifically track the language of the statute. Iowa Code § 814.6(1)(a)(3) (Supp. 2020)(“Right of appeal is granted the defendant from” “. . . [a] final judgment of sentence, except” “. . . [a] conviction where the defendant has pled guilty. This . . . does not apply to a guilty plea for a class “A” felony or in a case where the defendant establishes good cause.”).

Rule 2.8(2)(b)(7) (p. 14 L5-14) & **Rule 2.10(3)(b)(2)** *Rejection of conditional plea agreement.* (p. 16 L9-14)

Portions of **Proposed Rule 2.8(2)(b)(7)** (p. 14 L11-14) repeat portions of **Proposed Rule 2.10(3)(b)(2)** (p. 16 L. 12-14). We have no opposition to the defendant being fully advised at the time of the plea that the district court may reject the plea agreement and if the defendant persists in the guilty plea, he/she shall not have a *right* to withdraw the plea on the ground that the court did not follow the plea agreement. However, in **Proposed Rule 2.10(3)(b)(2)** (p. 16 L9-14), we urge the Court to retain the language in Current Rule

2.10(4). See Iowa R. Crim. P. 2.10(4) (“If the defendant persists in the guilty plea and it is accepted by the court, the defendant shall not have the right subsequently to withdraw the plea *except upon a showing that withdrawal is necessary to correct a manifest injustice.*”) (emphasis added). See ABA Standard 14-2.1(b) (“court should allow the defendant to withdraw the plea whenever the defendant, upon a timely motion for withdrawal, proves that withdrawal is necessary to correct a manifest injustice.”); ABA Standard 14-3.3(e) (“In all other cases where a defendant pleads guilty pursuant to a plea agreement and the judge decides that the final disposition should not include the contemplated charge or sentence concessions, withdrawal of the plea may be permitted as set forth in standard 14-2.1.”).

Rule 2.8(2)(c) *Manner and method of plea colloquy.* (p. 14 L15-18)

We do not support the requirement that a defendant be placed under oath for an in-court guilty plea. First, it is unclear what the change is intending to achieve. The ABA Standards do not require guilty pleas to be made under oath. ABA Standard 14-1.5 (determining voluntariness of plea); ABA Standard 14-1.6 (determining factual basis of plea). Nor does Federal Rule of

Criminal Procedure 11 require a guilty plea be made under oath. See Fed. R. Crim. P. 11(b)(1) (stating the defendant *may* be placed under oath). If the intent is to avoid having innocent persons plead guilty, the Rule will not achieve that goal. Schmidt v. State, 909 N.W.2d 778, 787 (Iowa 2018) (“[I]nnocent defendants plead guilty for reduced charges and shorter sentences.”). The only result of the Rule change is to make it more likely the county attorney will pursue perjury charges for a defendant who later challenges his/her plea. See **Proposed Rule 2.10(4)** (p. 16 L15-19)(making the use of plea inadmissible except criminal proceedings for perjury or false statement). Any challenge to a guilty plea whether it is a claim of actual innocent based upon a DNA exoneration or a claim asserting ineffective assistance of counsel may result in additional involvement in the criminal justice system. This will not fulfill the goal that convictions as entered provide a reliable public record and accounting of conduct and are not merely fictions. Cf. State v. Hack, 545 N.W.2d 262, 263 (Iowa 1996)(stating plea bargains should not be fictions).

Proposed Rule 2.8(4) (written guilty pleas to misdemeanors)(p. 14 L33-p. 15 L8) does not require the guilty plea

to be made under oath. However, an in-court guilty plea to a misdemeanor would require the plea to be made under oath. Will district associate courts not approve written guilty pleas unless signed under oath? Will thousands of hours be taken up in court just in case a misdemeanor defendant challenges the validity of his/her guilty plea? We are not advocating this Court require written pleas to be under oath. Such a requirement would add additional hurdles to an already overburdened misdemeanor docket. Sworn written guilty pleas would require a notarized signature. Could defense counsel notarize his/her client's signature or would defense counsel need to take an independent notary to the jail or client meeting to attest to the defendant's sworn admission? Such a requirement adds more burdens on an already overwhelmed criminal justice system where the vast majority of cases are resolved by a guilty plea.

If the Court adopts the provision requiring the defendant to be placed under oath for the guilty plea colloquy, we suggest **Proposed Rule 2.8(2)(b)** be modified to include an advisement that the State has a right, in a prosecution for perjury or false statement, to use any statement that the defendant gives under oath against the

defendant. See Fed. R. Crim. P. 11(b)(1)(A) (requiring advisement); Fed. R. Crim. P. 11 advisory committee's note, (1975 Enactment, B. Committee Action) ("In addition, and as a result of its change in subdivision (e)(6), the Committee thought it only fair that the defendant be warned that his plea of guilty (later withdrawn) or nolo contendere, or his offer of either plea, or his statements made in connection with such pleas or offers, could later be used against him in a perjury trial if made under oath, on the record, and in the presence of counsel. House Report No. 94-247.").

Proposed Rule 2.8(2)(c) (p. 14 L16-17) provides that "[t]he court shall question the defendant and, if necessary, may allow either counsel to question the defendant." The proposed language is overly broad. It is the court's duty to ensure a guilty plea is voluntary and supported by a factual basis. Iowa Rule Crim. P. 2.8(2)(b). The court should only be permitted to question the defendant regarding topics relevant to the charge to which the defendant is pleading. The prosecutor should not be permitted to directly question the defendant. At most, **Proposed Rule 2.8(2)(c)** should be modified to limit any questioning by the prosecutor or defense counsel to that necessary to establish a factual basis. We

are concerned that **Proposed Rule 2.8(2)(c)** would allow questioning of a defendant that would elicit information which would permit the sentencing judge to consider what would otherwise be unproven conduct/offense or elicit or attempt to elicit incriminating information.

Rule 2.8(2)(d) *Challenging pleas of guilty.* (p. 14 L19-24).

Proposed Rule 2.8(2)(d)(3) (p. 14 L23-24) provides “That failure to raise such a challenge in a motion in arrest of judgment shall preclude the right to assert them.” **Proposed Rule**

2.8(2)(d)(3) drops Current Rule 2.8(2)(d)’s language “*on appeal.*”

This is inconsistent with **Proposed Rule 2.8(4)(c)** (p. 15 L5-8),

Proposed Rule 2.19(8)(a)(7) (p. 36 L27-29), **Proposed Rule**

2.24(3)(a)(2) (p. 46 L5-7), and Current Rule 2.24(3)(a). The current language “on appeal” should be retained.

Rule 2.8(3) *Record of proceedings.* (p. 14 L31-32)

We suggest the Court clarify **Proposed Rule 2.8(3)** (p. 14 L31-32) that a stenographic record shall be made of all felony plea proceedings and any in-court misdemeanor plea proceedings.

Rule 2.8(4) *Pleas of guilty to serious or aggravated misdemeanors.*
(p. 14 L33-p. 15 L8)

Proposed Rule 2.8(4)(b) (p. 15 L3-4) requires that the prosecutor acknowledge the plea agreement within the written guilty plea. We are concerned this may pose practical problems. The difficulties may include the prosecutor who is assigned to the case is unavailable to sign off and others might refuse to sign off on a colleague's case which will result in a defendant being in jail longer and incurring additional jail fees. **Proposed Rule 2.8(4)(b)** also does not afford defense counsel the presumption he/she truthfully stated the agreement. We suggest two possible solutions. **Proposed Rule 2.8(4)(b)** could be modified to require the State to file an objection to the stated plea agreement if disputed within a specified time. Or **Proposed Rule 2.10(2)** (p. 15 L21-26) could instead require written plea agreement be filed in all cases involving a plea agreement. With either option, both parties would share the burden of an accurate record of the plea agreement.

Rule 2.11 Pleadings and motions. (p. 16 L21-p. 22 L7).

Proposed Rule 2.11 eliminated Motions for Bill of Particulars. See Current Rule 2.11(5). Motion for Bill of Particulars should be

retained. While the motion may not be a common issue raised in an appeal, its existence in the district court is vital when necessary circumstances arise. A Bill of Particulars is “a more specific statement of the details of the offense charged.” State v. Conner, 241 N.W.2d 447, 452 (Iowa 1976). “Its purpose is to give the defendant information which the indictment (or information) and minutes of testimony by reason of their generality do not give.” Id. There are circumstances where a Motion for Bill of Particulars is needed to provide adequate notice for the preparation of a defense, such as when multiple counts of the same offense are alleged but it is unclear what allegations encompass each offense.

If the intent is that a Motion for Bill of Particulars is still available in criminal cases by virtual of **Proposed Rule 2.11(4)(b)** (p. 17 L1-2), we suggest the Court add a comment. If **Proposed Rule 2.11(4)(b)** is not applicable, there is no other Rule of Criminal Procedure which would replace the Motion for Bill of Particulars. Discovery is not a substitute for notice of the allegations against the defendant to comport with procedural due process. We urge the Court to retain Current Rule 2.11(5).

Rule 2.11(4)(h) motions for separate interpreters. (p. 17 L8).

Proposed Rule 2.11(4)(h) (p. 17 L8) retains the requirement for pretrial motion for separate interpreters. See Current Rule 2.11(2)(g). The Proposed Rules removed Current Rule 2.6(4)(c) regarding defendants sharing an interpreter. Summary, p. 4; Proposed Rule 2.6 (p. 10 L21-p. 11 L23). It is unclear if there is a continued need for this subsection.

Rule 2.11(5) *Effect of failure to raise defenses or objections.* (p. 17 L12-15)

Proposed Rule 2.11(5) (p. 17 L12-15) is consistent with Current Rule 2.11(3). However, we suggest the Court replace “waiver” with “forfeiture”. “Waiver is different from forfeiture.” United States v. Olano, 507 U.S. 725, 733, 113 S.Ct. 1770, 1777 (1993). “Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the “intentional relinquishment or abandonment of a known right.”” Id. (quoting Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 (1938)).

Rule 2.11(11) *Defense Notices.* (p. 19 L1-p. 20 L11)

Rule 2.11(11)(c) *Examination of the defendant for purposes of other defenses* (p. 19 L29-36).

While we are uncertain of the intent of **Proposed Rule 2.11(11)(c)** (p. 19 L29-36), it likely is in response to State v. Rodriguez, 807 N.W.2d 35 (Iowa 2011). Rodriguez held “that when a defendant puts at issue his or her mental capacity to knowingly, intelligently, or voluntarily waive his or her *Miranda* rights, the State is entitled to obtain an independent psychiatric evaluation of the defendant.” The Court further held “that, in order to protect the defendant’s constitutional right against self-incrimination, the safeguards found in *State v. Craney*, 347 N.W.2d 668, 673 (Iowa 1984), regarding the expert’s testimony following the evaluation, are applicable. Additionally, the expert should not disclose to the State the same matters about which *Craney* prohibits an expert from testifying.” State v. Rodriguez, 807 N.W.2d 35, 36 (Iowa 2011) (footnote omitted). We note the limitations in Rodriguez and Craney means that a non-attorney bears the responsibility for making the legal determination whether a given statement is “incriminatory.” For this reason, we ask the Court to not adopt **Proposed Rule**

2.11(11)(c). If the Court adopts **Proposed Rule 2.11(11)(c)**, we suggest the Court add a comment which outlines the safeguards required by Rodriguez and Craney. State v. Rodriguez, 807 N.W.2d at 38-39; State v. Craney, 347 N.W.2d at 673.

Additionally, **Proposed Rule 2.11(11)(c)**'s reach is unclear what types of examinations are included within the scope of the rule. Does **Proposed Rule 2.11(11)(c)** include the State's right to examine the defendant if the defense witness is the defendant's treating physician? Quite often when a witness is a medical professional, the witness may be a fact witness and an expert witness. If **Proposed Rule 2.11(11)(c)** is so broad as to encompass treating physicians, we request the Court not adopt it.

Rule 2.11(11)(d) *Affirmative defenses*. (p. 20 L1-5).

Proposed Rule 2.11(11)(d) (p. 20 L 1-5) expands the notice requirement to include all affirmative defenses. The Proposed Rule specifies some affirmative defenses but includes a catch-all "other affirmative defenses." We suggest the Court specify the "other affirmative defenses" are only those which (1) the legislature has designated as an affirmative defense; or (2) an Iowa appellate court decision has classified as an affirmative defense.

Additionally, we suggest adding a provision that when an affirmative defense has been noticed, the prosecution has a reciprocal duty to provide notice of any expert or lay witness the State intends to call to rebut the affirmative defense. Generally, the State is not required to give notice of rebuttal witnesses. State v. Folck, 325 N.W.2d 368, 371 (Iowa 1982). But there is no principled difference between **Proposed Rule 2.11(11)(d)** (p. 20 L1-5) and the other subsections of **Rule 2.11(11)** (p. 19 L811, p. 19 L26-28, p. 19L35-36) as it relates to the need for reciprocal notice.

Rule 2.11(12) *State's duty to disclose witnesses.* (p. 20 L12-p. 22 L7)

Proposed Rule 2.11(12) is referenced in **Proposed Rule 2.4(6)** (p. 8 L19-24), **Proposed Rule 2.5(3)** (p. 9 L16-20), and **Proposed Rule 2.11(11)(a)(3)** (p. 19 L12-13). Our comment is directed to all related rules as well as **Proposed Rule 2.11(12)** (p. 20 L12-p. 22 L7).

We acknowledge **Proposed Rule 2.11(12)** does not make substantive changes from Current Rule 2.11(12) but merely provides an organization change. However, the Court has an opportunity to improve and/or clarify the Rule. We propose three

changes. First, **Proposed Rule 2.11(12)(c)** (p. 20 L23-27) should be modified to require, at the time of nondisclosure of a witness's address, the State must simultaneously file, as confidential if appropriate, a notice outlining the basis for nondisclosure. Second, **Proposed Rule 2.11(12)(d)(1)** (p. 20 L32-p. 21 L2) should be modified to specify the necessary quantum of proof required for the State to prove the risks associated with the disclosure outweigh the criminal defendant's ability to conduct a pretrial investigation. We suggest the quantum of proof should be by clear and convincing evidence. Third, **Proposed Rule 2.11(12)(e)** (p. 21 L14-24) should be modified to only prohibit redissemination of addresses where there is a proven substantial risk, but the court in weighing the usefulness of the information, determined the address should be disclosed to the defense. In such situations, the court may enter an order which prohibits dissemination beyond the defendant and defense team. The modification would promote the objective to protect individual's privacy, when necessary, and recognize that vast amounts of information is readily available to the public by other means.

We note the Proposed Rules do not prohibit the State from dissemination of defense witnesses' addresses. This may be an oversight. Or it may be based on the invalid presumption that only the defendant and defense team would engage in harassment, intimidation, and other nefarious behavior. If the Court adopts **Proposed Rule 2.11(12)** as written, we suggest the Court include language to offer similar protections to defense witnesses.

Rule 2.12 Suppression of unlawfully obtained evidence. (p. 22 L9-21)

Rule 2.12(3) *Effect of failure to file.* (p. 22 L19-21)

Proposed Rule 2.12(3) (p. 22 p. 19-21) is consistent with **Proposed Rule 2.11(5)** (p. 17 L12-15). **Proposed Rule 2.12(3)** is not needed as **Proposed Rule 2.11(5)** already sets forth the effect of a failure to file the motion. We repeat our suggestion previously made to Proposed Rule 2.11(5). We suggest that the Court replace "waiver" with "forfeiture".

Rule 2.13 Depositions. (p. 22 L24-24 L27).

Rule 2.13(3) *Objections to depositions.* (p. 23 L9-14)

Proposed Rule 2.13(3) (p. 23 L9-14) expands the objections available which will increase the court's involvement in discovery

disputes. We urge the Court not to adopt this expansive rule.

Proposed Rule 2.13(3) will needlessly entangle the district court in approving a defense strategy and/or investigation. Cf. State v. Neiderbach, 837 N.W.2d 180, 231 (Iowa 2013) (Appel, J., concurring specially) (“[T]he district court will not have access to the defense’s investigative file and may not be privy to potential strategies available that might be affected by or contingent upon information uncovered in mental health records.”); State v. Dahl, 874 N.W.2d 348, 353 (Iowa 2016) (“The State should not impede the right of an indigent defendant to fully investigate the case or develop a valid defense.”).

Rule 2.13(5) *Presence of Defendant*. (p. 23 L20-26)

Rule 2.13(1) was implemented to protect a defendant’s constitutional right to confrontation. State v. Folkerts, 703 N.W.2d 761, 765 (Iowa 2005). The defendant has the right to be present for a discovery deposition. However, a defendant may waive his/her right to be personally present, and thereby his/her right to confrontation. State v. Nungesser, 269 N.W.2d 449, 450 (Iowa 1978). A defendant should be able to voluntarily waive his/her right to attend a discovery deposition. It would be best practice for

the defendant to file a written waiver. We urge the Court not to adopt **Proposed Rule 2.13(5)** (p. 23 L20-26) as written.

Rule 2.13(6) *Special circumstances.* (p. 23 L27-p. 24 L23).

Proposed Rule 2.13(6) eliminated the ability to depose witnesses not listed in the Minutes of Testimony or noticed by the defense. In Weaver, this Court stated Current Rule 2.13(2)(a) is to be used to perpetuate testimony, not for discovery. State v. Weaver, 608 N.W.2d 797, 801 (Iowa 2000). Current Rule 2.13(5) and **Proposed Rule 2.13(6)(a)** (p. 23 L28-34) governs perpetuating testimony. We ask the Court to retain Current Rule 2.13(2) with a slight modification. We propose the phrase “for use at trial” be deleted.

Rule 2.15 Subpoenas. (p. 26 L21-p. 27 L16)

Proposed Rule 2.15 does not contain a provision authorizing the defendant to issue a subpoena duces tecum for records held by a non-witness third party. The Court misses an important opportunity to establish a procedure which would permit the defendant to utilize a subpoena duces tecum for investigative purposes. We request the Court modify **Proposed Rule 2.15(2)** (p.

26 L26-30) to provide for subpoenas duces tecum to persons, not just witnesses. We propose:

Rule 2.15(2) *For production of documents.* A subpoena may direct a person to produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises.

a. If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice must be served on the other party prior to service except as provided in subsection (b).

b. If the subpoena duces tecum would disclose the defense strategy to the State, the defendant may file a motion under seal setting forth the basis for an ex parte subpoena duces tecum.

Cf. Iowa R. Civ. P. 1.1701; see also State v. Russell, 897 N.W.2d 717, 729 (Iowa 2017) (“If defense counsel feels an ex parte subpoena duces tecum is necessary, counsel should file a motion with the district court setting forth the basis for the request.”).

Rule 2.15(3) Service. (p. 26 L31-p. 27 L12)

Proposed Rule 2.15(3) (p. 26 L31-32) clarifies that a “party” may not serve a subpoena. Summary p. 8. There are concerns from defense attorneys that the definition and scope of “party” is unclear. Party is not defined in the Rules. The Proposed Rules use

the term “party” approximately 45 times and “party” generally encompasses the state and/or defendant and their respective attorneys. The Iowa Rules of Electronic Procedure defines “party” to “mean[] a person or entity by or against whom a case or part of a case is brought, including a plaintiff, petitioner, defendant, third-party defendant, or respondent.” Iowa R Elec. P. 16.201(24).

Does the **Proposed Rule 2.15(3)** (p. 26 L31-32) prohibit defense counsel or the prosecutor from serving a subpoena? Does the proposed rule prohibit an investigator employed by the defense or prosecution to serve a subpoena? Does the proposed rule only prohibit the defendant from serving a subpoena? We suggest the Court clarify the definition of “party” as used in **Proposed Rule 2.15(3)**.

Rule 2.17 Trial by jury or court. (p. 27 L32-p. 28 L25)

Rule 2.17(2) Trial on the minutes. (p. 28 L3-21).

Although we propose the Court authorize conditional guilty pleas and *Alford* pleas, we recognize the value of and the need for a provision for a Trial on the Minutes. We suggest the Court make two modifications to **Proposed Rule 2.17(2)** (p. 28 L3-21). First, **Proposed Rule 2.17(2)(a)** (p. 28 L4-7) should be modified to permit

the parties to agree that specified portions of the Minutes are not to be considered by the court. Generally, a defendant will submit to a Trial on the Minutes to preserve error on an adverse ruling for appeal purposes. Occasionally, the Minutes contain information which would be inadmissible at trial. This type of information may be excised from the record by the State filing Amended Minutes. However, it would be more efficient if the parties were permitted to agree that a portion of the Minutes will not be considered by the court. Second, **Proposed Rule 2.17(2)(c)(3)** (p. 28 L19-21) should be modified to clarify that defendant is giving up his/her right to object to the information contained in the portions of the Minutes the parties agreed the court may properly consider.

Rule 2.18 Juries. (p. 28 L27-p. 31 L35)

Rule 2.18(5) Challenges to individual juror for cause. (p. 29 L11-p. 30 L10)

We are generally supportive of **Proposed Rule 2.18(5)(a)** (p. 29 L15-18). It is an improvement from Current Rule 2.18(5)(a).

However, we suggest the Court make a modification. We propose:

- a. A previous conviction of the juror of a felony unless:

(1) it can be established through the juror's testimony or otherwise that the juror's voting rights have been restored; or

(2) the juror is not in actual confinement or on probation, parole, or other court supervision for a felony.

The second alternative is consistent with ABA Criminal Justice Section Standards, Jury Principle 2(A)(5).

https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_juryaddendum/

In Iowa, people of color are overrepresented in jails and prisons. <https://www.prisonpolicy.org/profiles/IA.html> In many Iowa counties, Blacks are more likely to be arrested than Whites. <https://www.aclu-ia.org/en/press-releases/iowa-ranks-among-worst-states-racial-disparities-marijuana-arrests> A study found racially diverse juries deliberated longer, discussed greater amounts of trial evidence, discussed race issues such as possibilities of profiling, asked more questions, and made fewer inaccurate statements when discussing the evidence than when juries were all White. Samuel R. Sommers, [On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition](#)

on Jury Deliberations, 90 Journal of Personality and Social Psychology, 597-612 (2006), available at https://www.ucl.ac.uk/human-resources/sites/human-resources/files/sommers_2006_-_identifying_multiple_effects_of_racial_composition_on_jury_deliberations.pdf

Rule 2.18(6) *Examination of jurors.* (p. 30 L11-22)

We are generally supportive of **Proposed Rule 2.18(6)** (p. 30 L11-22). Consistent with the Court's decision in State v. Jonas, 904 N.W.2d 566, 575 (Iowa 2017), we support the additional provision that a judge should not attempt to rehabilitate a jury by its own questioning (p. 30 L18-22). However, we suggest two modifications.

First, the Court should add a provision that juror voir dire should be open and accessible for public view. The only time voir dire should be closed to the public is when the court makes adequate findings to support the closure. Waller v. Georgia, 467 U.S. 39, 48, 104 S.Ct. 2210, 2216 (1984). Voir dire may, in limited circumstances, "give rise to a compelling interest of a prospective juror when interrogation touches on deeply personal matters that

person has legitimate reasons for keeping out of the public domain.”
Press-Enterprise Co. v. Superior Court of Cal., Riverside Cty., 464
U.S. 501, 511, 104 S.Ct. 819, 825 (1984). If the court orders a
juror examined individually, separate from the other jurors to avoid
possible contamination of the rest of the panel, the questioning
should be completed in public. **Proposed Rule 2.18(6)** (p. 30 L12-
14) should be modified to comport with a defendant’s constitutional
right to a public trial and the public’s First Amendment right of
access to criminal trials. U.S. Const. amend I, VI, XIV; Iowa Const.
art. I, §10.

Secondly, the added provision that a juror’s answers may be
used in a prosecution for perjury or contempt (p. 30 L14-18) is
problematic unless the jurors are advised that the answers may
subject them to prosecution for perjury or contempt. We suggest
the Court add a provision in **Proposed Rule 2.18(6)** (p. 30 L11) that
prior to administering the oath, the court advise the jurors their
answers may be used against them in a prosecution for perjury or
contempt.

Rule 2.18(10) *Number of strikes.* (p. 30 L33-p. 31 L4)

In State v. Jonas, the Court held:

Specifically, in order to show prejudice when the district court improperly refuses to disqualify a potential juror under Iowa Rule of Criminal Procedure 2.18(5)(k) and thereby causes a defendant to expend a peremptory challenge under rule 2.18(9), the defendant must specifically ask the court for an additional strike of a particular juror after his peremptory challenges have been exhausted. Where the defendant makes such a showing, prejudice will then be presumed.

State v. Jonas, 904 N.W.2d 566, 583 (Iowa 2017). **Proposed Rule**

2.18(10) (p. 30 L33-p. 31 L4) does not contain a subsection to outline the procedure required by Jonas. We ask the Court take this opportunity and add a provision outlining the procedure for requesting additional strikes.

Rule 2.18(14) *Reading of names or numbers.* (p. 31 L30-33).

Proposed Rule 2.18(14) (p. 31 L32) provides that the court shall read the names or assigned numbers of the jurors. The Proposed Rule does not outline when and under what circumstances assigned numbers may be used instead of juror's names. If the Court adopts this provision, **Proposed Rule 2.18(14)** (p. 31 L30-33) should be modified to provide clear guidelines when the district court may substitute juror assigned numbers.

Rule 2.19 Trial. (p. 32 L1-p. 36 L36)

Rule 2.19(3) Reporting of trial. (p. 32 L33-35).

Proposed Rule 2.19(3) (p. 32 L34-35) permits waiver of voir dire in misdemeanor cases. We ask the Court to prohibit waiver of voir dire in all indictable criminal cases. Jury selection is an integral part of ensuring a criminal defendant receives a fair trial. When error occurs during voir dire, an attempt to recreate the record is a poor substitute for contemporaneous reporting. This is true whether the record is made shortly after an objection or possibly years later in a postconviction relief action. Court reporters have indicated reporting voir dire and transcribing that record can be more difficult than other portions of a trial. The change in the rule may result in subtle, or not so subtle, pressure to waive reporting. While misdemeanor convictions carry lesser penalties, those penalties are still significant. Misdemeanor offenders are subject to incarceration and other restraints on the defendant's liberty. Reported voir dire in misdemeanor cases is important for appellate review. Misdemeanor offenders should have the same access to appellate review as felony offenders.

Rule 2.19(8) *Trial of questions involving prior convictions.* (p. 36 L3-36).

We are generally supportive of **Proposed Rule 2.19(8)** (p. 36 L3-36). We suggest two additions.

First, **Proposed Rule 2.19(8)(a)(1)** (p. 36 L14) only requires the defendant be informed of the “nature of the enhancement.” We understand “nature” to include the type and/or name of the enhancement, such as habitual offender or second or subsequent offense. Similar to the requirements of **Proposed Rule 2.8(2)(b)(1)** (p. 13 L11-16) that the defendant be informed of the “elements of the offense”, we propose the Court expand the advisement to include a definition of the prior offense and the required sequence of the offenses. For example, the court must inform the defendant the State alleges the defendant is a habitual offender; that he/she had been previously convicted in a court of this or any other state, or of the United States of the two felonies pled in the Trial Information; an offense is a felony if, by the law under which the person is convicted, it is so classified at the time of the person’s conviction; and the habitual offender statute only applies when conviction for the first predicate offense occurs before commission

of the second predicate offense and conviction of the second predicate offense occurs before commission of the current offense. See e.g. State v. Parker, 747 N.W.2d 196, 211 (Iowa 2008) (listing requirements of habitual offender enhancement).

Second, **Proposed Rule 2.19(8)(a)** (p. 36 L10-29) provides the procedure for an admission of prior conviction. **Proposed Rule 2.19(8)(b)** (p. 36 L30-33) provides a jury trial on the issue of the offender's identity with the person previously convicted. We suggest the Court clarify the third path. "Any claim by the offender that he or she was not represented by counsel and did not waive counsel in the prior convictions is heard and decided by the district court. Although the offender has no right to a jury trial on these issues, the other rights associated with a trial are applicable at the hearing before the court." State v. Harrington, 893 N.W.2d 36, 46 (Iowa 2017). For clarity, we suggest a separate subsection.

Rule 2.21 Evidence. (p. 38 L30-p. 39 L17)

Rule 2.21(5) Disposition of exhibits. (p.39 L8-17)

While **Proposed Rule 2.21(5)** (p. 39 L8-17) is an improvement from Current Rule 2.21(5), we have several concerns and suggestions.

First, it is unclear whether **Proposed Rule 2.21(5)(a)** (p. 39 L9-11) contemplates disposal of electronically filed exhibits. The proposed rule uses “all” which would indicate that all exhibits whether maintained electronically or nonelectronically would be destroyed sixty days after the expiration of all sentences except in Class A felonies. If the intent is to dispose of electronically maintained exhibits, **Proposed Rule 2.21(5)(a)** appears to conflict with Iowa Rule of Electronic Procedure 16.412. Electronically filed exhibits must be maintained. Iowa R. Elec. P. 16.4012(1). See also Iowa R. Elec. P. 16.103 (“To the extent these rules are inconsistent with any other Iowa court rule, the rules in this chapter govern electronically filed cases and cases converted to electronic filing.”). Iowa Rule of Electronic Procedure 16.412(8) only provides the clerk may in accordance with the Rules of Criminal Procedure dispose of exhibits for which the clerk of court is responsible for scanning.

Second, **Proposed Rule 2.21(5)(b)** (p. 39 L12-13) should be modified to provide the clerk may not dispose of any exhibits until the statute of limitations for filing postconviction relief has expired. Additionally, if there is a pending appeal, pending postconviction relief action, pending federal habeas corpus action, or pending

application for DNA testing, the clerk shall not dispose of the exhibits.

Third, **Proposed Rule 2.21(5)** should require notice. The clerk must provide notice to the defendant, the county attorney, and any other attorney of record that the exhibits are subject to destruction at least 90 days prior to actual destruction.

Rule 2.22 Verdict. (p. 39 L19-p. 42 L20)

Rule 2.22(3) *Special interrogatories.* (p. 39 L31-p. 40 L5)

We support **Proposed Rule 2.22(3)(a)** (p. 39 L32-p. 40 L3) which adds the requirement that a special interrogatory be submitted on accomplice questions and the factual findings which subject the defendant to increased punishment. However, we ask the Court to modify **Proposed Rule 2.22(3)(b)** (p. 40 L4-5) to require the waiver of the accomplice special interrogatories be made on the record.

Rule 2.22(8) *Acquittal on ground of insanity; commitment hearing.*
(p. 40 L34-p. 42 L20)

We do not have objections to the changes made in **Proposed Rule 2.22(8)**. However, we express concern that like Current Rule 2.22(8), **Proposed Rule 2.22(8)** does not contain a clear provision

for release from custody when the defendant is mentally ill but is not dangerous to the defendant's self or others. See Proposed Rule 2.22(8)(e)(1) (p. 41 L30-p. 42 L20) (“[T]he court finds that the defendant is not mentally ill *and* no longer dangerous to the defendant's self or to others, the court shall order the defendant released.”) (emphasis added); **Proposed Rule 2.22(8)(e)(3)** (p. 42 L13-20)(same). The Court in Stark recognized that if the Rule's language “is interpreted literally, the use of the conjunctive suggests that both a finding of no mental illness and a finding of no danger are required in order for a defendant to be released.” State v. Stark, 550 N.W.2d 467, 469 (Iowa 1996). “The purpose of commitment following an insanity acquittal like that of a civil commitment is to treat the individuals' mental illness and protect them and society from their potential dangerousness.” Id. The Court should revise the rule to comport with due process. Foucha v. Louisiana, 504 U.S. 71, 77, 112 S.Ct. 1780, 1784 (1992)(concluding it is a violation of due process for a state to confine a harmless, mentally ill person.).

We also note **Proposed Rule 2.1** (p. 1 L6-9) eliminated the definition of “mentally ill.” *Compare* Current Rule 2.1(2)(c). The

elimination of the definition is consistent with the decision in Stark.

We support a revision of the Proposed Rule that embodies Stark's holding and provides clear guidance to the district courts.

Rule 2.23 Judgment. (p. 42 L22-p. 44 L21)

Rule 2.23(2)(e) *Basis for sentence imposed.* (p. 43 L23-33)

Proposed Rule 2.23(2)(e) (p. 43 L28-29) lists information the court shall consider. The list does not include the defendant's statement. We suggest the Court modify **Proposed Rule 2.23(2)(e)(2)** to include defense counsel's recommendation and the defendant's statement in mitigation of sentence.

Rule 2.23(2)(g) *Notification of right to appeal.* (p. 44 L5-17)

Proposed Rule 2.23(2)(g)(2) (p. 44 L8-10) is in response to Iowa Code section 814.6(1)(a)(3) (Supp. 2020)(amended by 2019 Iowa Acts, ch. 140, § 28). Like our comment regarding **Proposed Rule 2.8(2)(b)6** (p. 14 L1-2), we urge the Court to not add this subsection. The meaning and validity of the statute is unsettled. This Court has defined "good cause" in only one context. State v. Damme, 944 N.W.2d 98 (Iowa 2020). Until the validity and meaning of amended Iowa Code section 814.6(1)(a)(3) is settled by

this Court, the inclusion of this language will only cause confusion and discourage appellate review.

If the Court determines **Proposed Rule 2.23(2)(g)(2)** should be included, we suggest the Court outline the procedure a defendant must follow to appeal from a guilty plea.

Rule 2.24 Motions after trial. (p. 44 L23-p. 47 L32)

Rule 2.24(2) *New trial.* (p. 44 L26-p. 45 L12)

Proposed Rule 2.24(2) eliminated the court's authority to grant a new trial for a reason not asserted in the motion. See Current Rule 2.24(2)(a) (“[T]he court may grant a motion for new trial even for a reason not asserted in the motion.”). We recognize this provision is not widely used. However, we urge the Court to retain the current language. We note the district court retains the authority to arrest judgment on its own motion. **Proposed Rule 2.24(3)(d)** (p. 46 L17-18). The district court should have a similar authority to grant a new trial if the grounds in **Proposed Rule 2.24(2)(b)** (p. 44 L31-p. 45 L12) exist for doing so. Permitting the district court discretion to grant a new trial when it is warranted in the interest of justice conserves judicial resources by eliminating the time and expense of an appeal and/or postconviction relief

action, instills confidence in the criminal justice system, and may prevent the defendant's needless loss of liberty.

Rule 2.24(3) *Arrest of judgment.* (p. 46 L1-p. 47 L18)

Rule 2.24(3)(c) *Grounds.* (p. 46 L12-16).

The second sentence in **Proposed Rule 2.24(3)(c)** (p. 46 L13-16) is in response to Iowa Code section 814.29 (Supp. 2020)(added by 2019 Iowa Acts, ch. 140, § 33). Similar to our comments regarding **Proposed Rule 2.23(2)(g)(2)** (p. 44 L5-17) and **Proposed Rule 2.8(2)(b)6** (p. 14 L1-2), we urge the Court not to include the language requiring the defendant to demonstrate he/she more likely than not would not have pled guilty if the defect in the guilty plea had not occurred. The applicability and validity of the statute is unsettled. This Court has not yet addressed challenges to Iowa Code section 814.29 (Supp. 2020).

Rule 2.24(3)(e) *Effect of order arresting judgment.* (p. 46 L19-28)

The second sentence of **Proposed Rule 2.24(3)(e)(1)** (p. 46 L20-25) may now conflict with **Proposed Rule 2.24(3)(c)** (p. 46 L13-16). This question too is unsettled. When the record does not establish a factual basis for the guilty plea, must the defendant demonstrate he/she would not have pled guilty without a factual

basis? If so, and the defendant can meet that burden, what information can the State supplement to establish a voluntary guilty plea? If the Court adopts **Proposed Rule 2.24(3)(c)**, we suggest the Court address the conflict between the two Rules.

Rule 2.24(5) *Correction of sentence.* (p. 47 L19-32)

Proposed Rule 2.24(5)(a) (p. 47 L20-22) amends Current Rule 2.24(5)(a) to provide the “district court” may correct an illegal sentence. The addition of the one word, “district”, restricts the scope of the rule. The appellate court cites Rule 2.24(5)(a) for authority to correct illegal sentence when it is raised for the first time on appeal. See, e.g., State v. Veal, 779 N.W.2d 63, 65 (Iowa 2010); State v. Bruegger, 773 N.W.2d 862, 871-72 (Iowa 2009). We urge the Court to retain the current language, the “court may correct an illegal sentence at any time.”

Rule 2.25 Reserved (p. 48 L1-5).

The Proposed Rules abolishes a Bill of Exceptions. (p. 48 L1-5). Bill of Exceptions is authorized by the Iowa Rule of Civil Procedure 1.1001. A Bill of Exceptions may be needed to preserve error for an appeal. The comment provides: “If a party needs a record to be made of a matter that occurred off the record, it shall

be the responsibility of that party to initiate that process by reasonable and appropriate means.” (p. 48 L3-5). The comment is unclear what process is reasonable and appropriate. How is a lawyer to make a record when the district court refuses to allow an offer of proof? What if a hearing is inadvertently not reported due to a technology failure? Iowa Rule of Appellate P. 6.807 is a poor substitute. We urge the Court to retain the Bill of Exceptions for those rare occasions where it is the best alternative available to produce the record for appeal.

Rule 2.26 Execution of judgment and stay thereof. (p. 48 L7-p. 49 L9)

Rule 2.26(2) Stay of execution. (p. 48 L34-p. 49 L9)

Rule 2.26(2)(c) Probation. (p. 49 L4-7).

Proposed Rule 2.26(2)(c) (p. 49 L4-7) contains no changes from the current rule. However, we suggest the Court modify the **Proposed Rule 2.26(2)(c)** to provide for a stay of probation during the appeal when an appeal bond is posted. Such a rule would provide a uniform process throughout the state and would eliminate a need for additional hearings in the district court. Currently, Judicial Districts and counties engage in different procedures in

determining whether an appellant's probation may be stayed pending appeal. For example, the Sixth Judicial District has required an appellant to demonstrate a reasonable likelihood of success on appeal to obtain a stay of his/her probation. The Fifth Judicial District (or Polk County) may not require probation supervision during the appeal in some cases while other cases supervision is required. Most appellants who are sentenced to incarceration, arguably a more severe sentence, are permitted a stay of confinement pending appeal. **Proposed Rule 2.26(2)(a)** (p. 48 L35-36). Appellants placed on probation should be given the same ability to stay execution of their sentences.

Rule 2.27 Presence of defendant; regulation of conduct by the court. (p. 49 L11-p. 50 L13)

Rule 2.27(1) Defendant's appearance. (p. 49 L12-25)

We are supportive of the addition of **Proposed Rule 2.27(1)(c)** (p. 49 L21-25) which permits the defendant to appear by interactive audiovisual system for matters other than trial. However, we disagree that the prosecutor should have to agree to the defendant's waiver of his/her right to be in court and decision to appear by video. A defendant should not be required to incur the expense of

transport and incarceration in the local jail. Nor should a defendant held outside the State of Iowa have to serve out a sentence only to be returned to Iowa for a proceeding that could have been disposed of by video. We ask the Court to delete this portion of **Proposed Rule 2.27(1)(c)** (p. 49 L23).

Rule 2.27(4) *Regulation of conduct in the courtroom.* (p.50 L 1-13)

Rule 2.27(4)(b) (p. 50 L9-11).

Proposed Rule 2.27(4)(b) (p. 50 L9-11) is unconstitutional. U.S. Const. amend. IV; Iowa Const. art. I, § 8. The proposed rule purports to allow a search of “any person in the courtroom” without probable cause or reasonable articulable suspicion for a *Terry* pat-down. The Judicial Branch is authorized to prohibit possession of a firearm in the courtroom. Iowa Code § 724.32 (new section added by 2020 HF 2502). However, that authority does not extend to searching citizens without probable cause or reasonable articulable suspicion for a *Terry* pat-down. In fact, Current Rule 2.27(4)(b) is also unconstitutional as written. Current Rule 2.27(4)(b) states, “[w]hen a magistrate reasonably believes a person who is present in the courtroom has a weapon in the person's possession, the magistrate may direct that such person be searched, and any

weapon be retained subject to order of the court.” Terry requires reasonable, articulable suspicion that an individual is both armed and dangerous, and only permits a pat-down under those circumstances, not a full search. Terry v. Ohio, 392 U.S. 1, 30 (1968). **Proposed Rule 2.27(4)(b)** is not limited in scope. We urge the Court to not adopt the **Proposed Rule 2.27(4)(b)**, and Current Rule 2.27(4)(b) should be amended to bring it into conformity with Terry.

Rule 2.29 Withdrawal and duty of continuing representation.
(p. 50 L28-p. 52 L4)

Rule 2.29(2)(c) (p. 51 L22-24)

Proposed Rule 2.29(2)(c) (p. 51 L22-24) is identical to the last sentence in Current Rule 2.29(5) which dictates the defendant and appointed appellate counsel are under a continuing duty to inform the trial court of any financial circumstances which make the defendant ineligible for court-appointed counsel. First, we note **Proposed Rule 2.28** (p. 50 L15-22) and Current Rule 2.28 do not contain a similar obligation for court-appointed trial counsel. Second, court-appointed appellate counsel will generally not have any knowledge of a change in the defendant’s financial

circumstances. Lastly, **Proposed Rule 2.29(2)(c)** is unnecessary as the defendant already “has a continuing duty to update information provided in the affidavit of financial status to reflect changes in the information previously provided.” Iowa Admin. Code r. 493-10.4(9). We request the Court eliminate **Proposed Rule 2.29(2)(c)**.

Rule 2.29(5) (p. 51 L34-p. 52 L4)

We note Rule of Appellate Procedure 6.109(5) should be updated to reflect the correct Rule of Criminal Procedure number if the Proposed Rule is adopted. See Iowa R. App. P. 6.109(5) (“Before court-appointed trial counsel for a criminal defendant may withdraw, the court file must contain proof counsel has completed counsel’s duties under Iowa R. Crim. P. 2.29(6).”).

Rule 2.33 Dismissal of prosecutions; right to speedy trial. (p. 52 L16-p. 53 L17)

Rule 2.33(1) *Dismissal generally; effect.* (p. 52 L17-23)

Proposed Rule 2.33(1) (p. 52 L17-23) eliminated the court’s authority to dismiss a case on its own motion in the interest of justice. There is limited published caselaw regarding a court’s obligation to sua sponte dismiss a prosecution in the interest of justice. However, this Court held that “in those instances where

defendant is neither admitted to bail nor represented by counsel” and his right to speedy trial has been violated, the court should dismiss on its own motion. State v. Myers, 215 N.W.2d 262, 264 (Iowa 1974). Current Rule 2.33(1) balances the prosecutor’s discretion to pursue charges with the court’s duty to promote justice. We urge the Court to retain this portion of Current Rule 2.33(1).

Rule 2.33(2) *Speedy trial*. (p. 52 L24-p. 53 L13)

Rule 2.33(2)(a) (p. 52 L28-35).

Proposed Rule 2.33(2)(a) (p. 52 L32-35) provides that the speedy indictment time period “commences for an adult only after the defendant has been taken before a magistrate for an initial appearance or a waiver of initial appearance is filed.” The Summary indicates this change is in response to the Court’s decision in State v. Williams, 895 N.W.2d 856 (Iowa 2017). Summary p. 16.

Proposed Rule 2.33(2)(a) misstates this Court’s holding in

Williams. Williams held:

Arrest for the purposes of the speedy indictment rule requires the person to be taken into custody in the manner authorized by law. The manner of arrest includes taking the arrested person to a magistrate. *The rule is triggered from the time a person is taken into custody, but*

only when the arrest is completed by taking the person before a magistrate for an initial appearance.

State v. Williams, 895 N.W.2d 856, 867 (Iowa 2017) (emphasis added). “A speedy indictment is only needed when a defendant is arrested and subsequently held to answer by the magistrate following the arrest.” Id. at 865. Thus, the time period for speedy indictment commences from the time the person is taken into custody. We urge the Court to not adopt **Proposed Rule 2.33(2)(a)** (p. 52 L32-35) as currently written because it is inconsistent with this Court’s holding in Williams.

Rule 2.33(2)(d) (p. 53 L7-11)

Proposed Rule 2.33(2)(d) (p. 53 L7-9) provides that defense counsel may waive defendant’s right to a speedy indictment and right to a speedy trial within 90 days after the indictment is found. “The speedy indictment rule gives effect to the constitutional guarantee of speedy trial.” State v. Williams, 895 N.W.2d 856, 866 (Iowa 2017). Article I, section 10 of the Iowa Constitution guarantees the right to a speedy trial. Iowa Const. art. I, §10. This constitutional directive is implemented by Iowa Rule of Criminal Procedure 2.33(2). Ennenga v. State, 812 N.W.2d 696, 701 (Iowa

2012); State v. Taylor, 881 N.W.2d 72, 76 (Iowa 2016). The Iowa Constitution protects personal, inalienable rights. Iowa Const. art I, §§1, 10.

This Court has emphasized that to show a speedy trial waiver, the State must show “an intentional relinquishment or abandonment of a known right or privilege.” State v. Gorham, 206 N.W.2d 908, 911 (Iowa 1973); State v. Taylor, 881 N.W.2d 72, 78 (Iowa 2016); Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 (1938). Only the defendant personally may knowingly and intelligently give up a right that is personal in nature.

We acknowledge the Iowa Supreme Court has held that trial counsel may waive a defendant’s speedy trial right without his consent. State v. O’Connell, 275 N.W.2d 197 (Iowa 1979); State v. LeFlore, 308 N.W.2d 39 (Iowa 1981). However, **Proposed Rule 2.33(2)(d)**, as well as O’Connell and LeFlore, appear to be in conflict with the principles of Gorham, Taylor and Zerbst. We urge the Court to modify **Propose Rule 2.33(2)(d)** (p. 53 L7-9) to require a waiver of speedy indictment and speedy trial to be made only by the defendant personally and on the record or by filing a written waiver.

SIMPLE MISDEMEANORS

Rule 2.57 Arrest warrant. (p. 59 L5-6).

Proposed Rule 2.57 (p. 59 L5-6) eliminated the language that the magistrate may issue a citation instead of an arrest warrant.

See Current Rule 2.57. The legislature has authorized the issuance of an arrest warrant or a citation instead of a warrant of arrest.

Iowa Code § 804.1(a), (b) (2019). We suggest the Court either eliminate the rule entirely as unnecessary or retain Current Rule 2.57.

Rule 2.59 Verification of complaint. (p. 59 L24-30)

The second sentence in **Proposed Rule 2.59** (p. 59 L26-28) may not accomplish its intent. See Summary p. 17. We suggest the Court modify the sentence to provide: “The defendant must inform the magistrate whether the name shown in the complaint is the defendant’s true and correct name and verify the defendant’s address.

Rule 2.62 Bail. (p. 60 L20-24).

We acknowledge **Proposed Rule 2.62** is the same as Current Rule 2.62. However, we suggest the Court to eliminate the last sentence which limits the defendant to one bond review except

upon changed circumstances. This portion of **Proposed Rule 2.62** (p. 60 L23-24) appears to conflict with Iowa Code section 811.2(6). Iowa Code 811.2(6) (2019) (“A magistrate ordering the release of the defendant on any conditions specified in this section *may at any time amend the order* to impose additional or different conditions of release, provided that, if the imposition of different or additional conditions results in the detention of the defendant as a result of the defendant’s inability to meet such conditions, the provisions of subsection 3 of this section shall apply.”) (emphasis added).

Rule 2.64 Trial. (p. 61 L1-14)

Rule 2.64(2)(b) (p. 61 L7-8) & **Rule 2.64(2)(d)** (p. 61 L11-14)

We recognize **Proposed Rules 2.64(2)(b)** (p. 61 L7-8) and **2.64(2)(d)** (p. 61 L11-14) are a restatement of a portion of Current Rule 2.64. However, we suggest the Court replace “waiver of jury” and “waiver of jury trial” with *forfeiture* of the right to demand a jury trial. See comments to **Proposed Rule 2.11(5)** (p. 17 L12-15) and **Proposed Rule 2.12(3)** (p. 22 p. 19-21).

Rule 2.67 Forfeiture of collateral in lieu of appearance. (p. 61 L31-p. 62 L5)

Proposed Rule 2.67 (p. 61 L31-p. 62 L5) is confusing. As written, **Proposed Rule 2.67** (p. 61 L36-p. 62 L1) would permit the clerk to “enter a conviction pursuant to the defendant’s written appearance”. The Proposed Rule should be clarified that the defendant has filed a statement consenting to a “forfeiture of collateral security in lieu of appearance”. See Current Rule 2.72.

Rule 2.71 Prior convictions. (p. 63 L9-24)

We question the need for the addition of **Proposed Rule 2.71** (p. 63 L9-24). A cursory check of the Criminal Code did not reveal an offense which is a simple misdemeanor that would remain a simple misdemeanor when it is enhanced by a prior conviction. When an offense would otherwise be classified as a simple misdemeanor is enhanced by a prior conviction, the Rules of Criminal Procedure for indictable offenses would be applicable. If there is, in fact, a simple misdemeanor which would remain governed by the Rules of Criminal Procedure for simple misdemeanors **Proposed Rule 2.19(8)** (p. 36 L3-36) should govern

the procedure. See **Proposed Rule 2.52 Applicability of indictable offense rules.** (p. 58 L9-12).

Rule 2.72 Appeals (p. 63 L26-p. 65 L2)

Rule 2.72(6) Review by supreme court. (p. 64 L32-p. 65 L2)

Proposed Rule 2.72(6) (p. 64 L32-33) requires the defendant to complete an appeal in the district court prior to seeking discretionary review with the Supreme Court. The legislature has authorized discretionary review of a simple misdemeanor conviction may be available without pursuing an appeal in the district court. Iowa Code § 814.6(2)(d) (Supp. 2020). **Proposed Rule 2.72(6)** conflicts with the Code.

The Court should not adopt this provision for additional reasons. First, this requirement may increase indigent defense costs and waste judicial resources. The current process conserves resources, especially when the defendant has other indictable offenses under review as an appeal of right. When a discretionary review is granted and related convictions are pending on direct appeal, the cases can be consolidated for appellate review which saves time and resources. Second, it is not uncommon for a simple misdemeanor appeal to the Supreme Court to be mistakenly filed.

Iowa Code section 814.6(2)(d) allows appellate counsel to seek discretionary review pursuant to Iowa Rule of Appellate Procedure 6.108. This process also conserves resources. Often the mistake is not discovered within the 10-day period for filing the appeal in the district court. If the defendant is precluded from seeking discretionary review, the defendant will then be limited to postconviction relief and an appeal from postconviction relief, if denied. Allowing a discretionary review is the better option for the defendant and the conservation of judicial and indigent defense resources.

Respectfully submitted,



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JUL 14 2020



[EXTERNAL] Chapter 2 Amendments
Irwin, Joshua to: rules.comments

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1 attachment



Josh Irwin Comments on Proposed Changes to Rules of Criminal Procedure.docx

To Whom It May Concern,

My comments regarding the proposed amendments to the Iowa Rules of Criminal Procedure are attached. Thank you for the opportunity to comment, and for your work thus far.

If any questions or concerns arise, please do not hesitate to contact me by email.

Thank you,

Josh Irwin

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JUL 14 2020

CLERK SUPREME COURT

Josh Irwin
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July 14, 2020

Iowa Supreme Court
Clerk of the Iowa Supreme Court
1111 East Court Avenue
Des Moines, IA 50319
Via email: rules.comments@iowacourts.gov

Re: Comments on the Proposed Amendments to the Iowa Rules of Criminal Procedure

Dear Chief Justice Christensen, Justices of the Iowa Supreme Court, and members of the Iowa Rules of Criminal Procedure Review Task Force,

Thank you for the opportunity to comment on the proposed amendments to the Iowa Rules of Criminal Procedure, and for the important work that has been done by the task force thus far. My suggestions, written in my individual capacity and informed by my experiences as a former assistant public defender and current assistant appellate defender, are as follows:

Rule 2.6(2)(a), p. 10 L. 30-34 (regarding disclosure of codefendants)

A requirement should be added that, to the extent possible, the State must list all codefendants in the complaint (not just the indictment or information). I mention

this here because no rule controls the content of a complaint in an indictable case, but the subject matter of this rule addresses cases where multiple defendants are charged. In my experience, the content and format of the complaint differ depending on the jurisdiction—some county attorney’s offices file the complaint as submitted by the police agency, while others file a document prepared by the county attorney’s office. When public defender’s offices receive cases, the information contained in the complaint is often all they have to conduct initial conflict screening. These documents frequently only list the charged defendant by name, even when it is apparent that they were arrested and charged along with others. This means that effective conflict screening cannot occur until police reports are provided via the discovery process, or the trial information is filed. The practical result of this process is that attorneys have to withdraw from cases after a significant amount of time has already passed, due to a conflict that could easily have been discovered earlier if codefendants had been disclosed by the State. Disclosure of codefendants at the complaint stage would substantially reduce this problem, and this requirement should be added to the rules.

Rule 2.6(4-5), p. 11 L. 8-19 (requiring disclosure in the indictment of all prior convictions or other facts that subject the defendant to penalty enhancement)

This is a welcome change that will provide defendants adequate notice of the potential penalties involved with their charges, and the opportunity to challenge any alleged prior convictions or facts as incorrect.

Rule 2.8(2)(b)(3), p. 13 L. 20-26 (regarding judicial advisory of immigration consequences during plea proceedings)

The following italicized changes would better conform to the defense counsel disclosures required by State v. Diaz, 896 N.W.2d 723 (Iowa 2017), would address the problem of judges asking defendants questions about their immigration status, and would bring the language of the disclosures into conformity with the language used in the Immigration and Nationality Act (“removal” rather than “deportation,” “inadmissibility” rather than “inability to reenter the United States”):

3) That a criminal conviction, deferred judgment, or deferred sentence may affect a defendant’s status under federal immigration laws. The court shall inform the defendant, *without inquiring about the defendant's immigration status*, that if the defendant is not a citizen of the United States, the effects may include *removal, bars to relief from removal, inadmissibility*, mandatory detention in immigration custody, ineligibility for release on bond during immigration proceedings, *denial of citizenship, adverse consequences to immediate family*, and increased penalties for unauthorized reentry into the United States.

Rule 2.8(2)(c), p. L. 15-18 (requiring that the defendant be placed under oath for a plea colloquy, and allowing the prosecution to question the defendant during the colloquy)

The requirement that defendants be placed under oath during a guilty plea colloquy, particularly when combined with questioning from the court and “either counsel” (including the prosecutor), raises serious concerns. While defendants waive their right to remain silent with regard to the case at bar during plea proceedings, there is no limitation in the rules that would prevent questioning that

implicates other matters, and thus the defendant's answers could subject them to prosecution beyond the case that is the subject of the plea. Even if the questioning is directed toward the current case, the defendant's answers could go beyond that scope and, because they are under oath and on the record, could be used against them in a future prosecution. Additionally, the purpose of allowing questioning is to complete the required disclosures as well as establish a basis for the plea; there is no reason why it would be necessary for a prosecutor to question a defendant to accomplish those goals. If a prosecutor has concerns about some aspect of the proceeding, those concerns should be raised to the judge and to defense counsel, who can address them by questioning the defendant. Finally, requiring defendants to be placed under oath during in-person pleas but not paper pleas seems like an odd and arbitrary disparity. This should not be taken to mean that defendants should be placed under oath to complete paper pleas, as this would raise many practical issues. Getting someone qualified to place a defendant under oath could be very difficult—the defendant might be signing the plea in jail, or in the attorney's office, or on an extremely busy case management conference day in court. To summarize, placing defendants under oath for in-person plea proceedings raises constitutional and practical concerns that likely outweigh the problem being addressed, and allowing prosecutors to question defendants during a plea proceeding is unnecessary and further exacerbates these concerns. These changes appear to be designed to punish defendants who plead guilty and subsequently make a claim of actual innocence. This would only serve to perpetuate injustice. These changes should not be adopted. If the requirement that defendants be placed under oath is adopted, language should be added requiring that the court advise defendants that their answers could be used against them in future proceedings.

Rule 2.8(4)(c), p. 15 L. 5-8 (regarding advisory in written guilty plea that pleading guilty waives appellate rights)

This change is in response to Iowa Code section 814.6(1)(a)(3) regarding restricted appellate rights for defendants who plead guilty. While defendants should certainly be advised of those restrictions by defense counsel, incorporating a required judicial advisory into the rules at this stage is premature given that the constitutional limits of those restrictions are presently the subject of substantial litigation. The proposed rule change also does not reflect the recent holding from the Iowa Supreme Court that “good cause exists to appeal from a conviction following a guilty plea when the defendant challenges his or her sentence rather than the guilty plea.” State v. Damme, 944 N.W.2d 98, 105 (Iowa 2020). This new development reflects the unsettled nature of section 814.6(1)(a)(3), and that incorporating it into the rules of criminal procedure is premature. This change should not be adopted. If it is adopted, the language from Damme should also be included in the advisory.

Rule 2.9, p. 15 L. 12-14 (regarding case management conferences)

Language should be added permitting represented defendants to waive presence at the case management conference(s) via their attorney. In my experience, defendants are frequently subjected to multiple case management conference dates, their appearance is mandatory under threat of an arrest warrant if they fail to appear, and judges are sometimes inflexible about permitting waivers of appearance. The result is that defendants have to repeatedly make arrangements such as taking time off work or finding childcare so that they can attend court dates where, very often, nothing requiring their presence takes place. This has a coercive

effect. It was not unusual for defendants to tell me that they wanted to plead guilty so they wouldn't have to deal with making the arrangements necessary to attend additional court dates. Adding language making it clear that defendants are allowed to waive presence at case management conferences would significantly reduce defendants' negative opinions and experiences with the criminal justice system, and give them the flexibility they need to avoid undertaking substantial hardship.

Rule 2.9 (deletion of language discouraging continuances)

Removing the language discouraging continuances is a welcome change that will hopefully shift emphasis away from the hasty disposal of cases at the cost of adequate preparation.

Rule 2.10(2), p. 15 L. 25-26 (requiring all parties to acknowledge plea agreement terms)

The requirement that “[a]ll parties shall acknowledge the agreement either in writing or in open court on the record,” while beneficial in theory, could raise logistical issues in practice. In the case of a written guilty plea, I take this requirement to mean that the prosecutor must sign the plea to acknowledge that the terms of the plea agreement are mutually understood. This can be problematic if the prosecutor is not available, perhaps because they are out sick or are in trial. In my experience, sometimes prosecutors refuse to sign off on a plea in one of their colleagues' cases without confirming the details with their colleague. The end result of this problem is that defendants sometimes sit in jail longer than they otherwise have to under the terms of the plea agreement, simply because they are

waiting on their lawyer to track down a prosecutor. Defense attorneys deserve the benefit of a presumption that they are accurately summarizing the plea agreement, and prosecutors should have the responsibility of reviewing the plea once it has been filed and making a record if they disagree about the terms. This change should not be adopted.

Rule 2.11 (deletion of motion for bill of particulars)

It is unclear what benefit this change is intended to achieve, but its limitation on the defense is quite clear. A motion for bill of particulars allows defendants to request clarification when prosecutors file excessively vague minutes of testimony. This is not an unusual occurrence. While the motion is no longer a prerequisite to a motion to dismiss, removing a tool that defendants can use to get the clarification necessary to prepare a defense, as well as bring the State into compliance with notice requirements, would hinder the defense without providing any substantial benefit. This change should not be adopted.

Rule 2.11(11)(c), p. 19 L. 29-36 (allowing the State to have an expert examine the defendant when the defendant has been examined by an “expert for a reason other than insanity or diminished capacity [who] is expected to testify at trial”)

This rule as written is overly broad and should not be adopted. If it is adopted, language should be added requiring safeguards to protect the defendant’s constitutional rights as outlined in State v. Rodriguez, 807 N.W.2d 35, 39-39 (Iowa 2011) and State v. Craney, 347 N.W.2d 668, 673 (Iowa 1984). However, serious consideration should be given to the fact that those safeguards require the State’s

expert witness not to disclose any incriminatory statements to the prosecution. This means that the witness, who in all likelihood is not an attorney, is responsible for conducting the legal analysis of determining whether a given statement is “incriminatory,” potentially without knowing the circumstances underlying the statement. This is very problematic and weighs heavily against adopting this rule. If the rule is adopted, language should be added stating that any incriminating statements mistakenly shared by the State’s expert are inadmissible in a prosecution related to the statements, and may not be considered in any application for a search or arrest warrant related to the underlying activity.

Rule 2.13(3), p. 23 L. 9-14 (allowing for expanded objections to depositions and requiring the non-objecting party to prove depositions are necessary in the interest of justice)

Expanding the grounds for objections and requiring the non-objecting party to prove that the deposition is “necessary in the interest of justice” is highly problematic. Proving that a deposition is “necessary in the interest of justice” would require defense counsel to disclose trial strategy in many instances. Additionally, the proposed rule does not state the burden of proof during the “necessary in the interest of justice” hearing. This rule will result in abuse and confusion, and should not be adopted.

Rule 2.13(4), p. 23 L. 15-17 (allowing expanded timeframe for depositions where the defendant has waived speedy trial)

Expanding the timeframe for depositions to occur where the defendant waives speedy trial is a welcome change that will allow for adequate preparation prior to deposition as well as more flexibility for scheduling.

Rule 2.15(2), p. 26 L. 26-30 (regarding subpoenas for production of documents)

This subsection does not allow the defense to use a subpoena duces tecum to obtain documents from non-witnesses. Without such a provision, the defense's investigation is limited to documents obtained by the prosecution, and those that third parties are willing to turn over voluntarily. This is insufficient to protect defendants' rights. For example, if surveillance video could prove a defendant's alibi, but the party in possession of that video refuses to turn it over and the prosecution refuses to obtain it, the defense's hands are tied. The words "the witness" should be replaced with the words "any individual or corporation" to solve this problem and allow the defense to conduct adequate investigation.

Rule 2.15(3), p. 26 L. 32-32 (stating that subpoenas may be served "by any adult person not a party thereto")

The restriction that parties may not serve subpoenas could be interpreted to mean that county attorneys, defense attorneys, and employees of those respective offices (including investigators, who serve subpoenas routinely under the current rules) cannot serve subpoenas. This language should not be adopted unless language is added clarifying the definition of "party" for purposes of this subsection.

Rule 2.17(2)(a), p. 28 L. 4-7 (allowing for trial on the minutes of testimony)

Language should be added permitting the prosecution and defense to agree that portions of the minutes of testimony that are inadmissible or otherwise unrelated to the elements of the charged offense will not be considered by the court. This would be more efficient than having the prosecutor file amended minutes of testimony. This is especially important since Iowa Code section 814.6(1)(a)(3) restricts defendants' right to appeal from a guilty plea, and will likely result in trials on the minutes becoming more common.

Rule 2.18(6), p. 30 L. 18-22 (disallowing courts from attempting to rehabilitate jurors during jury selection)

The language disallowing judges from attempting to rehabilitate jurors is a welcome change that will preserve the judge's impartial role in the criminal justice system.

Rule 2.19(3), p. 32 L. 33-35 (regarding waiver of reporting of jury selection)

The language permitting waiver of reporting of voir dire in misdemeanor cases should be removed from this proposed rule. Error is just as likely to occur during voir dire for a misdemeanor trial as for a felony trial. Reporting voir dire is no doubt burdensome for court reporters, but it is crucial for preserving error. Allowing the option of waiver means that, in practice, defendants are subjected to pressure—sometimes subtle, sometimes not—to waive, and thereby give up their chance to appeal based on errors during voir dire. Mandatory reporting of voir dire

in all jury trials would eliminate this pressure, and would ensure that errors that occur during jury selection are preserved for appeal.

Rule 2.24(3)(c), p. 46 L. 13-16 (requiring the defendant who has filed a motion in arrest of judgment after pleading guilty to demonstrate that they “more likely than not would not have pled guilty if the defect in the plea proceedings had not occurred”)

This rule is in response to Iowa Code section 814.29. That section, like section 814.6(1)(a)(3) discussed above, is the subject of litigation to determine its constitutionality and limitations. Because the legality of the new code section is still being determined, it should not be incorporated into the rules.

Rule 2.27(4)(b), p. 50 L. 9-11 (allowing the court to order the search of any person who enters the courtroom)

This rule allows for the search of any individual entering the courtroom without probable cause or Terry suspicion, and is therefore blatantly unconstitutional. It should not be adopted. In fact, current rule 2.27(4)(b) is also unconstitutional as written. That subsection states, “[w]hen a magistrate reasonably believes a person who is present in the courtroom has a weapon in the person's possession, the magistrate may direct that such person be searched, and any weapon be retained subject to order of the court.” Terry requires reasonable, articulable suspicion that an individual is both armed *and dangerous*, and only permits a pat-down under those circumstances, not a full search. Terry v. Ohio, 392 U.S. 1, 30 (1968). The proposed amended language should not be adopted, and the current rule should be amended to bring it into conformity with Terry. I suggest:

b. When the court has a reasonable, articulable suspicion that a person in the courtroom is armed and dangerous, the court may order a pat-down of that person's outer clothing, and any weapon or other prohibited item may be retained subject to order of the court.

Rule 2.33(2)(a), p. 52 L. 32-35 (stating that the speedy indictment “45-day period commences for an adult only after the defendant has been taken before a magistrate for an initial appearance or a waiver of initial appearance has been filed”)

This language reflects a frequent misinterpretation of State v. Williams, 895 N.W.2d 856 (Iowa 2017), and should not be adopted. Specifically, Williams did *not* hold that the speedy indictment clock starts running from the date of initial appearance, and in fact included express language to the contrary: “*The rule is triggered from the time a person is taken into custody, but only when the arrest is completed by taking the person before a magistrate for an initial appearance.*” Williams, 895 N.W.2d at 867 (emphasis added). The Williams case was limited to the fairly rare circumstance where a defendant is taken into custody and subsequently released without an initial appearance because no charges are brought at that time. Any interpretation of the case as a sweeping change to the speedy indictment requirement in all cases is incorrect, and should not be adopted. In the place of this incorrect language, the rule should specifically state that the speedy indictment clock runs from the time the defendant is taken into custody, as stated in Williams, in order to rectify the pervasive misunderstanding of that case.

Thank you again for the opportunity to comment on the proposed amendments, and for the important work of the Iowa Rules of Criminal Procedure Review Task Force.

Respectfully submitted,

/s/ Josh Irwin

Josh Irwin

Assistant Appellate Defender

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JUL 14 2020

CLERK SUPREME COURT



[EXTERNAL] RE: Chapter 2 Amendments
Tricia Bushnell to: rules.comments@iowacourts.gov

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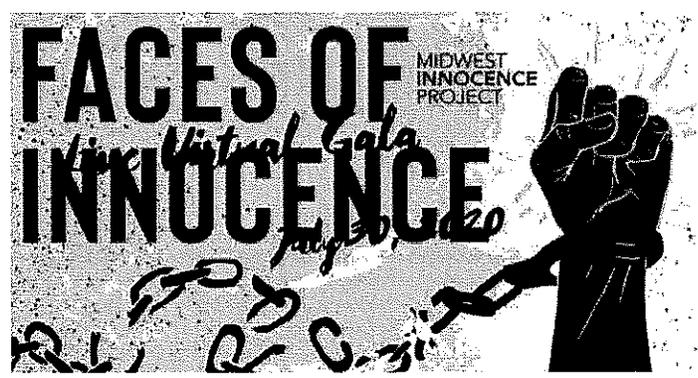
Apologies, please use the updated and corrected version attached.

Best,

-T

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From: Tricia Bushnell
Sent: Tuesday, July 14, 2020 2:52 PM
To: rules.comments@iowacourts.gov
Subject: Chapter 2 Amendments

Hi,

Attached please find a letter outlining comments from the Midwest Innocence Project regarding the

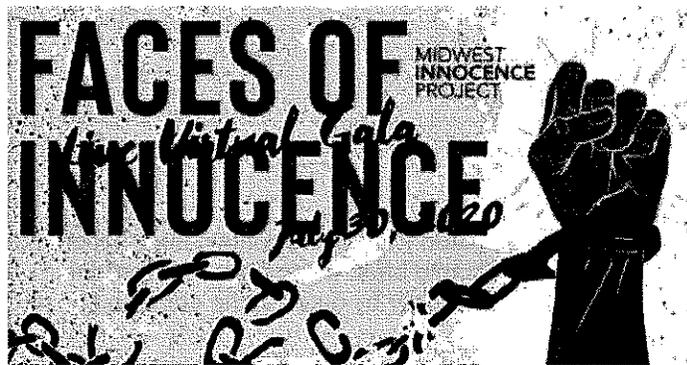
proposed Chapter 2 Amendments.

Best,

-T

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MIDWEST INNOCENCE PROJECT



3619 BROADWAY BLVD., #2 • KANSAS CITY, MO 64111

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JUL 14 2020

CLERK SUPREME COURT

July 15, 2020

Justice of the Iowa Supreme Court
Supreme Court Clerk
Via email: rules.comments@iowacourt.gov
111 E. Court Ave
Des Moines, IA 50319

Re: Proposed Amendments to Iowa Court Rules of Criminal Procedure Ch. 2

Dear Justices:

I write on behalf of the Midwest Innocence Project to voice our grave concerns and objections regarding the proposed amendments to the Rules of Criminal Procedure contained in Chapter 2. The Midwest Innocence Project represents individuals convicted of crimes they did not commit in our five-state region (Iowa, Missouri, Kansas, Nebraska, and Arkansas), and works to implement policies to prevent wrongful convictions in the first place. The Rules of Criminal Procedure governing a defendant's and their attorney's access to discovery to prove their innocence or provide a defense is critical component of ensuring the criminal legal system creates fair and just outcomes. Many of the proposed changes would not only undermine that ability but would also erode the public's confidence in the fairness of Iowa's criminal legal system.

The Iowa State Public Defender Wrongful Conviction Division, the Iowa State Appellate Defender, and the Iowa Association for Justice have also submitted comments outlining their concerns, all of which the Midwest Innocence Project also share. In addition to supporting their letters, we also want to highlight the following specific proposed changes as exceptionally troubling:

Rule 2.21(5) Disposition of exhibits.

The proposed version of Rule 2.21 regarding how exhibits are maintained after conviction does not address Class "A" felonies, which are the most serious criminal offenses with the most at stake for all parties involved. Over 500 people have been exonerated nationwide in proceedings that included post-conviction DNA testing on evidence that is often introduced as an exhibit.¹ It is imperative that the legal system, designed and implemented by humans and thus subject to human mistakes, be able to correct injustices where they occur. Access to evidence for DNA testing provides one such safety valve and requires that exhibits be retained in Class A felonies. We believe the Rules should explicitly require that the clerk maintain exhibits until the defendant's sentence has been completed. Additionally, defendants should be provided notice of any scheduled

¹ The National Registry of Exonerations, <http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx#>.



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destruction of exhibits. Proposed Rule 2.21(5) should mandate that clerks provide notice to the defendant and defendant's counsel at least 90 days prior to actual destruction.

Rule 2.24(2) Motions after Trial

A fundamental concept underpinning the criminal legal system is that we must be able to correct a manifest injustice. *Schlup v. Delo*, 513 U.S. 298, 325 (1995) (“[T]he injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system”); *see also In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (noting the “fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free”). The Rules of Criminal Procedure should not aim to diminish the opportunity to correct such an injustice, particularly when the current rules pose no burden. Under the new proposed amendment, a District Court no longer has a 30-day requirement to hear and decide a motion for a new trial and eliminate the District Court's ability to grant a new trial *sua sponte*. These proposed changes directly contradict the fundamental precept that our criminal justice system protect the innocent and correct such a manifest injustice *immediately*. Every day spent in prison for a crime a defendant did not commit is an intolerable punishment. Moreover, there is no need to make these rule changes. Motions for New Trial are rare and granted only in egregious circumstances; thus, there should be no limit on the court's discretion in the interest of justice. The current rule is not burdensome as it allows a continuance for good cause when necessary to obtain the witnesses and evidence necessary. Further, Rule 2.24 also makes no explicit mention of actual innocence claims. As this Court recognized in *State v. Schmidt*, 909 N.W.2d 778 (Iowa 2018); Iowa Const. art. I, §§ 9, 17. Rule 2.24 should be amended to allow claims of actual innocence explicitly.

Rule 2.8(2)(c) Manner and method of plea colloquy.

Currently, 95% of felony convictions in the U.S. are obtained through guilty pleas.² The system relies on guilty pleas to function—if every person charged with a crime demanded a trial, the system would be brought to a halt within a matter of hours. There are thus incredible incentives for an individual to make the rational choice to plead guilty to a crime they did not commit, including, for example, to avoid a harsher sentence. Indeed, 18% of known exonerees pleaded guilty to crimes they did not commit.³ With that in mind, there is no benefit to requiring defendants to plead under oath. Indeed, this Court and courts around the country have consistently allowed and endorsed the use of the *Alford* plea.⁴ By adopting the proposed change to require all guilty pleas be under oath, this Court would be encouraging prosecutors to punish those persons who later attempted to make a claim under *Schmidt*. There is no justice in that gamesmanship. A fair criminal justice

² The Innocence Project; www.Guiltypleaproblem.org/stats

³ *Id.*

⁴ The *Alford* plea allows a defendant to plead guilty while maintaining innocence and admitting that the State has enough evidence to secure a conviction. *North Carolina v. Alford*, 400 U.S. 25 (1970).



816.221.2166



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system should allow for innocent people to make rational decisions and still be able to correct a manifest injustice.

2.11(5) Motion for Bill of Particulars.

The proposed amendments eliminate the Motion for Bill of Particulars. There is no rationale for the total elimination of the defendant's right to seek specifics from the State prior to trial. The elimination of this safeguard will prevent pre-trial negotiations, increase discovery demands and lead to wrongful convictions.

Rules 2.14 and 2.15 Discovery & Subpoenas

It is difficult to imagine why a criminal legal system committed to justice and truth would implement the changes outlined below, limiting both the defendant's access to information in the State's possession and the ability of a defendant to investigate. The ability to investigate the charges presented is fundamental to a fair criminal legal system, requiring that a defendant be able to investigate to mount a defense and to permit counsel to make fully informed and educated decisions as required under *Strickland v. Washington*, 446 U.S. 668 (1984), confront their accusers under the Sixth Amendment, and ensure that the State is complying with the requirements to disclose information under *Brady v. Maryland*, 373 U.S. 83 (1963). As states around the country move toward more transparency (at least 17 now have open-file discovery statutes), Iowa should not turn a blind eye to these Constitutional requirements and protections.

The Iowa State Public Defender Wrongful Conviction Division has outlined in detail several problems with the new proposed rules, which we outline again here, including:

- The proposed changes restrict a defendant's ability to subpoena documents from witnesses that are not contained in the minutes of testimony, preventing defense counsel from seeking outside, unknown witnesses and sources of information, unless the state has chosen to use the evidence first. This is problematic for many reasons, but most importantly because it constricts a defendant's due process and prevents investigation, a key process in the truth-seeking process. In order to obtain records from law enforcement, phone companies, employers, surveillance video—all potential exculpatory evidence, a defendant must be able to issue subpoena duces tecums for records.
- The proposed changes to Rule 2.14(1) eliminate the defendant's ability to be present after complaint, indictment, or information when witnesses are summoned by the prosecution, greatly limiting the ability of the client to assist with his defense and foreclosing any communication between the defendant and their counsel during the proceedings, which may be critical to their defense. Notably, a defendant has a constitutional right to be present at every critical stage of the proceedings. U.S. Const. amend. VI; Iowa Const. art. I, § 10; *State v. McKee*, 312 N.W.2d 907 (Iowa 1981). This rule change should not put that in question.



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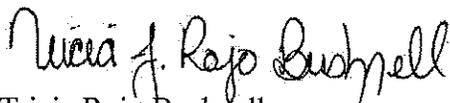


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- The general language of “state shall permit the defendant to inspect” is also troublesome. The burden is on the State to prove the elements of the charge, to produce the evidence prior to trial, all necessary for a fair and just trial that affords the defendant due process. The State further has the responsibility under *Brady v. Maryland* to disclose all exculpatory evidence whether requested or not by the defendant. See also *Herrington v. State*, 659 N.W.2d 509 (Iowa 2003); *DiSimone v. State*, 803 N.W.2d 97 (Iowa 2011). Indeed, the American Bar Association recommendations for Discovery support an open-file discovery process, permitting for full and complete discovery between both parties.⁵ The language in the rules would be more applicable if it read “the State shall produce to the defendant in its original and accessible format” the discovery.
- Changes to Rule 2.14(2) (1) eliminate the state’s required disclosure of defendant’s statements that are audio or voice recorded, the transcript or record of any testimony of the defendant before a grand jury. This change moves Iowa in the wrong direction and discourages audio and video recordings of interrogations and statements or confessions. Nationwide, 323 wrongful convictions involved false confessions.⁶ These are statements by a defendant made to law enforcement that are later proven to be untrue. The best way to prevent wrongful convictions caused by false confessions is to mandate video recording of the interrogation, the statement and confession. Eliminating the state’s requirement to disclose such videos, when obtained, is illogical and deprives criminal defendants of due process.

As an organization committed to ensuring innocent people are not convicted for crimes they did not commit, we are gravely concerned about the consequences of the proposed rule changes. We urge this Court to conduct further review of the proposed amendments to Chapter 2 and the Iowa Rules of Criminal Procedure to safeguard the rights of the accused in Iowa and level the playing field to ensure a fair and just process.

Sincerely,



Tricia Rojo-Bushnell
Executive & Legal Director
Iowa Attorney No. AT13307

⁵ American Bar Association, Criminal Justice Standards, Discovery, https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_discovery_blk/

⁶ The National Registry of Exonerations (Jul. 13, 2020 2:45 PM), <http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx#>

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JUL 14 2020

CLERK SUPREME COURT



[EXTERNAL] Comments on Proposed Amendments to the Rules of Criminal Procedure (Chapter 2)

Al Smith to: rules.comments@iowacourts.gov

07/14/2020 03:15 PM

History: This message has been forwarded.

1 attachment



7.14.2020 Chapter 2 Amendments.docx

Please find attached my comments on the proposed changes to Chapter 2. Thank you.



ALEXANDER SMITH, Lawyer

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July 14, 2020

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JUL 14 2020

CLERK SUPREME COURT

Justices of the Iowa Supreme Court
1111 E. Court Avenue
Des Moines, IA 50319

Re: Proposed Amendments to Iowa Court Rules of Criminal Procedure Ch. 2

Dear Honorable Justices:

I have seen the letters from my colleagues Nick Klinefeldt, Erica Nichols, Robert Rigg, Benjamin Bergmann, Martha Lucey, and others, and ask that you consider me as joining their specific concerns. My name is Al Smith. I am an attorney at the Parrish Law Firm and I have had the privilege of arguing in front of this court in State v. Zarate, 908 N.W.2d 831 (Iowa 2018) and Sahinovic v. State, 940 N.W.2d 357 (Iowa 2020).

I have previously been disinclined to publicly comment on Iowa Supreme Court decisions, rule changes, bills proposed in the Iowa legislature, or other public matters. My philosophy was that I was merely a private citizen whose opinion could not control the outcome, and I should instead focus on where I could do good: doing a good job in the cases where I was the attorney. I cannot do that any longer. "Defense counsel should seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to defense counsel's attention, counsel should stimulate and support efforts for remedial action." ABA Standard 4-1.2(e).

It is obvious that the public's faith in the criminal justice system is faltering. Black Lives Matter protests continue in Iowa, for over a month now, from Le Mars to Keokuk, from Decorah to Council Bluffs, from Sioux City to Clinton, in cities as large as Des Moines and Cedar Rapids to towns as small as Lone Tree and Coon Rapids. <https://www.washingtonpost.com/nation/2020/07/11/midwest-changing-demographics-black-lives-matter-protests/?arc404=true>. These protests are not just against the police, but the entire criminal justice system. They are against Iowa's cash

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Page 2

bail system, which punishes the poor, against the overrepresentation of people of color in Iowa's prisons and jails, and against our harsh criminal laws. These proposed rule changes only give these protesters more reason to doubt the justness of our system.

The Iowa Supreme Court expects much of criminal defense attorneys, and it should. When the Iowa Supreme Court decided Morales Diaz v. State, 896 N.W.2d 723 (Iowa 2017), some commentators thought it greatly expanded the scope of the duties of criminal defense attorneys. The court ruled the way it did because “[t]he practice and expectations of the legal community, and its clients, reveals counsel has a duty to provide that information.” Justices have recognized that the Iowa Supreme Court “has an expansive view of ineffective assistance of counsel.” Rhoades v. State, 848 N.W.2d 22, 33 (Iowa 2014) (Mansfield, J., concurring). “In some respects, we are using ineffective assistance as a substitute for a plain error rule, which we do not have in Iowa.” Id. One need look no farther than guilty pleas to see this is true. Errors in federal guilty pleas are corrected using plain error. See United States v. Dominguez Benitez, 542 U.S. 74, 83 (2004). In contrast, in Iowa, the lack of factual basis for a guilty plea is raised on ineffective assistance of counsel grounds and the attorney is not allowed to not give a proper factual basis for a strategic reason because looking out for his client's interest only “would erode the integrity of all pleas and the public's confidence in our criminal justice system.” State v. Hack, 545 N.W.2d 262, 263 (Iowa 1996). This is done “seemingly without regard to counsel's actual competence.” Rhoades v. State, 848 N.W.2d 22, 33 (Iowa 2014) (Mansfield, J., concurring). Criminal defense attorneys often bear the burden in the public's confidence of the legitimacy of the criminal justice system.

I am not complaining. I do not fear an expansive constitutional duty to my clients. To my knowledge, neither does the Iowa criminal defense bar. In fact, we welcome it. We are proud to uphold the public's confidence in the criminal justice system. We strive to not just be constitutionally adequate, but exceptional zealous advocates for our clients.

The public has the view that if they are charged with a crime, they will be provided an attorney if they cannot afford one, and that attorney will use the legal process to put on a zealous defense on their behalf. The public also tends to think that people who plead guilty do so because they are, in fact, guilty, and not that they were scared into pleading guilty.

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With these proposed rule changes, the public would be wrong. Criminal defense attorneys only have a few tools in our arsenal when we are appointed to represent a client or a client comes into our office. One is usually a desire to work hard on behalf of our client. The other is our knowledge, which can be supplemented by our aforementioned work ethic. The Iowa criminal defense bar has sufficient work ethic and knowledge to ably represent our clients. But we need the tools of the legal process to supplement the rest. We need to be able to depose witnesses not listed in the minutes in order to further our investigation, (Rule 2.13(2)(a)); subpoena witnesses at pre-trial hearings to argue our pretrial motions (Rule 2.15(1); issue subpoenas duces tecum to investigate documents and physical evidence (Rule 2.15(2)); and request bills of particulars so we know what the case of the State is so we can actually prepare to meet it (Rule 2.11(5)). The Iowa Supreme Court has told us that we have a duty to investigate. Ledezma v. State, 626 N.W.2d 134 (Iowa 2001). How are we to discharge our duties with these proposed rule changes? Under these changes, criminal defense attorneys have great duties but little power to exercise those duties.

The court should not rely upon any illusions about the cordiality of Iowa attorneys if they approve these changes to the rules. Prosecutors will not allow discovery simply to assist us in doing our constitutionally mandated jobs. They will only do so if required. Often, they do not bother to do what is already required. The current Iowa R. Crim. P. 2.14(2)(a)(3) states that “[u]pon the filed request of the defendant, the state shall furnish to defendant such copy of the defendant’s prior criminal record, if any, as is then available to the state.” I hope it would surprise the court to learn that I rarely am furnished a copy of my client’s criminal record even after filing a request for mandatory discovery and having the court approve that request. The court rarely gets to see these issues come to light, as they rarely come up in appellate cases. The defense bar makes up for the prosecution’s failure in other ways. But we are running out of ways.

The court has lofty goals for what a prosecutor’s office should look like. These lofty goals are in conflict with the actual goals of a high-volume prosecutor’s office, which are to dispose of cases quickly, cheaply, and with conviction. Without rules that constrain prosecutorial behavior and mandate openness and discovery, those goals are made up. They do not exist. They are nice words that justify whatever cruelty can be inflicted by our system, but they are only words. They might make us all sleep a little

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GRIBBLE GENTRY BROWN & BERGMANN L.L.P
LAWYERS

July 15, 2020
Page 4

better at night, but those words have not done one thing for any Iowan unjustly targeted by the police or a prosecutor's office. The public gets hundreds of rules about how to lawfully drive and walk and live while prosecutors get few, if any, rules about how to justly prosecute a case against that public.

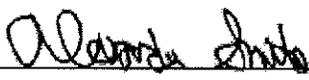
Slightly off topic but equally important, the proposed change allowing the destruction of evidence is particularly wrong-headed. Already, defendants are no longer allowed to bring ineffective assistance of counsel claims on direct appeal. Now, their only avenue for litigating these claims is through postconviction relief applications. The rule changes will make showing prejudice unnecessarily burdensome.

The Iowa criminal justice system can be a system of justice, with specific rules that allow open access to prosecutor files, opportunities for defendants to test the strength of the State's case, and investigatory tools that allow defendants to actually defend themselves. Or it can be a bureaucracy that quickly sends people to prison while appellate court opinions speak of high ideals like "reasonable doubt" and "trial by jury" that rarely, if ever happen in practice. The court's decision on whether to adopt these rules will likely embrace one approach or the other.

As I see more and more protesters charged with exercising their First Amendment rights and being attacked by the police, it is more and more difficult for me to pretend that everything is okay with how we do things. It is more difficult for me to hold my tongue at the risk of offending a professional colleague or the court. Not only are these proposed changes wrong, our current rules are inadequate. Regardless of the court's decision, I will be here, seeking justice for my clients in whatever court I can find it in. I only ask that the court give me the tools I need in order to do so.

Very truly yours,

PARRISH KRUIDENIER DUNN BOLES
GRIBBLE GENTRY BROWN & BERGMANN, L.L.P.

BY: 
Alexander Smith
asmith@parrishlaw.com

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JUL 14 2020

CLERK SUPREME COURT



[EXTERNAL] Chapter 2 Amendments
Rita Bettis Austen to: rules.comments

07/14/2020 04:21 PM

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1 attachment



Comments Re Proposed Amendments to Chapter 2.docx

Please see attached.

Rita Bettis Austen

Legal Director

ACLU of Iowa

505 Fifth Avenue, Ste. 808

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pronouns: she/her/hers

www.aclu-ia.org

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IN THE IOWA SUPREME COURT

CLERK SUPREME COURT

In the Matter of Public Comment
on Proposed Amendments to
Chapter 2, Iowa Rules of Criminal
Procedure

Comments Submitted on Behalf of
the American Civil Liberties
Union of Iowa Foundation
(ACLU of Iowa)

These brief comments regarding the Proposed Amendments to Chapter 2, Iowa Rules of Criminal Procedure are submitted on behalf of the American Civil Liberties Union of Iowa Foundation (“ACLU of Iowa”). The ACLU of Iowa is the statewide affiliate of the American Civil Liberties Union. The ACLU of Iowa is a nonprofit, nonpartisan organization dedicated to the principles of liberty and equality embodied in the state and federal Constitutions and laws, with thousands of Iowa members. Founded in 1935, the ACLU of Iowa is the fifth oldest state affiliate of the national American Civil Liberties Union. The ACLU of Iowa works in the courts, legislature, and through public education and advocacy to safeguard the rights of everyone in our state. Particularly relevant to these comments, the ACLU of Iowa is committed to ensuring that constitutional protections for the criminally accused are scrupulously honored.

First, the ACLU of Iowa supports the recommendations submitted by the Iowa Association for Justice (“IAJ”) regarding the Proposed Amendments as consistent with the due process protections afforded persons accused of crimes under the Iowa and U.S. Constitutions. Rather than repeat the discussion and arguments in comments that have already been filed by the IAJ regarding the Proposed Amendments, the ACLU of Iowa hereby indicates its agreement with those previously filed comments.

The ACLU of Iowa is in particular concerned about the lack of discovery available to defendants to subpoena witnesses and materials which are critical to the defense, which should be included in the Proposed Amendment to Rule 2.15 as set forth by the IAJ.

In addition, the ACLU of Iowa is particularly concerned with the proposed elimination of the Bill of Particulars in Rule 2.11(5), an essential safeguard to ensure defendants have the opportunity to adequately prepare a defense against specific charges made. This must be restored before the final Amendments are adopted.

Likewise, regarding the Proposed Amendment to Rule 2.18(5)(a), lines 15-18, the ACLU of Iowa agrees with the NAACP that it would be

prudent to wait a short period of months until the issuance of the Governor's promised Executive Order restoring voting rights to persons convicted of felony offenses before considering a rule which will necessarily be impacted either in form or in practice by the Executive Order. As correctly stated by the NAACP in their comments, the Executive Order may or may not provide adequate assurance to a criminal defendant of their constitutional right to a jury pool comprised of a fair cross-section of the community. In particular, should the Executive Order include a requirement that victim restitution be paid prior to restoration of voting rights, the rule should be changed so as not to systematically disqualify potential jurors based only on inability to pay victim restitution, which could be expected to have a significant disparate impact disadvantaging Black Iowans and other Iowans of color in light of existing disparities in our criminal justice system and in socioeconomic wellbeing. The ACLU of Iowa further agrees that the normal voir dire process to check the bias of a potential juror who has been convicted of a felony is sufficient to ensure a fair trial, without a presumption that persons whose rights to vote have not yet been restored are biased.

Finally, the ACLU of Iowa wishes to express its appreciation to the members of the committee and the Court for their time and expertise in compiling the proposed Amendments, many of which make valuable and needed improvements to the Rules of Criminal Procedure.

Dated this 14th Day of July, 2020.

Respectfully submitted:

/s/ Rita Bettis Austen
Rita Bettis Austen, AT0011558
ACLU of Iowa Foundation Inc.
505 Fifth Avenue, Ste. 808
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Telephone: 515-207-0567
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From: **Nichols Cook, Erica** <enicholscook@spd.state.ia.us>
Date: Tue, Jul 14, 2020 at 9:16 AM
Subject: Chapter 2 Amendments
To: Rules Comments <rules.comments@iowa.gov>

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Please see the attached word document for comments.

--

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--

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Governor, Kim Reynolds
Lt. Governor, Adam Gregg

OFFICE OF THE STATE PUBLIC DEFENDER
Jeff Wright, State Public Defender

July 21, 2020

Justices of the Iowa Supreme Court
Supreme Court Clerk
Via email: rules.comments@iowacourts.gov
1111 E. Court Ave
Des Moines, IA 50319

Re: Proposed Amendments to Iowa Court Rules of Criminal Procedure Ch. 2

Dear Justices:

On behalf of myself and the Wrongful Conviction Division of the State Public Defender, I write to raise concerns and objections to the proposed amendments to the Rules of Criminal Procedure contained in Chapter 2.

All attorneys have the ethical responsibility to advocate zealously on the behalf of their clients. This is more sobering when you consider what is at stake in the criminal justice system, an attorney carries a tremendous responsibility that will affect the rest of their client's life. The National Registry of Exonerations data reports that 709 out of 2,641 exonerations nationwide were caused in part by ineffective legal representation.¹ That means competent and zealous criminal defense attorneys can prevent wrongful convictions. However, all criminal defense attorneys must execute this advocacy by utilizing the Rules of Criminal Procedure.

While, all prosecutors, including local county attorneys and the attorney general's office must also adhere to the Rules of Criminal Procedure, their responsibility is not to zealously seek convictions or represent alleged victims, but instead to seek justice and truth. Previously, this Court announced the proposed adoption of addition to Rules of Professional Responsibility 32:3.8 (g) and (h). However, this Court has failed to adopt these subsections which would reinforce the role of prosecutors to seek truth and justice, not convictions.

¹ The National Registry of Exonerations (Jul. 13, 2020 2:45 PM),
<http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx#>

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State of
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Governor, Kim Reynolds
Lt. Governor, Adam Gregg

OFFICE OF THE STATE PUBLIC DEFENDER
Jeff Wright, State Public Defender

These responsibilities of the parties in the criminal justice system extend to every part of the judicial process. This includes arrest, arraignment, investigation, defense and trial. The proposed changes do not ensure that defense attorneys are able to fulfill their obligations. I also write in support of the comments submitted by the Iowa Association for Justice and the State Appellate Defender.

The following specific comments are provided regarding the most troubling proposed changes:

Rule 2.21(5) Disposition of exhibits.

The proposed version of Rule 2.21 does not appear to address Class “A” felonies. The Rules should be explicit, as Class A felonies are the most serious criminal offenses and there is the most at stake for all parties involved. Based on data on wrongful convictions and our personal experiences in seeking exhibits in Class A felonies, where defendants are serving life in prison, the Rules should explicitly require that the clerk should maintain the exhibits until the defendant’s sentence has been completed. The potential injustice that would be caused by the proposed changes and sanctioned destruction of exhibits a mere 60 days after a final appeal is incalculable. Nationwide, 514 people have been exonerated by DNA evidence that many times was located in court exhibits or evidence.² It is imperative to a fair system of justice, that we as a society and criminal justice system maintain those exhibits. Additionally, defendant should be given notice of the scheduled destruction of exhibits. Proposed Rule 2.21(5) should mandate that the clerk must provide notice to the defendant and defendant’s counsel at least 90 days prior to actual destruction.

Rule 2.24(2) Motions after Trial

The proposed amendment eliminates the thirty-day requirement for the District Court to hear and decide a motion for a new trial. The current rule is not burdensome, as it allows a continuance for good cause when necessary to obtain the witnesses and evidence necessary. There is no need to remove this provision and its removal would serve to sanction delay.

The proposed amendments also remove the court’s ability to grant a new trial *sua sponte*. Motions for New Trial are rare and granted only in egregious circumstances, there should be no limit on the court’s discretion in the interest of justice. This proposal hampers the District Court’s ability to administer justice.

² The National Registry of Exonerations (Jul. 13, 2020 2:45 PM),
<http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx#>

State of
IOWA

Governor, Kim Reynolds
Lt. Governor, Adam Gregg

OFFICE OF THE STATE PUBLIC DEFENDER
Jeff Wright, State Public Defender

Rule 2.24 also makes no explicit mention of actual innocence claims. As this Court recognized in *State v. Schmidt*, any incarceration of an actually innocent person violates the due process rights preserved in the Iowa Constitution. 909 N.W.2d 778 (Iowa 2018); Iowa Const. art. I, §§ 9, 17. Rule 2.24 should be amended to allow claims of actual innocence explicitly.

Rule 2.8(2)(c) Manner and method of plea colloquy.

It is not necessary to require defendants to plead under oath. This Court has consistently allowed and endorsed the *Alford* plea in Iowa Courts. The *Alford* plea allows a defendant to plead guilty while maintaining innocence and admitting that the State has enough evidence to secure a conviction. *North Carolina v. Alford*, 400 U.S. 25 (1970). This Court has recognized that the actually innocent can be enticed to plead guilty. By adopting this proposed change to require all guilty pleas be under oath---this Court would be encouraging prosecutors to punish those persons who later attempted to make a claim under *Schmidt*. That cannot be what this Court intended when it decided *Schmidt*. Research has shown that 95% of felony convictions in the United States are obtained through guilty pleas, while 18% of exonerations involved a guilty plea.³

2.11(5) Motion for Bill of Particulars.

The proposed amendments eliminate the Motion for Bill of Particulars. There is no rationale for the total elimination of the defendant's right to seek specifics from the State prior to trial. The elimination of this safeguard will prevent pre-trial negotiations, increase discovery demands and lead to wrongful convictions.

Rules 2.14 and 2.15 Discovery & Subpoenas

One of the most important duties of a criminal defense attorney is the duty to investigate. An attorney cannot form a legitimate trial strategy without conducting an adequate investigation. An adequate investigation requires access to the law enforcement investigation, access to the evidence the state has in its possession and the ability to obtain evidence of innocence or impeachment not in the possession of the State. Effective investigation requires a process in which defense attorneys can obtain documents, photographs, videos that will assist in the defense of their clients.

³The Innocence Project; www.Guiltypleaproblem.org/stats

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Governor, Kim Reynolds
Lt. Governor, Adam Gregg

OFFICE OF THE STATE PUBLIC DEFENDER
Jeff Wright, State Public Defender

The proposed changes restrict a defendant's ability to subpoena documents from witnesses that are not contained in the minutes of testimony---this prevents defense counsel from seeking outside, unknown witnesses and sources of information---unless the state has chosen to use the evidence first. This is problematic for many reasons, but most importantly because it constricts a defendant's due process and prevents investigation. It is common that in order to obtain records from law enforcement, phone companies, employers, surveillance video---all potential exculpatory evidence---that Defendant cannot obtain without a subpoena duces tecum for records.

The proposed changes eliminate the defendant's ability to be present after complaint, indictment, or information when witnesses are summoned by the prosecution. Rule 2.14(1). While no changes are being made to Rule 2.5---a defendant has a constitutional right to be present at every critical stage of the proceedings. U.S. Const. amend. VI; Iowa Const. art. I, § 10; *State v. McKee*, 312 N.W.2d 907 (Iowa 1981).

The general language of "state shall permit the defendant to inspect" is also troublesome. The burden is on the State to prove the elements of the charge, to produce the evidence prior to trial, all necessary for a fair and just trial that affords the Defendant due process. The State further has the responsibility under *Brady v. Maryland* to disclose all exculpatory evidence whether requested or not by the Defendant. *Herrington v. State*, 659 N.W.2d 509 (Iowa 2003); *DiSimone v. State*, 803 N.W.2d 97 (Iowa 2011). The language in the rules would be more applicable if it read "the State shall produce to the defendant in its original and accessible format" the discovery.

Rule 2.14(2) (1), the changes eliminate the state's required disclosure of defendant's statements that are audio or voice recorded, the transcript or record of any testimony of the defendant before a grand jury. This change moves Iowa in the wrong direction and discourages audio and video recordings of interrogations and statements or confessions. Nationwide, 323 wrongful convictions involved false confessions.⁴ These are statements by a defendant made to law enforcement that are later proven to be untrue. The best way to prevent wrongful convictions caused by false confessions is to mandate video recording of the interrogation, the statement and confession. Eliminating the state's requirement to disclose such videos, when obtained, is illogical and deprives criminal defendants of due process.

⁴ The National Registry of Exonerations (Jul. 13, 2020 2:45 PM), <http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx#>

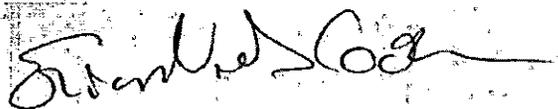
State of
IOWA

Governor, Kim Reynolds
Lt. Governor, Adam Gregg

OFFICE OF THE STATE PUBLIC DEFENDER
Jeff Wright, State Public Defender

I urge you to conduct further review of the proposed amendments to Chapter 2 and the Iowa Rules of Criminal Procedure to increase protections for the accused in Iowa and level the playing field, instead of allowing the State additional advantages that will lead to more wrongful convictions in Iowa. Thank you for the opportunity to comment on this critical proposal.

Sincerely,



Erica Nichols Cook
Director, Wrongful Conviction Division
Iowa State Public Defender
enicholscook@spd.state.ia.us
ENC/eanc

FILED
JUL 21 2020
CLERK SUPREME COURT

From: Reuben Neff <reubenneff@wapellocounty.org>
To: "rules.comment@iowacourts.gov" <rules.comment@iowacourts.gov>
Date: 07/20/2020 11:11 AM
Subject: [EXTERNAL] FW: Chapter 2 Amendments

Good morning,

I accept that the attached commentary is late, given the deadline was July 14, 2020. However, if you look below, I did submit the commentary on June 29, 2020 but sadly sent my document to rules.comment@iowa.gov instead of rules.comment@iowacourts.gov. I respectfully request that my commentary still be reviewed but recognize that this might not be possible. Thank you.

Reuben Neff
Wapello County Attorney
219 N. Court St, Ottumwa, IA 52501
(641) 683 0030

From: laura.hudson@iowa.gov [mailto:laura.hudson@iowa.gov] **On Behalf Of** Comments, Rules
Sent: Monday, July 20, 2020 10:53 AM
To: Reuben Neff <reubenneff@wapellocounty.org>
Cc: Kathy Weinberg <kathy.weinberg@iowa.gov>
Subject: Re: Chapter 2 Amendments

Mr. Neff,

i am in receipt of an email to this account on June 29, 2020. However, the account to which your comments were sent is not monitored, unless the Board of Nursing has rules out for comment. That said, I believe you must have sent your comments to the wrong email account. I apologize for the delay, but wanted you to know about this issue.

Sincerely,
Laura R. Hudson, MSN, RN
Associate Director - CE/Workforce
Office/Cell 515-201-2509
Fax: 515-281-4825
Iowa Board of Nursing
Iowa Center for Nursing Workforce
400 SW 8th Street, Suite B

Des Moines, IA 50309

Member of the National Forum of State Nursing Workforce Centers

Website: nursing.iowa.gov

The mission of the board is to protect the public health, safety and welfare by regulating the licensure of nurses, the practice of nurses, nursing education and continuing education.

This e-mail and any files transmitted with it are confidential and are intended solely for the use of the individual(s) to whom it is addressed by the sender. If you are NOT the intended recipient, or the person responsible for delivering the e-mail to the intended recipient, be advised that you have received this e-mail in error, and that any use, dissemination, forwarding, printing, or copying of the contents of this e-mail is strictly prohibited.

On Mon, Jun 29, 2020 at 10:34 AM Reuben Neff <reubenneff@wapellocounty.org> wrote:
Good morning,

Please find my comments on rule proposals attached to this email. Thank you for your time.

Reuben Neff
Wapello County Attorney
219 N. Court St, Ottumwa, IA 52501
(641) 683 0030



Commentary on Rule Proposals--06.29.2020.docx

JUL 21 2020

CLERK SUPREME COURT



219 N. Court
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Phone: (641) 683-0030
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Wapello County Attorney

Reuben A. Neff

In re: Chapter 2 Amendments

Rule 2.9 Trial assignments (page 15, lines 10-14)

Proposed changes eliminate 2.9(2) "*Firmness of trial date*". The date assigned for trial shall be considered firm. Motions for continuance are discouraged. A motion for continuance shall not be granted except upon a showing of good and compelling cause.

Unfortunately, the elimination of this rule only contributes to the already lengthy delays to case resolutions. Such delays are anathema to the enactment of justice, yet remain common in Iowa. Though the phrase "justice delayed is justice denied" is cliché at this point in time, it is still true. Our courts already allow for significant delays in prosecutions under the guise of the defense preparing their case when the reality is that court appointed counsel fails to prioritize their caseloads. See Dru Stevenson, Monopsony Problems With Court-Appointed Counsel, 99 Iowa L. Rev. 2273 (2014); Eve Brensike Primus, Culture as a Structural Problem in Indigent Defense, Minn. L. Rev. 100 (2016).

Eliminating language discouraging continuances does nothing to improve the delivery of justice in our system. Worse, it eliminates one of the few bits of language a Court may rely on when imposing deadlines on an attorney or attorneys failing in their duties to zealously represent their clients. If anything, this language should be sharpened to put a greater burden on courts to ensure the State and Defense are acting expeditiously to bring matters to a final disposition, which benefits defendants, victims, and judicial economy.

Rule 2.13(5) Presence of Defendant (page 23, lines 20-26)

Proposed language for Rule 2.13(5) *Presence of Defendant* would codify an incorrect interpretation of the law that has been an accepted, but incorrect, practice in Iowa for an extended period of time. This proposed language *requires* the presence of the Defendant for felony depositions. However, this is not required by the federal constitution, state constitution, or binding Iowa case law.

There should not be a rule requiring the presence of the defendant unless the deposition is to perpetuate testimony. Iowa Rule of Criminal Procedure 2.27 establishes when a defendant must be present throughout his or her prosecution. The Rule states the defendant shall be present at initial appearance, arraignment and plea (unless a written arraignment form is filed), pretrial proceedings, and shall be personally present at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence. Depositions that are not for the purpose of perpetuation *are not critical stages of a trial*.

The Iowa Supreme Court, in State v. Peterson, 219 N.W.2d 665 (Iowa 1974), held that a defendant may take discovery depositions of a State's witness. After that, new rules of criminal procedure were created to delineate the actual procedures for how this would be accomplished. The Iowa Supreme Court, in State v. Folkerts, 703 N.W.2d 761 (Iowa 2005), State v. Davis, 259 N.W.2s 812 (Iowa 1977), and State v. Holderness, 301 N.W.2d 733 (Iowa 1981), sometimes makes it seem that defendants have the right to depositions and to be present for them by relying on rules of procedure that state a defendant "shall be personally present at every stage of the trial." Further reading of case law clearly holds that this is not the case.

The Iowa Supreme Court clearly delineated the difference in concepts of discovery depositions and depositions taken for introduction at trial (depositions to perpetuate testimony). These two types of deposition are different. For a deposition to

perpetuate testimony, this will be the only time a defendant has the right to confront a witness. For a discovery deposition, this is merely to interview, after which point the defendant will attend trial and will carry out their right to confront the witness.

The Iowa Supreme Court did clearly state, in Otteson v. Iowa Dist. Ct., 443 N.W.2d 726 (Iowa 1989), that “if a deposition is taken for discovery only-not for use at trial- the deposition is not a ‘stage of trial’ for which the defendant must be present.”

Though many attorneys and even judges in Iowa seem to believe that a defendant has the absolute constitutional right to be present during depositions, neither the State nor national Constitution provide such a right. In Van Hoff v. State, 447 N.W.2d 665 (Iowa Ct. App. 1989), the Iowa Court of Appeals specifically noted that

“[d]epositions, which were taken as discovery depositions and not to perpetuate testimony of one who would be absent from trial and none of which were introduced into evidence at trial, were not ‘stages of trial’ at which defendant had to be present and failure of counsel to have defendant present at depositions did not constitute ineffective assistance.”

This principal of law was reaffirmed by our appellate courts as recently as March 20, 2019 in Beloved v. State, 928 N.W.2d 170 (Iowa Ct. App. 2019), where the defendant’s convictions for two sexual abuse charges were sustained despite the defendant complaining that he was unable to be present during the defense attorney’s deposition of a State expert witness. “[C]ounsel does not fail to perform an essential duty when taking ‘discovery depositions not taken for use at trial’ in a defendant’s absence because it does not amount to a ‘stage of trial.’” Id. at 4, citing Van Hoff, 447 N.W.2d at 674-75.

Sexual abuse victims already run into horrible judicially imposed trauma when courts, in their failure to understand the lack of a constitutional requirement regarding a defendant’s presence during depositions, require the State to keep the sex abuse victim in the same small deposition room with his or her abuser. To further institutionalize this misunderstanding will only further the public’s disillusionment in the level of justice our system delivers.

Rule 2.33(2) Right to speedy trial (page 52, lines 24-35; page 53, lines 1-3)

The current speedy trial criminal procedures do not reflect the nationwide strides towards modernization to best balance the rights of defendants, realities of overburdened court systems, and realities of defense case management strategies. Instead of ensuring that a defendant receives a speedy trial, the current procedures incentivize a defense strategy of:

- 1) demanding speedy trial amongst a multitude of cases, essentially pitting the interests of multiple clients against each other, in an effort to constrain limited court resources in the hopes of a better plea bargain, and
- 2) waiving speedy trial when there are upcoming available trial dates, only to later re-demand when court dockets become clogged in the hopes of pressuring the prosecution to give a better plea offer, and then either obtaining the desired offer or again waiving speedy trial once the State reschedules trials to create an available trial slot.

At least five times a year, the State in Wapello County contacts court administration to obtain extra trial dates based on demands for speedy trial, only to have the defense waive speedy trial as those extra dates loom. This is a waste of court resources, court time, State time, victim’s time, and the defendant’s time.

Further, the ninety (90) day deadline for speedy trial is too short for most defense counsel to properly investigate and prepare a serious felony case for trial. This reality leads to most defense counsel to waive speedy trial at the moment of an arraignment for a felony case when they genuinely want to defend their client on the merits of a case. This should not happen as a matter of course but does because our rules do not account for the complexities of felony cases.

To bring our procedures in line with the national consensus, the following changes should be implemented:

1. The felony speedy trial deadline should be six months as opposed to 90 days from initial appearance, as is the case in Ohio, New York, Florida, Nebraska, and numerous other states.
2. The remedy for a failure to bring a defendant to trial within six months should be: 1) release from custody, and 2) to receive a trial within a short turnaround. The remedy should not be outright dismissal. This deviation from Iowa jurisprudence is followed in New York, Florida, Illinois, and many other states. The one exception to this is when the delay causes irreparable harm to the defendant, as is envisioned by Barker v. Wingo, 407 U.S. 514 (1972).
3. When computing speedy trial deadlines, courts should exclude periods of time leading up to trial involving delay caused by the defendant. This includes defendant requested continuances. This is the rule of procedure and common

practice in many states across the country and can be specifically found in Illinois, New York, Florida, and Nebraska.

4. Defendants who actively assert a speedy trial right should be prevented from unilaterally waiving that right as trial nears. Most other states require that such a waiver be approved by the Court and State before granting waiver requests.

The American Bar Association, Standard 12-1.1 notes that the purpose of the standard on Speedy Trial is as follows:

The standards on Speedy Trial and Timely Resolution of Criminal Cases have three main purposes: 1) to effectuate the right of the accused to a speedy trial; 2) to further the interests of the public, including victims and witnesses, in the fair, accurate, and timely resolution of criminal cases; and 3) to ensure the effective utilization of resources.

Currently, our rules fail to effectuate a real right to a speedy trial. This is because those defendants seeking to have their cases properly reviewed are forced to waive speedy trial. Those who seek dismissal through unruly bureaucracy seek to assert the right with no desire to actually proceed to trial. These two realities do nothing to further the interests of the public and certainly do nothing to alleviate the burdens of our justice system on victims and witnesses. Finally, this method of handling speedy trial wastes court resources. To rectify these unfortunate results and in compliance with constitutional rights as written in both our state and national constitutions, the aforementioned proposed rule changes would better serve a defendant's constitutional speedy trial right while simultaneously deterring inappropriate manipulation of court dockets as a strategy.

Six month felony speedy trial deadline: To change our speedy trial deadline for felonies, absent a speedy trial waiver, to six months better reflects the complexities of felony cases. Too often, defense attorneys are under pressure to waive their client's speedy trial right in felony cases as a matter of course to possess sufficient time to review discovery, schedule and take depositions, and independently investigate the case. Further, due to the largely rural nature of Iowa's counties, many judicial districts provide few trial dates for felonies throughout the year. A felony speedy trial deadline of six months better serves the administration of justice by providing greater possibilities of actually providing a trial to a defendant genuinely seeking trial.

Remedies for missing speedy trial deadline: Most states recognize that the evil our speedy trial protections aim to protect against are holding criminal charges over the head of a defendant indefinitely, causing that defendant undue de facto liberty restrictions and hurdles in presenting a defense. This loss of liberty is particularly acute if the defendant is in custody during the pendency of criminal charges. As the U.S. Supreme Court acknowledged though, "delay is not an uncommon defense tactic." Barker v. Wingo, 407 U.S. 514, 521 (1972). Delay can cause witnesses to become unavailable or to forget material details. Unlike other rights, the U.S. Supreme Court recognized that the deprivation of a speedy trial "does not per se prejudice the accused's ability to defend himself." Id. at 521-22.

In recognition of the actual evils relating to speedy trial violations, Florida, New York, and other states do not require outright dismissal of a case for a mere violation of speedy trial deadlines. For Florida, the remedy for missing the speedy trial deadline is to hold a hearing date within five (5) days of the filing of a "notice of expiration of speedy trial," and unless the court finds good cause to extend the deadline, the court shall set a trial date within ten (10) days of the hearing. This remedy better balances an interest in defendants seeking a legitimate end to their case and the State/community/victims' interest in protecting the community from deviant behavior. This also dissuades defense counsel from seeking questionable continuances, whose real purpose is to move the case closer to the speedy trial deadline, under the claim of needing to review discovery, set depositions, or seek mitigation while doing nothing over the continuance period. Zealous advocacy should be encouraged by our rules.

No matter what, a violation of speedy trial should always require freedom from custody, which is the view held nationally.

Speedy trial computation: Most states and the U.S. Supreme Court recognize that defendants, absent procedural corrections, possess an interest in dragging their cases out and to push said cases up to their speedy trial deadlines in the hopes of a dismissal due to the lack of an available trial date. For this reason, unlike Iowa, most states, e.g. Florida, New York, and Nebraska, present procedures excluding continuances charged to defendants when calculating speedy trial deadlines and continuances due to the defendant's unavailability. Florida even requires judges, at every continuance, to note

whether the continuance is charged to the State, defense, or Court.

In Nebraska, a continuance granted at the request or with the consent of the defendant or their counsel is excluded from computing speedy trial. Florida does the same. The truth is that most states provide for such procedures. Such procedures eliminate any incentive for defense counsel or a defendant to not speedily and effectively handle a criminal case. Failing to eliminate such an incentive leaves a strategy in our court system that is completely inapposite to the pursuit of actual justice.

Procedure surrounding right assertion: As is specifically noted in Florida's rules of criminal procedure, "demand for speedy trial; accused is bound." When the accused files an outright demand for speedy trial, the filing evidences a bona fide desire to obtain a speedy trial. Based on this understanding, a demand may not be withdrawn without approval by the court and the consent of the State or when good cause exists. However, good cause cannot be based on the nonreadiness by defense counsel for trial. This incentivizes zealous preparation and representation of defendants while simultaneously excluding a strategy of delay for the simple goal of delay. Keep in mind that those states that employ this concept grant a felony speedy trial deadline of six months from the outset unless there is a waiver of speedy trial. When a defendant files a demand for speedy trial in these states, it is to alert the court that they are ready to proceed to trial or to reassert previously waived speedy trial rights.

Consistently throughout each of these states' rules of procedure, the reality that felonies are more complex than misdemeanors and require more preparation time are recognized by speedy deadlines of six months. Each of these rules recognizes common practice in other states that defendants must 1) assert their speedy trial rights to obtain a quick turnaround for their case and, particularly in regard to Florida, 2) a defendant demanding a speedy trial receives a faster turnaround than the normal ninety days or six months but is also asserting affirmatively that they want a speedy trial. This recognition of an assertion of rights also provides a practical rule; a defendant, after affirmatively demanding speedy trial, gains the benefit of a quicker turnaround that cannot be waived unless the Court finds good cause or the prosecution agrees to a waiver. For Nebraska, New York, and Illinois, who do not require the steps Florida does, the benefit of speedy trial is freedom from custody, not outright elimination of charges due to clerical matters. Keep in mind that constitutional protections for speedy trial remain in each of these states. They simply have chosen to better balance rules of procedure and not pass rules that grant defendants' rights and benefits that go beyond what is required by their respective constitutions.

Our rules of criminal procedure remain largely what they were back in 1978. For those rules that received revision, most revisions occurred in 2002. Much has changed since then. Access to courts, filings, legal resources, and educational materials are markedly improved. More should be done to update our speedy trial rules to reflect this evolution of society than what is presented in the committee proposals at this time.

Endnotes contain verbatim rules regarding speedy trial taken from New Yorkⁱ, Floridaⁱⁱ, Illinoisⁱⁱⁱ, and Nebraska^{iv} to show common practice on the national level and provide a reference. Further, the constitutional provisions of New York^v, Florida^{vi}, Illinois^{vii}, and Nebraska^{viii} are included to show that they are the substantively the same as Iowa's. Important and relevant passages are underlined.

ⁱ New York Speedy Trial Rules of Procedure

- 1. Except as otherwise provided in subdivision three of this section, a motion made pursuant to paragraph (e) of subdivision one of section 170.30 or paragraph (g) of subdivision one of section 210.20 of this chapter must be granted where the people are not ready for trial within:
 - (a) six months of the commencement of a criminal action wherein a defendant is accused of one or more offenses, at least one of which is a felony;
 - (b) ninety days of the commencement of a criminal action wherein a defendant is accused of one or more offenses, at least one of which is a misdemeanor punishable by a sentence of imprisonment of more than three months and none of which is a felony;
 - (c) sixty days of the commencement of a criminal action wherein the defendant is accused of one or more offenses, at least one of which is a misdemeanor punishable by a sentence of imprisonment of not more than three months and none of which is a crime punishable by a sentence of imprisonment of more than three months; or
 - (d) thirty days of the commencement of a criminal action wherein the defendant is accused of one or more offenses, at least one of which is a violation and none of which is a crime.
 - (e) for the purposes of this subdivision, the term offense shall include vehicle and traffic law infractions.

-
- 2. Except as provided in subdivision three of this section, where a defendant has been committed to the custody of the sheriff or the office of children and family services in a criminal action he or she must be released on bail or on his or her own recognizance, upon such conditions as may be just and reasonable, if the people are not ready for trial in that criminal action within:
 - (a) ninety days from the commencement of his or her commitment to the custody of the sheriff or the office of children and family services in a criminal action wherein the defendant is accused of one or more offenses, at least one of which is a felony;
 - (b) thirty days from the commencement of his or her commitment to the custody of the sheriff or the office of children and family services in a criminal action wherein the defendant is accused of one or more offenses, at least one of which is a misdemeanor punishable by a sentence of imprisonment of more than three months and none of which is a felony;
 - (c) fifteen days from the commencement of his or her commitment to the custody of the sheriff or the office of children and family services in a criminal action wherein the defendant is accused of one or more offenses, at least one of which is a misdemeanor punishable by a sentence of imprisonment of not more than three months and none of which is a crime punishable by a sentence of imprisonment of more than three months; or
 - (d) five days from the commencement of his or her commitment to the custody of the sheriff or the office of children and family services in a criminal action wherein the defendant is accused of one or more offenses, at least one of which is a violation and none of which is a crime.
 - (e) for the purposes of this subdivision, the term offense shall include vehicle and traffic law infractions.
 - 3.
 - (a) Subdivisions one and two of this section do not apply to a criminal action wherein the defendant is accused of an offense defined in sections 125.10, 125.15, 125.20, 125.25, 125.26 and 125.27 of the penal law.
 - (b) A motion made pursuant to subdivisions one or two of this section upon expiration of the specified period may be denied where the people are not ready for trial if the people were ready for trial prior to the expiration of the specified period and their present unreadiness is due to some exceptional fact or circumstance, including, but not limited to, the sudden unavailability of evidence material to the people's case, when the district attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available in a reasonable period.
 - (c) A motion made pursuant to subdivision two of this section shall not:
 - (i) apply to any defendant who is serving a term of imprisonment for another offense;
 - (ii) require the release from custody of any defendant who is also being held in custody pending trial of another criminal charge as to which the applicable period has not yet elapsed;
 - (iii) prevent the redetention of or otherwise apply to any defendant who, after being released from custody pursuant to this section or otherwise, is charged with another crime or violates the conditions on which he has been released, by failing to appear at a judicial proceeding at which his presence is required or otherwise.
 - 4. In computing the time within which the people must be ready for trial pursuant to subdivisions one and two of this section, the following periods must be excluded:
 - (a) a reasonable period of delay resulting from other proceedings concerning the defendant, including but not limited to: proceedings for the determination of competency and the period during which defendant is incompetent to stand trial; demand to produce; request for a bill of particulars; pre-trial motions; appeals; trial of other charges; and the period during which such matters are under consideration by the court; or
 - (b) the period of delay resulting from a continuance granted by the court at the request of, or with the consent of, the defendant or his or her counsel. The court may grant such a continuance only if it is satisfied that postponement is in the interest of justice, taking into account the public interest in the prompt dispositions of criminal charges. A defendant without counsel must not be deemed to have consented to a continuance unless he or she has been advised by the court of his or her rights under these rules and the effect of his consent, which must be done on the record in open court; or
 - (c)
 - (i) the period of delay resulting from the absence or unavailability of the defendant. A defendant must be considered absent whenever his location is unknown and he is attempting to avoid apprehension or prosecution, or his location cannot be determined by due diligence. A defendant must be considered unavailable whenever his location is known but his presence for trial cannot be obtained by due diligence; or
 - (ii) where the defendant has either escaped from custody or has failed to appear when required after having previously been released on bail or on his own recognizance, and provided the defendant is not in custody on another matter, the period extending from the day the court issues a bench warrant pursuant to section 530.70 of this chapter because of the defendant's failure to appear in court when required, to the day the defendant subsequently appears in the court pursuant to a bench warrant or voluntarily or otherwise; or
 - (d) a reasonable period of delay when the defendant is joined for trial with a co-defendant as to whom the time for trial pursuant to this section has not run and good cause is not shown for granting a severance; or
 - (e) the period of delay resulting from detention of the defendant in another jurisdiction provided the district attorney is aware of such detention and has been diligent and has made reasonable efforts to obtain the presence of the defendant for trial; or
 - (f) the period during which the defendant is without counsel through no fault of the court; except when the defendant is proceeding as his own attorney with the permission of the court; or

- (g) other periods of delay occasioned by exceptional circumstances, including but not limited to, the period of delay resulting from a continuance granted at the request of a district attorney if (i) the continuance is granted because of the unavailability of evidence material to the people's case, when the district attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available in a reasonable period; or (ii) the continuance is granted to allow the district attorney additional time to prepare the people's case and additional time is justified by the exceptional circumstances of the case. Any such exclusion when a statement of unreadiness has followed a statement of readiness made by the people must be evaluated by the court after inquiry on the record as to the reasons for the people's unreadiness and shall only be approved upon a showing of sufficient supporting facts; or
- (h) the period during which an action has been adjourned in contemplation of dismissal pursuant to sections 170.55, 170.56 and 215.10 of this chapter; or
- (i) the period prior to the defendant's actual appearance for arraignment in a situation in which the defendant has been directed to appear by the district attorney pursuant to subdivision three of section 120.20 or subdivision three of section 210.10 of this chapter; or
- (j) the period during which a family offense is before a family court until such time as an accusatory instrument or indictment is filed against the defendant alleging a crime constituting a family offense, as such term is defined in section 530.11 of this chapter.
- 5. Whenever pursuant to this section a prosecutor states or otherwise provides notice that the people are ready for trial, the court shall make inquiry on the record as to their actual readiness. If, after conducting its inquiry, the court determines that the people are not ready to proceed to trial, the prosecutor's statement or notice of readiness shall not be valid for purposes of this section. Any statement of trial readiness must be accompanied or preceded by a certification of good faith compliance with the disclosure requirements of section 245.20 of this chapter and the defense shall be afforded an opportunity to be heard on the record as to whether the disclosure requirements have been met. This subdivision shall not apply to cases where the defense has waived disclosure requirements.
- 5-a. Upon a local criminal court accusatory instrument, a statement of readiness shall not be valid unless the prosecuting attorney certifies that all counts charged in the accusatory instrument meet the requirements of sections 100.15 and 100.40 of this chapter and those counts not meeting the requirements of sections 100.15 and 100.40 of this chapter have been dismissed.
- 6. An order finally denying a motion to dismiss pursuant to subdivision one of this section shall be reviewable upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty.
- 7. For purposes of this section,
 - (a) where the defendant is to be tried following the withdrawal of the plea of guilty or is to be retried following a mistrial, an order for a new trial or an appeal or collateral attack, the criminal action and the commitment to the custody of the sheriff or the office of children and family services, if any, must be deemed to have commenced on the date the withdrawal of the plea of guilty or the date the order occasioning a retrial becomes final;
 - (b) where a defendant has been served with an appearance ticket, the criminal action must be deemed to have commenced on the date the defendant first appears in a local criminal court in response to the ticket;
 - (c) where a criminal action is commenced by the filing of a felony complaint, and thereafter, in the course of the same criminal action either the felony complaint is replaced with or converted to an information, prosecutor's information or misdemeanor complaint pursuant to article one hundred eighty of this chapter or a prosecutor's information is filed pursuant to section 190.70 of this chapter, the period applicable for the purposes of subdivision one must be the period applicable to the charges in the new accusatory instrument, calculated from the date of the filing of such new accusatory instrument; provided, however, that when the aggregate of such period and the period of time, excluding the periods provided in subdivision four, already elapsed from the date of the filing of the felony complaint to the date of the filing of the new accusatory instrument exceeds six months, the period applicable to the charges in the felony complaint must remain applicable and continue as if the new accusatory instrument had not been filed;
 - (d) where a criminal action is commenced by the filing of a felony complaint, and thereafter, in the course of the same criminal action either the felony complaint is replaced with or converted to an information, prosecutor's information or misdemeanor complaint pursuant to article one hundred eighty of this chapter or a prosecutor's information is filed pursuant to section 190.70 of this chapter, the period applicable for the purposes of subdivision two of this section must be the period applicable to the charges in the new accusatory instrument, calculated from the date of the filing of such new accusatory instrument; provided, however, that when the aggregate of such period and the period of time, excluding the periods provided in subdivision four of this section, already elapsed from the date of the filing of the felony complaint to the date of the filing of the new accusatory instrument exceeds ninety days, the period applicable to the charges in the felony complaint must remain applicable and continue as if the new accusatory instrument had not been filed.
 - (e) where a count of an indictment is reduced to charge only a misdemeanor or petty offense and a reduced indictment or a prosecutor's information is filed pursuant to subdivisions one-a and six of section 210.20 of this chapter, the period applicable for the purposes of subdivision one of this section must be the period applicable to the charges in the new accusatory instrument, calculated from the date of the filing of such new accusatory instrument; provided, however, that when the aggregate of such period and the period of time, excluding the periods provided in subdivision four of this section, already elapsed from the date of the filing of the indictment to the date of the filing of the new accusatory instrument exceeds six months, the period applicable to the charges in the indictment must remain applicable and continue as if the new accusatory instrument had not been filed;
 - (f) where a count of an indictment is reduced to charge only a misdemeanor or petty offense and a reduced indictment or

a prosecutor's information is filed pursuant to subdivisions one-a and six of section 210.20 of this chapter, the period applicable for the purposes of subdivision two of this section must be the period applicable to the charges in the new accusatory instrument, calculated from the date of the filing of such new accusatory instrument; provided, however, that when the aggregate of such period and the period of time, excluding the periods provided in subdivision four of this section, already elapsed from the date of the filing of the indictment to the date of the filing of the new accusatory instrument exceeds ninety days, the period applicable to the charges in the indictment must remain applicable and continue as if the new accusatory instrument had not been filed.

- 8. The procedural rules prescribed in subdivisions one through seven of section 210.45 of this chapter with respect to a motion to dismiss an indictment are not applicable to a motion made pursuant to subdivision two of this section. If, upon oral argument, a time period is in dispute, the court must promptly conduct a hearing in which the people must prove that the time period is excludable.

ii Florida Speedy Trial Rules of Procedure

- (a) **Speedy Trial without Demand.** Except as otherwise provided by this rule, and subject to the limitations imposed under subdivisions (e) and (f), every person charged with a crime shall be brought to trial within 90 days of arrest if the crime charged is a misdemeanor, or within 175 days of arrest if the crime charged is a felony. If trial is not commenced within these time periods, the defendant shall be entitled to the appropriate remedy as set forth in subdivision (p). The time periods established by this subdivision shall commence when the person is taken into custody as defined under subdivision (d). A person charged with a crime is entitled to the benefits of this rule whether the person is in custody in a jail or correctional institution of this state or a political subdivision thereof or is at liberty on bail or recognizance or other pretrial release condition. This subdivision shall cease to apply whenever a person files a valid demand for speedy trial under subdivision (b).
- (b) **Speedy Trial upon Demand.** Except as otherwise provided by this rule, and subject to the limitations imposed under subdivisions (e) and (g), every person charged with a crime by indictment or information shall have the right to demand a trial within 60 days, by filing with the court a separate pleading entitled "Demand for Speedy Trial," and serving a copy on the prosecuting authority.
 - (1) No later than 5 days from the filing of a demand for speedy trial, the court shall hold a calendar call, with notice to all parties, for the express purposes of announcing in open court receipt of the demand and of setting the case for trial.
 - (2) At the calendar call the court shall set the case for trial to commence at a date no less than 5 days nor more than 45 days from the date of the calendar call.
 - (3) The failure of the court to hold a calendar call on a demand that has been properly filed and served shall not interrupt the running of any time periods under this subdivision.
 - (4) If the defendant has not been brought to trial within 50 days of the filing of the demand, the defendant shall have the right to the appropriate remedy as set forth in subdivision (p).
- (c) **Commencement of Trial.** A person shall be considered to have been brought to trial if the trial commences within the time herein provided. The trial is considered to have commenced when the trial jury panel for that specific trial is sworn for voir dire examination or, on waiver of a jury trial, when the trial proceedings begin before the judge.
- (d) **Custody.** For purposes of this rule, a person is taken into custody
 - (1) when the person is arrested as a result of the conduct or criminal episode that gave rise to the crime charged, or
 - (2) when the person is served with a notice to appear in lieu of physical arrest.
- (e) **Prisoners outside Jurisdiction.** A person who is in federal custody or incarcerated in a jail or correctional institution outside the jurisdiction of this state or a subdivision thereof, and who is charged with a crime by indictment or information issued or filed under the laws of this state, is not entitled to the benefit of this rule until that person returns or is returned to the jurisdiction of the court within which the Florida charge is pending and until written notice of the person's return is filed with the court and served on the prosecutor. For these persons, the time period under subdivision (a) commences on the date the last act required under this subdivision occurs. For these persons the time period under subdivision (b) commences when the demand is filed so long as the acts required under this subdivision occur before the filing of the demand. If the acts required under this subdivision do not precede the filing of the demand, the demand is invalid and shall be stricken upon motion of the prosecuting attorney. Nothing in this rule shall affect a prisoner's right to speedy trial under law.
- (f) **Consolidation of Felony and Misdemeanor.** When a felony and a misdemeanor are consolidated for disposition in circuit court, the misdemeanor shall be governed by the same time period applicable to the felony.
- (g) **Demand for Speedy Trial; Accused Is Bound.** A demand for speedy trial binds the accused and the state. No demand for speedy trial shall be filed or served unless the accused has a bona fide desire to obtain a trial sooner than otherwise might be provided. A demand for speedy trial shall be considered a pleading that the accused is available for trial, has diligently investigated the case, and is prepared or will be prepared for trial within 5 days. A demand filed by an accused who has not diligently investigated the case or who is not timely prepared for trial shall be stricken as invalid on motion of the prosecuting attorney. A demand may not be withdrawn by the accused except on order of the court, with consent of the state or on good cause shown. Good cause for continuances or delay on behalf of the accused thereafter shall not include nonreadiness for trial,

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- except as to matters that may arise after the demand for trial is filed and that reasonably could not have been anticipated by the accused or counsel for the accused. A person who has demanded speedy trial, who thereafter is not prepared for trial, is not entitled to continuance or delay except as provided in this rule.
- **(h) Notice of Expiration of Time for Speedy Trial; When Timely.** A notice of expiration of speedy trial time shall be timely if filed and served after the expiration of the periods of time for trial provided in this rule. However, a notice of expiration of speedy trial time filed before expiration of the period of time for trial is invalid and shall be stricken on motion of the prosecuting attorney.
 - **(i) When Time May Be Extended.** The periods of time established by this rule may be extended, provided the period of time sought to be extended has not expired at the time the extension was procured. An extension may be procured by:
 - (1) stipulation, announced to the court or signed in proper person or by counsel, by the party against whom the stipulation is sought to be enforced;
 - (2) written or recorded order of the court on the court's own motion or motion by either party in exceptional circumstances as hereafter defined in subdivision (l);
 - (3) written or recorded order of the court with good cause shown by the accused;
 - (4) written or recorded order of the court for a period of reasonable and necessary delay resulting from proceedings including but not limited to an examination and hearing to determine the mental competency or physical ability of the defendant to stand trial, for hearings on pretrial motions, for appeals by the state, for DNA testing ordered on the defendant's behalf upon defendant's motion specifying the physical evidence to be tested pursuant to section 925.12(2), Florida Statutes, and for trial of other pending criminal charges against the accused; or
 - (5) administrative order issued by the chief justice, under Florida Rule of Judicial Administration 2.205(a)(2)(B)(iv), suspending the speedy trial procedures as stated therein.
 - **(j) Delay and Continuances; Effect on Motion.** If trial of the accused does not commence within the periods of time established by this rule, a pending motion for discharge shall be granted by the court unless it is shown that:
 - (1) a time extension has been ordered under subdivision (i) and that extension has not expired;
 - (2) the failure to hold trial is attributable to the accused, a codefendant in the same trial, or their counsel;
 - (3) the accused was unavailable for trial under subdivision (k); or
 - (4) the demand referred to in subdivision (g) is invalid.
 - If the court finds that discharge is not appropriate for reasons under subdivisions (j)(2), (3), or (4), the pending motion for discharge shall be denied, provided, however, that trial shall be scheduled and commence within 90 days of a written or recorded order of denial.
 - **(k) Availability for Trial.** A person is unavailable for trial if the person or the person's counsel fails to attend a proceeding at which either's presence is required by these rules, or the person or counsel is not ready for trial on the date trial is scheduled. A person who has not been available for trial during the term provided for in this rule is not entitled to be discharged. No presumption of nonavailability attaches, but if the state objects to discharge and presents any evidence tending to show nonavailability, the accused must establish, by competent proof, availability during the term.
 - **(l) Exceptional Circumstances.** As permitted by subdivision (i) of this rule, the court may order an extension of the time periods provided under this rule when exceptional circumstances are shown to exist. Exceptional circumstances shall not include general congestion of the court's docket, lack of diligent preparation, failure to obtain available witnesses, or other avoidable or foreseeable delays. Exceptional circumstances are those that, as a matter of substantial justice to the accused or the state or both, require an order by the court. These circumstances include:
 - (1) unexpected illness, unexpected incapacity, or unforeseeable and unavoidable absence of a person whose presence or testimony is uniquely necessary for a full and adequate trial;
 - (2) a showing by the state that the case is so unusual and so complex, because of the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate investigation or preparation within the periods of time established by this rule;
 - (3) a showing by the state that specific evidence or testimony is not available despite diligent efforts to secure it, but will become available at a later time;
 - (4) a showing by the accused or the state of necessity for delay grounded on developments that could not have been anticipated and that materially will affect the trial;
 - (5) a showing that a delay is necessary to accommodate a codefendant, when there is reason not to sever the cases to proceed promptly with trial of the defendant; and
 - (6) a showing by the state that the accused has caused major delay or disruption of preparation of proceedings, as by preventing the attendance of witnesses or otherwise.
 - **(m) Effect of Mistrial; Appeal; Order of New Trial.** A person who is to be tried again or whose trial has been delayed by an appeal by the state or the defendant shall be brought to trial within 90 days from the date of declaration of a mistrial by the trial court, the date of an order by the trial court granting a new trial, the date of an order by the trial court granting a motion in arrest of judgment, or the date of receipt by the trial court of a mandate, order, or notice of whatever form from a reviewing court that makes possible a new trial for the defendant, whichever is last in time. If a defendant is not brought to trial within the prescribed time periods, the defendant shall be entitled to the appropriate remedy as set forth in subdivision (p).
 - **(n) Discharge from Crime; Effect.** Discharge from a crime under this rule shall operate to bar prosecution of the crime charged and of all other crimes on which trial has not commenced nor conviction obtained nor adjudication withheld and that

were or might have been charged as a result of the same conduct or criminal episode as a lesser degree or lesser included offense.

- (o) **Nolle Prosequi; Effect.** The intent and effect of this rule shall not be avoided by the state by entering a nolle prosequi to a crime charged and by prosecuting a new crime grounded on the same conduct or criminal episode or otherwise by prosecuting new and different charges based on the same conduct or criminal episode, whether or not the pending charge is suspended, continued, or is the subject of entry of a nolle prosequi.
- (p) **Remedy for Failure to Try Defendant within the Specified Time.**
 - (1) No remedy shall be granted to any defendant under this rule until the court has made the required inquiry under subdivision (j).
 - (2) At any time after the expiration of the prescribed time period, the defendant may file a separate pleading entitled "Notice of Expiration of Speedy Trial Time," and serve a copy on the prosecuting authority.
 - (3) No later than 5 days from the date of the filing of a notice of expiration of speedy trial time, the court shall hold a hearing on the notice and, unless the court finds that one of the reasons set forth in subdivision (j) exists, shall order that the defendant be brought to trial within 10 days. A defendant not brought to trial within the 10-day period through no fault of the defendant, on motion of the defendant or the court, shall be forever discharged from the crime.

iii Illinois Speedy Trial Rules of Procedure

- § 103-5. Speedy trial.
 - (a) Every person in custody in this State for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he or she was taken into custody unless delay is occasioned by the defendant, by an examination for fitness ordered pursuant to Section 104-13 of this Act, by a fitness hearing, by an adjudication of unfitness to stand trial, by a continuance allowed pursuant to Section 114-4 of this Act after a court's determination of the defendant's physical incapacity for trial, or by an interlocutory appeal. Delay shall be considered to be agreed to by the defendant unless he or she objects to the delay by making a written demand for trial or an oral demand for trial on the record. The provisions of this subsection (a) do not apply to a person on bail or recognizance for an offense but who is in custody for a violation of his or her parole, aftercare release, or mandatory supervised release for another offense.
 - The 120-day term must be one continuous period of incarceration. In computing the 120-day term, separate periods of incarceration may not be combined. If a defendant is taken into custody a second (or subsequent) time for the same offense, the term will begin again at day zero.
 - (b) Every person on bail or recognizance shall be tried by the court having jurisdiction within 160 days from the date defendant demands trial unless delay is occasioned by the defendant, by an examination for fitness ordered pursuant to Section 104-13 of this Act, by a fitness hearing, by an adjudication of unfitness to stand trial, by a continuance allowed pursuant to Section 114-4 of this Act after a court's determination of the defendant's physical incapacity for trial, or by an interlocutory appeal. The defendant's failure to appear for any court date set by the court operates to waive the defendant's demand for trial made under this subsection.
 - For purposes of computing the 160 day period under this subsection (b), every person who was in custody for an alleged offense and demanded trial and is subsequently released on bail or recognizance and demands trial, shall be given credit for time spent in custody following the making of the demand while in custody. Any demand for trial made under this subsection (b) shall be in writing; and in the case of a defendant not in custody, the demand for trial shall include the date of any prior demand made under this provision while the defendant was in custody.
 - (c) If the court determines that the State has exercised without success due diligence to obtain evidence material to the case and that there are reasonable grounds to believe that such evidence may be obtained at a later day the court may continue the cause on application of the State for not more than an additional 60 days. If the court determines that the State has exercised without success due diligence to obtain results of DNA testing that is material to the case and that there are reasonable grounds to believe that such results may be obtained at a later day, the court may continue the cause on application of the State for not more than an additional 120 days.
 - (d) Every person not tried in accordance with subsections (a), (b) and (c) of this Section shall be discharged from custody or released from the obligations of his bail or recognizance.
 - (e) If a person is simultaneously in custody upon more than one charge pending against him in the same county, or simultaneously demands trial upon more than one charge pending against him in the same county, he shall be tried, or adjudged guilty after waiver of trial, upon at least one such charge before expiration relative to any of such pending charges of the period prescribed by subsections (a) and (b) of this Section. Such person shall be tried upon all of the remaining charges thus pending within 160 days from the date on which judgment relative to the first charge thus prosecuted is rendered pursuant to the Unified Code of Corrections or, if such trial upon such first charge is terminated without judgment and there is no subsequent trial of, or adjudication of guilt after waiver of trial of, such first charge within a reasonable time, the person shall be tried upon all of the remaining charges thus pending within 160 days from the date on which such trial is terminated; if either such period of 160 days expires without the commencement of trial of, or adjudication of guilt after waiver of trial of, any of such remaining charges thus pending, such charge or charges shall be dismissed and barred for want of prosecution unless delay is occasioned by the defendant, by an examination for fitness ordered pursuant to Section 104-13 of this Act, by a fitness hearing, by an adjudication of unfitness for trial, by a continuance allowed pursuant to Section 114-4 of this Act after a court's determination of the defendant's physical incapacity for trial, or by an

interlocutory appeal; provided, however, that if the court determines that the State has exercised without success due diligence to obtain evidence material to the case and that there are reasonable grounds to believe that such evidence may be obtained at a later day the court may continue the cause on application of the State for not more than an additional 60 days.

- (f) Delay occasioned by the defendant shall temporarily suspend for the time of the delay the period within which a person shall be tried as prescribed by subsections (a), (b), or (e) of this Section and on the day of expiration of the delay the said period shall continue at the point at which it was suspended. Where such delay occurs within 21 days of the end of the period within which a person shall be tried as prescribed by subsections (a), (b), or (e) of this Section, the court may continue the cause on application of the State for not more than an additional 21 days beyond the period prescribed by subsections (a), (b), or (e). This subsection (f) shall become effective on, and apply to persons charged with alleged offenses committed on or after, March 1, 1977.

^{iv} Nebraska Speedy Trial Rules of Procedure

- 29-1207

- Trial within six months; time; how computed.
 - (1) Every person indicted or informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in this section.
 - (2) Such six-month period shall commence to run from the date the indictment is returned or the information filed, unless the offense is a misdemeanor offense involving intimate partners, as that term is defined in section 28-323, in which case the six-month period shall commence from the date the defendant is arrested on a complaint filed as part of a warrant for arrest.
 - (3) If a defendant is to be tried again following a mistrial, an order for a new trial, or an appeal or collateral attack, such period shall commence to run from the date of the mistrial, order granting a new trial, or the mandate on remand.
 - (4) The following periods shall be excluded in computing the time for trial:
 - (a) The period of delay resulting from other proceedings concerning the defendant, including, but not limited to, an examination and hearing on competency and the period during which he or she is incompetent to stand trial; the time from filing until final disposition of pretrial motions of the defendant, including motions to suppress evidence, motions to quash the indictment or information, demurrers and pleas in abatement, and motions for a change of venue; and the time consumed in the trial of other charges against the defendant;
 - (b) The period of delay resulting from a continuance granted at the request or with the consent of the defendant or his or her counsel. A defendant without counsel shall not be deemed to have consented to a continuance unless he or she has been advised by the court of his or her right to a speedy trial and the effect of his or her consent. A defendant who has sought and obtained a continuance which is indefinite has an affirmative duty to end the continuance by giving notice of request for trial or the court can end the continuance by setting a trial date. When the court ends an indefinite continuance by setting a trial date, the excludable period resulting from the indefinite continuance ends on the date for which trial commences. A defendant is deemed to have waived his or her right to speedy trial when the period of delay resulting from a continuance granted at the request of the defendant or his or her counsel extends the trial date beyond the statutory six-month period;
 - (c) The period of delay resulting from a continuance granted at the request of the prosecuting attorney, if:
 - (i) The continuance is granted because of the unavailability of evidence material to the state's case, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will be available at the later date; or
 - (ii) The continuance is granted to allow the prosecuting attorney additional time to prepare the state's case and additional time is justified because of the exceptional circumstances of the case;
 - (d) The period of delay resulting from the absence or unavailability of the defendant;
 - (e) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance. In all other cases, the defendant shall be granted a severance so that he or she may be tried within the time limits applicable to him or her; and
 - (f) Other periods of delay not specifically enumerated in this section, but only if the court finds that they are for good cause.

^v New York Speedy Trial Constitutional Provision

New York's constitution does not contain a speedy trial provision and, instead, relies on the United States Constitution's speedy trial provisions in conjunction with New York Rule of Criminal Procedure 30.30, which is cited in an earlier endnote in this document.

^{vi} Florida Speedy Trial Constitutional Provision

Article 1, Section 16. Rights of Accused and of Victims

In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, **and to have a speedy and public trial by impartial jury in the county where the crime was committed.** If the county is not known, the indictment or information may charge venue in two or more counties conjunctively and proof that the crime was committed in that area shall be sufficient; but before pleading the accused may elect in which of those counties the trial will take place. Venue for prosecution of crimes committed beyond the boundaries of the state shall be fixed by law.

vii Illinois Speedy Trial Constitutional Provision

Article 1, Section 8. Rights After Indictment

In criminal prosecutions, the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation and have a copy thereof; to be confronted with the witnesses against him or her and to have process to compel the attendance of witnesses in his or her behalf; **and to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed.**

viii Nebraska Speedy Trial Constitutional Provision

Article 1, Section 11. Rights of Accused

In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation, and to have a copy thereof; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; **and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.**