IN THE SUPREME COURT OF IOWA
Supreme Court No. 19-2011

STATE OF IOWA,
Plaintiff-Appellant,

vs.

DEONSY SMITH, JR.,
Defendant-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR DUBUQUE COUNTY
THE HONORABLE MONICA L. ZRINYI WITTIG, JUDGE

APPELLANT'S REPLY BRIEF

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ROUTING STATEMENT

Smith asserts the Iowa Supreme Court should retain this case because it involves substantial issues of first impression. Appellee's Br. 16; Iowa R. 6.1101(2)(c). He does not articulate what issues those are. As the State's Brief and Reply explain, the preserved issues in this case are subject to existing legal principles. *See* Appellant's Br. 6. Transfer remains appropriate. Iowa R. App. P. 6.1101(3).

RESPONSE TO APPELLEE'S ARGUMENT

I. Smith's Due Process rights were not violated. He has not met his burden to establish actual prejudice.

Preservation of Error

The parties agree that a Federal Fifth Amendment Due Process challenge was preserved. This Court need only address that claim.

No Iowa Constitution due process argument was presented below, nor decided by the district court. Smith's pro se letter specifically relied upon rule 2.33(2) to demand a speedy trial and cited the Fifth Amendment. 3/27/2019 Letter p.1; App. ____. His subsequent "motion to dismiss for lack of due process" did not cite any constitutional provision. 4/5/2019 Motion to Dismiss p.1; App. ____. Counsel's motion to dismiss sought relief under rule 2.33(2) exclusively. 8/28/2019 Motion to Dismiss p.1–2; App. ____. At the

hearing, counsel presented cases applying the federal standard and made no argument presenting the "totality of the circumstances" test Smith proposes on appeal. 9/12/2019 Hearing Tr p.4 line 1–p.8 line 13; Appellee's Br. 41–43. The district court's ruling reflected a finding that Smith's Fifth Amendment rights were violated. 10/31/2019 Dismissal Order p.3 ("IT IS HEREBY ORDERED that the complaint filed herein is dismissed and the prosecution must cease as the Defendant's preaccusatorial delay violated the Defendant's due process rights. His *Fifth Amendment rights* have been violated." (emphasis added)). Smith's attempt to inject a different standard under the Iowa Constitution's due process clause arrives too late. *State v. Prusha*, 874 N.W.2d 627, 629–30 (Iowa 2016); *see also State v. Williams*, 929 N.W.2d 621, 629 n.1 (Iowa 2019).

And this Court should reject Smith's suggestion that his failure to identify or cite a constitutional provision before the district court necessarily preserved claims under both. Appellee's Br. 23 (citing *State v. Harrington*, 805 N.W.2d 391, 393 n.3 (Iowa 2011)); 4/5/2019 Motion to Dismiss for Lack of Due Process; App. ___. To support this assertion, Smith relies on the Supreme Court's footnote within *Harrington* finding that Iowa and Federal constitutional

challenges were preserved by a party's use of the non-specific term "constitutional." This assertion by the *Harrington* court was incorrect.

In the footnote, the Supreme Court cited *King v. State*, 797 N.W.2d 565, 571 (Iowa 2011) for the proposition that "When there are parallel constitutional provisions in the federal and state constitutionals and a party does not indicate the specific constitutional basis, we regard both federal and state constitutional claims as preserved." *See Harrington*, 805 N.W.2d 393 n.3. This was only half correct. Read in its entirety, this was *King's* discussion on the topic:

> King presents an ineffective-assistance-of-counsel claim. He does not, however, indicate whether the case has been brought under the Sixth Amendment to the United States Constitution or article I, section 10 of the Iowa Constitution. When there are parallel constitutional provisions in the federal and state constitutions and a party does not indicate the specific constitutional basis, *we regard both federal and state constitutional claims as preserved, but consider the substantive standards under the Iowa Constitution to be the same as those developed by the United States Supreme Court under the Federal Constitution.*

King, 797 N.W.2d at 571 (emphasis added). Under the *King* formulation, both claims are preserved but must be treated as coextensive. *Id.* And for this proposition, *King* in turn cited *State v. Wilkes*, 756 N.W.2d 838, 842 n. 1 (Iowa 2008). But *Wilkes* offered no support for the *King* court's finding that inarticulate advocacy could preserve error—that court simply assumed for the sake of argument that the two provisions should be *interpreted* identically:

> We zealously guard our ability to interpret the Iowa Constitution differently from authoritative interpretations of the United States Constitution by the United States Supreme Court. On appeal, however, Wilkes makes no argument that the Iowa Constitution should be interpreted differently than the United States Constitution. Therefore, consistent with our prior cases, we for prudential reasons assume for the purposes of this appeal that the United States Constitution and the Iowa Constitution should be interpreted in an identical fashion.

Wilkes, 756 N.W.2d at 842 n.1 (citations omitted). There is no persuasive legal authority for the *King* or *Harrington* courts' conclusion a non-specific "constitutional" claim preserves both State and Federal constitutional challenges. *Harrington* and subsequent opinions' reiteration of this erroneous statement has compounded the problem further. *See State v. Coleman*, 890 N.W.2d 284, 286 (Iowa

2017). Smith's reliance on *Harrington* is understandable, but this proposition was flawed then and remains flawed now.

First, it is difficult to explain away the tension of why or how a bare citation is sufficient to preserve an argument urging the Iowa Constitution provides additional protections. Second, such a lax standard is in tension with Iowa courts' repeated holdings that constitutional claims must first be presented to the district court. *See, e.g., In re K.C.*, 660 N.W.2d 29, 38 (Iowa 2003); *see also Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal."). Constitutional arguments, like any other challenge, must be articulated and specific. *See State v. Seering*, 701 N.W.2d 655, 661 (Iowa 2005) (rejecting claim that was preserved because it was "inherent in the argument" presented to the district court; "our rules of preservation do not hinge on the mere entwinement of claims or the inherency of a discrete claim as part of a broader claim"). This is especially true in discussing why the Iowa Constitution is distinct. *See State v. Gibbs*, 941 N.W.2d 888, 902–903, 905 (Iowa 2020) (McDonald, J., concurring); *see generally Coleman*, 890 N.W.2d at

303 (Waterman, J. dissenting) ("Constitutional jurisprudence should not be a race to the bottom."). Less is not more, and although Iowa Supreme Court is the ultimate interpreter of the Iowa Constitution, it is a court for the correction of errors at law. Iowa Const. Art. 5, §4. Although the district court clearly erred in this case, it made no error as to the Iowa Constitution because it did not rule on a claim Smith failed to present. His novel arguments about what protections the Iowa Constitution should provide cannot be raised for the first time on appeal nor relied upon to sustain the district court's ruling. *See, e.g., State v. Webb*, 516 N.W.2d 824, 828 (Iowa 1994) ("We may not consider an issue that is raised for the first time on appeal, 'even if it is of constitutional dimension.'"); *DeVoss* v. *State*, 648 N.W.2d 56, 61–63 (Iowa 2002).

The same is true of Smith's new claim a district court may sua sponte dismiss a prosecution to vindicate a defendant's speedy trial rights pursuant to the Iowa Constitution's due process clause. Appellee's Br. 44–45. He did not urge this as a ground for relief below. The district court did not indicate this was its intent when it dismissed the case. 10/31/2019 Dismissal Order; App. ____. And Smith offers no legal authority to support his assertion. In addition to

being a ground upon which he cannot rely, this Court could find the matter waived. Iowa R. App. P. 6.903(2)(g)(3); *DeVoss*, 648 N.W.2d at 61–63.

In sum, *Harrington* and other cases suggesting that the bare use of the word "constitution" preserves an Iowa constitutional claim are wrong. Smith's reliance on Iowa's constitution as a ground for relief arrives too late and cannot sustain the district court's ruling. This Court need only address the preserved challenge.

Merits

A. The district court found prejudice despite Smith failing to allege or prove any. This requires reversal.

Like the district court, Smith misframes the analysis by focusing on the State's delay before addressing the question of prejudice. Appellee's Br. 29–33; 10/31/2019 Dismissal Order; App. ___. Although both elements must be present for him to prevail, he must prove actual prejudice *first*. *State v. Brown*, 656 N.W.2d 355, 363 (Iowa 2003). This actual prejudice standard "is stringent." *State v. Edwards*, 571 N.W.2d 497, 501 (Iowa Ct. App. 1997). It requires the defendant to show the loss of evidence or testimony has meaningfully impaired his ability to present a defense. *Id.* The defendant's proof of

actual prejudice —not generalized assertions or speculation—is the prerequisite to relief and without that showing the reason for the delay is immaterial. *Id.* at 501 (citing *United States v. Manning*, 56 F.3d 1188, 1194 (9th Cir. 1995) and *United States v. Sherlock*, 962 F.2d 1349, 1354 (9th Cir. 1989)), 501 n.4 ("The State is not required to explain the reasons for the delay until actual prejudice has been shown.").

Smith's brief assails the State's failure to provide an explanation for its delay in serving its arrest warrant on him. Appellee's Br. 29–32. The reply is simple—the State did not need to provide a reason because Smith offered no clear explanation or proof of how his defense was meaningfully prejudiced. 9/12/2019 Hearing Tr. p.4 line 1–20; p.5 line 7–15; p.7 line 5–13; p.8 line 8–13; p.10 line 4–13. His filings did not allege what prejudice to his defense had occurred. 3/27/2019 Letter; 4/5/2019 Motion to Dismiss for Lack of Due Process; 8/12/2019 Motion to Dismiss Detainer; 8/28/2019 Motion to Dismiss; App. ___. And in any event, there is no indication in the record the State delayed its prosecution in an attempt to obtain an unfair advantage over Smith. Contrary to Smith's request, this Court will not indulge in a presumption such intent absent proof in the

record. *Compare State v. Isaac*, 537 N.W.2d 786, 788 (Iowa 1995) ("Isaac makes no showing that the State delayed to gain a tactical advantage over him. We will not fill this void in the evidence by presuming otherwise.") *with State v. Hall*, 395 N.W.2d 640, 643 (Iowa 1986) *and* Appellee's Br. 53–54.

Tellingly, Smith does not attempt to defend the district court's findings "There is spoliation of evidence now. Witnesses' memories have faded now. His ability to assert an alibi has been extinguished. His ability to defend the allegations has been compromised or even destroyed due to the delay." 10/31/2019 Dismissal Order p.3; App. ___; Appellee's Br. 33–36. Likely this is because he did not establish any of those conclusions and nothing in the record before the district court could support them.

Instead, Smith urges on appeal for the first time that the State's delay prejudiced him because it prevented the sentences from running concurrently. He made no such allegation below and the district court made no such finding. 10/31/2019 Dismissal Order p.2–3; App. ___. Even as the prevailing party below, this is not a ground for affirming the district court's clearly erroneous conclusions that Smith's defense was actually prejudiced by the State's delay. *Duck*

Creek Tire Serv., Inc. v. Goodyear Corners, L.C., 796 N.W.2d 886, 893 (Iowa 2011) ("It is well-settled law that a prevailing party can raise an alternative ground for affirmance on appeal without filing a notice of cross-appeal, *as long as the prevailing party raised the alternative ground in the district court*." (emphasis added)); *see also Moyer v. City of Des Moines*, 505 N.W.2d 191, 193 (Iowa 1993) ("A successful party, without appealing, may attempt to save a judgment on appeal based on grounds urged in the district court but not considered by that court."); *DeVoss*, 648 N.W.2d at 61–63.

Smith's complete failure to prove actual prejudice was fatal to his claim. The district court's findings were without basis in the record and misapplied the applicable law. This Court should reverse the lower court's error.

B. No Iowa Constitution preaccusatorial delay framework was raised or decided below. Iowa law already forecloses relief.

Recognizing his claim fails under the established due process preaccusatorial delay test, Smith asks this court for the first time on appeal to adopt a new "totality of the circumstances" due process test for preaccusation delay under the Iowa constitution. Appellee's Br. 41–43. Aside from not urging this below, Smith is not operating in a

jurisprudential void. The Iowa Supreme Court has already concluded that the Iowa's constitution's due process standard for preaccusation delay *also* requires a showing of actual prejudice. *See Isaac*, 537 N.W.2d at 788. In resolving Isaac's Federal and Iowa Constitution due process challenges, the supreme court held that Isaac's failure to establish actual prejudice meant the district court could not have sustained a motion to dismiss on due process grounds. *Id.* Even under the Iowa Constitution, Smith's claim still fails.

II. No constitutional speedy trial challenge was raised below—Smith cannot rely on the claim on appeal. Smith's rule-based speedy trial claim fails because Iowa's rules did not apply until he was arrested on the charge.

Preservation of Error

To be clear, the parties agree that a rule 2.33(2) speedy trial claim was preserved by Smith's August 28 motion to dismiss and the district court's ruling that his statutory speedy trial rights were violated. 8/28/2019 Motion to Dismiss p.1–2; 10/31/2019 Dismissal Order p.1, 3; App. ____.

Smith's brief chides the State's initial brief for failing to "discuss the other bases for the district court's ruling, including . . . both the federal and state speedy trial provisions . . ." Appellee's Br. 22. The

State did not do so because it did not believe any error occurred below on that claim and those arguments could not be presented for the first time on appeal. Smith did not assert his constitutional speedy trial rights were violated below, nor was this a basis for the district court's ruling. Smith's pro se letter specifically relied upon rule 2.33(2) to demand a speedy trial and cited the Fifth Amendment's Due Process protections, not the Speedy Trial provisions of the Sixth Amendment or Article I, Section 10 of the Iowa constitution. 3/27/2019 Letter p.1; App. ____. His subsequent "motion to dismiss for lack of due process" referred to a "Right to a speedy trial," but did not cite to any authority aside from the uniform commercial code—he did not use the word "constitution." 4/5/2019 Motion to Dismiss p.1; App. ____. Counsel's subsequent motion to dismiss urged for dismissal due to the State's alleged violation of rule 2.33(2) exclusively. 8/28/2019 Motion to Dismiss p.1–2; App. ____.

In turn, the district court's ruling that his "speedy trial rights have also been violated" was a ruling on Smith's assertion that the State failed to comply with rule 2.33(2)'s requirements—not the constitution. 10/31/2019 Dismissal Order p.3; App. ____. It is telling that the district court did not engage in the four-factor test set out the

United States Supreme Court adopted in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). *Id.* at 1–3; App. ___; *See State v. Taylor*, 881 N.W.2d 72, 77 (Iowa 2016) (observing that under Rule 2.33(2)'s test for good cause "We have repeatedly rejected the multifactor balancing test of *Barker v. Wingo*. . . The good-cause test under our speedy trial rules relies on only one factor: the reason for the delay."); *see generally State v. Petersen*, 288 N.W.2d 332, 334–35 (Iowa 1980) (identifying that constitutional speedy trial claims under either the Sixth Amendment or Article Section 10 of the Iowa Constitution require the application of the *Barker*-multifactor test); *State v. Zaehringer*, 306 N.W.2d 792, 793–94 (Iowa 1981) (same). Smith cannot rely on the speedy trial provisions of the Federal or Iowa constitutions to uphold the district court's ruling. *Duck Creek Tire Serv., Inc.*, 796 N.W.2d at 893; *DeVoss*, 648 N.W.2d at 63 (holding "one party should not ambush another by raising issues on appeal, which that party did not raise in the district court").

Urged above, the State renews its request for this Court to reject any suggestion that a failure to identify or cite a constitutional provision before the district court necessarily preserved claims under both constitutions. Appellee's Br. 23 (citing *Harrington*, 805 N.W.2d

at 393 n.3); 4/5/2019 Motion to Dismiss for Lack of Due Process; App. ____. Smith's argument is even less persuasive here. Unlike his Fifth Amendment Due Process Delay claim, Smith never raised a constitutional speedy trial claim, and the parties did not litigate the issue. *See* Hearing Tr. p.6 line 6–p.10 line 16; App. ____. Unsurprisingly, the district court never ruled on it. 10/31/2019 Dismissal Order p.2–3; App. ____. Had Smith raised the claim, the State would likely have responded to it. *See* 9/14/2019 Resistance p.2–3 (responding to Smith's assertion of preaccusation delay); App. ____. And contrary to his assertion, the injection of new constitutional claims absent a developed record does not serve judicial economy. Appellee's Br. 24–26. Nor are his constitutional claims "incidental" to the rule-based challenge he presented below. *Id.* Iowa courts have been clear that rule 2.33(2)'s protections are "more specific and more stringent" than the speedy trial provisions of the constitutions. *See, e.g., Petersen*, 288 N.W.2d at 335. Our appellate courts' long standing principle of constitutional avoidance warrants further caution. *See, e.g., Salsbury Labs. v. Iowa Dep't of Envtl. Quality*, 276 N.W.2d 830, 837 (Iowa 1979) ("Avoidance of constitutional issues except when necessary for proper disposition of controversy is a bulwark of

American jurisprudence."). Because no constitutional speedy trial claim was presented to or ruled upon by the district court, no discussion here is necessary. Smith cannot rely upon this ground. This Court need only answer whether the district court's ruling under rule 2.33(2) was correct.

Merits

Smith misapprehends rule 2.33(2)'s applicability. Before the district court, Smith sought dismissal because the State failed to indict him with 45 days pursuant to rule 2.33(2)(a). 8/28/2019 Motion to Dismiss; App. ____. By its own text, neither 2.33(2)(a) or (b) applied yet:

> a. When an adult is *arrested* for the commission of a public offense . . . and an indictment is not found against the defendant within 45 days, the court must order the prosecution to be dismissed, unless good cause to the contrary is shown or the defendant waives the defendant's right thereto.
>
> b. If a defendant *indicted for a public offense* has not waived the defendant's right to a speedy trial the defendant must be brought to trial *within 90 days after indictment is found* or the court must order the indictment to be dismissed unless good cause to the contrary be shown.

Iowa R. Crim. P. 2.33(2)(a), (b) (emphasis added). As it argued in its initial brief, the question of when Smith's rights to speedy indictment

and subsequently speedy trial attached turned on when he was "arrested." Appellant's Br. 21–22. Smith was not arrested until he was taken into custody by Dubuque County. *See State v. Waters*, 515 N.W.2d 562, 565-566 (Iowa Ct. App. 1994); *State v. Beeks*, 428 N.W.2d 307, 309 (Iowa Ct. App. 1988); *see also State v. Bartlett*, No. 17–1170, 2018 WL 3301830, at *3–*4 (Iowa Ct. App. July 5, 2018); *Cashen v. State*, No. 16–0038, 2016 WL 6637470, at *1–*2 (Iowa Ct. App. Nov. 9, 2016); *State v. Cooper*, No. 10-0171, 2010 WL 3894481, at *1–*3 (Iowa Ct. App. Oct. 6, 2010). The filing of a complaint and the existence of the arrest warrant did not trigger these rule-based rights to attach.

Smith does not address these cases or the question of when Smith was "arrested." Appellee's Br. 65–69. Instead, he urges this Court to constructively find he was "held to answer" for the charge and again reiterates that the State failed to provide good cause for the delay. Appellee's Br. 67–69 (citing *State v. Williams*, 895 N.W.2d 856, 860 (Iowa 2017)). Smith's discussion requires clarification.

In a trifecta of cases, the Iowa Supreme Court sought to remedy growing confusion following its opinions in *State v. Wing*, 791 N.W.2d 243 (Iowa 2010) and *State v. Schmitt*, 290 N.W.2d 24 (Iowa

1980). *See Williams*, 895 N.W.2d 856; *see also State v. Smith*, No. 14-0812, 2017 WL 2291377 (Iowa 2017); *State v. Washington*, No. 14-0792, 2017 WL 2290095 (Iowa 2017). In *Williams*, the court traced the historical changes in Iowa's speedy indictment rule. Earlier versions of the indictment window "commenced from the time the defendant was 'held to answer;'" with subsequent revisions changing the relevant triggering event to "arrest." *Williams*, 895 N.W.2d at 860–62 (discussing Iowa Code § 3248 (1851); §§ 795.1, 795.2 (1975); § 813.2 (Supp. 1977); Iowa R. Crim. P. 2.33(2)). Following the adoption of the term "arrest," Iowa's appellate courts inconsistently considered whether the "arrest" had been conducted "in the manner authorized by law"—whether the officer's seizure of the person had satisfied the statutory requirements essential to completing the manner of arrest. *Williams*, 895 N.W.2d at 863–64 (discussing cases); *see also* Iowa Code §§ 804.5, 804.14, 804.21. The Iowa Supreme Court's opinion in *Wing* had further complicated the issue, altering the definition of "arrest" as when a person was "seized" for the crime to a constitutional definition of the term. *Wing*, 791 N.W.2d at 248.

In order to rectify these errors, *Williams* overruled *Wing*'s constitutional seizure test and returned the definition of "arrest" in speedy indictment claims to an inquiry whether an arrested had been completed "in the manner authorized by law." *Williams*, 895 N.W.2d at 865–66. To meet the standard of an "arrest," following the seizure of the person, the officer must take the person "to the nearest or most accessible magistrate without unnecessary delay." *Id.* at 865; Iowa Code §§ 804.21, 804.22. "Once the arrested person is before the magistrate, the arrest process is complete . . . all the rights under the law available to defendants become applicable, including the right to a probable-cause preliminary hearing and the right to a speedy indictment." *Williams*, 895 N.W.2d at 865. "A speedy indictment is only needed when a defendant is arrested and subsequently held to answer by the magistrate following the arrest." *Id.* Restated, an "arrest" under rule 2.33(2)(a) is complete and the rule's protections trigger "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." *Id.* at 867

In light of this discussion, this Court must reject Smith's request his pro se filings were sufficient to find him "held to answer."

Appellee's Br. 66–67. Smith misapprehends *Williams* in two critical respects. The first is that being "held to answer" triggers rule 2.33(2)(a)'s protections. Appellee's Br. 66–67. *Williams* clarifies *arrest* is the moment of attachment and said arrest must be conducted "in the manner authorized by law"— it requires bringing the defendant before a magistrate. *Williams*, 895 N.W.2d at 865–66. This did not occur until Smith was brought to Dubuque.

Second, he is mistaken his act of filing an "arraignment" form and other documents could have satisfied this requirement. Such a process is inconsistent with the rules of procedure—arraignment necessarily follows the filing of the indictment or information. Iowa Rs. Crim. P. 2.8(1), 2.4, 2.5. Again, the State had not filed its information against Smith because he had not been arrested for this crime at the time he was being held in the Fort Dodge Correctional Facility. The arrest for this crime was completed upon him being brought to Dubuque County, being served the warrant, and completing the arrest procedures outlined in Iowa Code sections 804.5, 804.15, and 804.21. *Beeks*, 428 N.W.2d at 308-09; *Williams*, 895 N.W.2d at 867. Whether he was in the State's custody while

serving a different sentence arising from Dubuque County has no effect on the legal fact Smith was not in Dubuque County's custody.

In sum, *Williams* offers no support to Smith's assertion a defendant may be constructively "held to answer" triggering rule 2.33's protections. To the contrary, the opinion sought to create a uniform procedure of "arrest" to trigger rule 2.33(2)(a)'s speedy indictment protections. It would defy the logic underlying that opinion—and the very the text of rule 2.33(2)—to conclude Smith triggered the speedy indictment clock through his filings when he was not arrested until September 12.

And this Court should reject Smith's requests to "liberally" construe the rule to accommodate his position. Appellee's Br. 66–67. He asks for far more than a liberal interpretation of the term "arrest"—his request borders on asking this Court to rewrite the rule. It should likewise reject his proposal to utilize its powers and grant him relief to ensure "the sound administration of justice." Appellee's Br. 68. The Iowa Supreme Court indeed has "considerable discretion in supervising the operation of judicial branch," but that discretion does not include overriding the terms of Iowa's criminal procedure rules. Neither of Smith's offered authorities support the broad

intervention he proposes. Appellee's Br. 68 (citing *State v. Young*, 863 N.W.2d 249, 256 (Iowa 2015) (rejecting invitation to authorize collateral attacks on prior convictions based on nonconstitutional errors) and *State v. Tyler*, 873 N.W.2d 741 (Iowa 2014) (rejecting State's request to adopt federal authority on general verdicts, upholding prior opinions "as a matter of sound judicial administration . . . This is our precedent and we see no reason to overturn it")).

And if somehow considered independently of his speedy indictment rights under rule 2.33(2)(a), Smith's speedy trial rights under 2.33(2)(b) could not have been violated because the rights had not yet attached. Iowa Rule of Criminal Procedure 2.33(2)(b) requires trial "within 90 days after *indictment* is found." (emphasis added). At the time Smith began filing his requests for speedy trial, the State had only filed a complaint and warrant. A preliminary complaint is not an "indictment." Trial informations and grand jury indictments are "indictments." Iowa R. Crim. P. 2.4, 2.5. Preliminary complaints and trial information serve different purposes. *See State v. Petersen*, 678 N.W.2d 611, 613–14 (Iowa 2004). Thus, "[t]he triggering event for the speedy trial time frame, under the plain language of the rule, is the

filing of the indictment or information." *State v. Olson*, 528 N.W.2d 651, 653 (Iowa 1995); *see also Ciric v. State*, No. 15-1860, 2017 WL 936087, at *3 (Iowa Ct. App. Mar. 8, 2017) (same). Neither of Smith's rights under 2.33(2)(a) or 2.33(2)(b) were violated. The district court erred when it dismissed this case and this Court must correct the error.

III. No party asked, nor did the district court articulate it was dismissing pursuant to Iowa Rule of Criminal Procedure 2.33(1). This is not a ground upon which Smith can rely.

Preservation of Error

Although he faults the State's initial brief for "not discuss[ing] the other bases for the district court's ruling," the State did not discuss how rule 2.33(1) was preserved because Smith did not rely upon the rule as a ground for relief in his filings or argument before the district court. Appellee's Br. 22, 25–26. And the district court's order dismissing the case did not indicate that it was utilizing rule 2.33(1) as a basis for its dismissal of the State's prosecution. Nor did the court examine the relevant factors. *See State v. Lundeen*, 297 N.W.2d 232, 235–36 (Iowa Ct. App. 1980). The lower court's express reliance on rule 2.33(2)(a) and repeated reference to Smith's "speedy trial rights" eliminates the possibility that its ruling encompassed a

dismissal in the "furtherance of justice." 10/31/2019 Dismissal Order p.1–3; App. ____. Smith does not identify how this issue was preserved. Appellee's Br. 22, 25–26. There is nothing for this Court to review.

Tacitly acknowledging this fact, Smith asks this Court to address the issue anyway. Appellee's Br. 25–26. This Court should reject Smith's attempts to bypass error preservation and inject an issue into the case for the first time on appeal. Contrary to Smith's brief, a 2.33(1) "furtherance of justice" dismissal was neither "incidental" nor "intertwined" with the actually decided due process and rule-based speedy trial issues. *See Feld v. Borkowski*, 790 N.W.2d 72, 84 (Iowa 2010); Appellee's Br. 24–25. Because this is not an evidentiary question, this Court may not affirm the district court's ruling on a ground not urged below or relied upon by the district court. *See, e.g., DeVoss*, 648 N.W.2d at 62–63 ("[W]e hold that we will not consider a substantive or procedural issue for the first time on appeal, even though such issue might be the only ground available to uphold a district court ruling."). The matter is not properly before this Court on appeal.

And even accepting Smith's argument that a rule 2.33(1) dismissal occurred here, the lower court's decision must be reversed and remanded. The State was not given adequate notice that the district court intended to dismiss the case pursuant to rule 2.33(1) and had no opportunity to build a record. *State v. Brumage*, 435 N.W.2d 337, 340 (Iowa 1989); *Lundeen*, 297 N.W.2d at 235. Ordinarily, lack of notice alone mandates reversal. *Id.* (each citing *In re Judges of Cedar Rapids Mun. Court*, 130 N.W.2d 553, 555 (Iowa 1964) for proposition prior to dismissal "Justice requires 'a fair opportunity for each side to present its case must be afforded.'"). Had either Smith or the district court indicated dismissal "in furtherance of justice" was being considered, the State would likely have responded in order to sustain its case, just as it did to Smith's Federal Due Process claim. *See* 9/14/2019 Resistance p.2–3 (responding to Smith's assertion of preaccusation delay); App. ___.

Preserved or not, rule 2.33(1) cannot sustain the district court's action here. Its dismissal order must be vacated.

CONCLUSION

Smith's presentation of new constitutional and rule-based claims grounds for relief may not be considered for the first time on appeal. The district court's express rulings that Smith's Fifth Amendment Due Process and rule-based speedy trial rights were violated are without support in the record and contrary to law. Smith never established how the State's delay actually prejudiced his defense. This Court should remedy the lower court's errors. It should reverse and remand to reinstitute the case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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