IN THE IOWA SUPREME COURT

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No. 18-0296

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BILLY DEAN CARTER, BILL G. CARTER, and the ESTATE OF SHIRLEY D. CARTER by and through BILL G. CARTER, EXECUTOR,
Plaintiffs-Appellees,

v.

JASON CARTER,
Defendant-Appellants.

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APPEAL FROM THE DISTRICT COURT OF MARION COUNTY
HON. MARTHA L. MERTZ

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# FINAL BRIEF OF PLAINTIFFS-APPELLEES

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## ROUTING STATEMENT

This case should be routed to the Supreme Court because it involves "issues of broad public importance" arising from a case that has received repeated national media attention. Iowa R. App. P. 6.1101(2)(d). Additionally, the Appellant asks this court to transform Iowa law in at least three significant ways: (1) He asks this court to construe Iowa Code § 622.11 for the first time to confer on a private citizen the ability to control what a law enforcement agency produces in response to a subpoena directed to it by another person; (2) he seeks a substantial change in the standard by which motions to vacate civil judgments based on newly discovered evidence are adjudicated; and (3) he asks this Court to create an equitable tolling doctrine for jurisdictional statutes of limitation. Though unjustified and wrong, all of these requests present "substantial questions of enunciating or changing legal principles." Iowa R. App. P. 6.1101(2)(f).

## STATEMENT OF THE CASE

The Appellant ("Jason") provides a recitation of the case that is largely correct with two exceptions. First, Jason did not include his interlocutory appeal to this Court on September 12, 2017, and this Court's refusal to grant review on October 25, 2017. Second, Jason makes references to the criminal proceedings against him for First Degree Murder. Jason does not say to what

extent he believes that the record in his criminal case is available for this appeal, but it is not available. Notwithstanding Jason's request that this Court take judicial notice of his acquittal, nothing in the criminal matter affects the outcome of the civil trial or this appeal. Jason Carter was found liable for his mother's death in this civil case before he was charged with First Degree Murder.

## STATEMENT OF FACTS

This trial, as Jason chose to frame it, was about whether Bill Carter or Jason Carter killed Shirley Carter. Bill was Shirley's husband. Jason was her son. Shirley was killed with a high-powered rifle at relatively close range in the farmhouse she and Bill shared in rural Marion County.

In this lawsuit, Bill, his older son Billy, and Shirley's estate (the "Plaintiffs") alleged that Jason was the killer. Jason defended the case by pointing the finger back at Bill and—importantly—specifically disclaiming the possibility that some unknown person was to blame. During opening statements, Jason's attorney told the jurors that Bill was the killer. 12/5/2017 Trial Tr. 83:20–24. During closing arguments, Jason's attorney told the jury that the case should be resolved by deciding whether they believed Bill or Jason. Each testified extensively: Bill for over 3 hours and Jason for over 5 hours. Jason's lawyer told the jury that "You have two men here who have

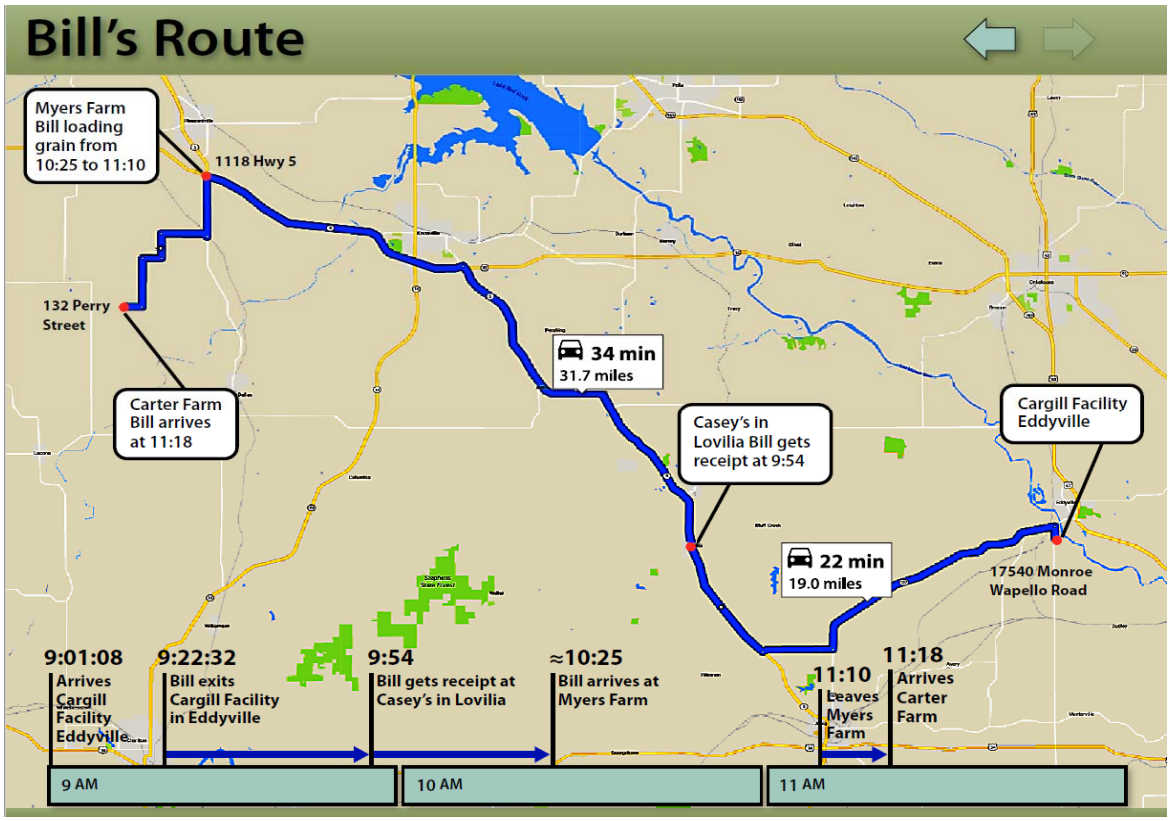
accused each other of a crime. And you have to decide which of the two is the more credible." 12/15/2017 Trial Tr. 52:21–23. The jury decided—after two hours of deliberation following a two-week trial—that Jason killed Shirley. 12/15/2017 Trial Tr. 121–22.

Jason's and Bill's Whereabouts

Shirley was killed on the morning of July 19, 2015. Married for over 50 years, Bill and Shirley were together early that morning, as they typically were. They got coffee together in Milo, Iowa. 12/8/2017 Trial Tr. 67–68 (Testimony of Bill Carter). They spoke to a neighbor who testified that he saw them between 7:00 a.m. and 7:30 a.m., and that nothing was out of the ordinary. 12/6/2017 Trial Tr. 151–54 (Testimony of Donald Hunerdosse). Bill then dropped Shirley off at their farmhouse, and he was seen leaving the house at approximately 7:45 a.m. 12/8/2017 Trial Tr. 10–12 (Testimony of Justin Jordan). Shirley placed a telephone call from her home at 8:46 a.m. App. v. 2, pp. 247–249. She was reported dead by Jason at 11:08 a.m. This makes 8:46 a.m. to 11:08 a.m. the crucial window.

On that morning, Jason and Bill were each separately taking loads of corn from rural Marion County, near Lacona, Iowa, to a processing facility in Eddyville, Iowa. The drive lasts about an hour. 12/12/2017 Trial Tr. 59:8–

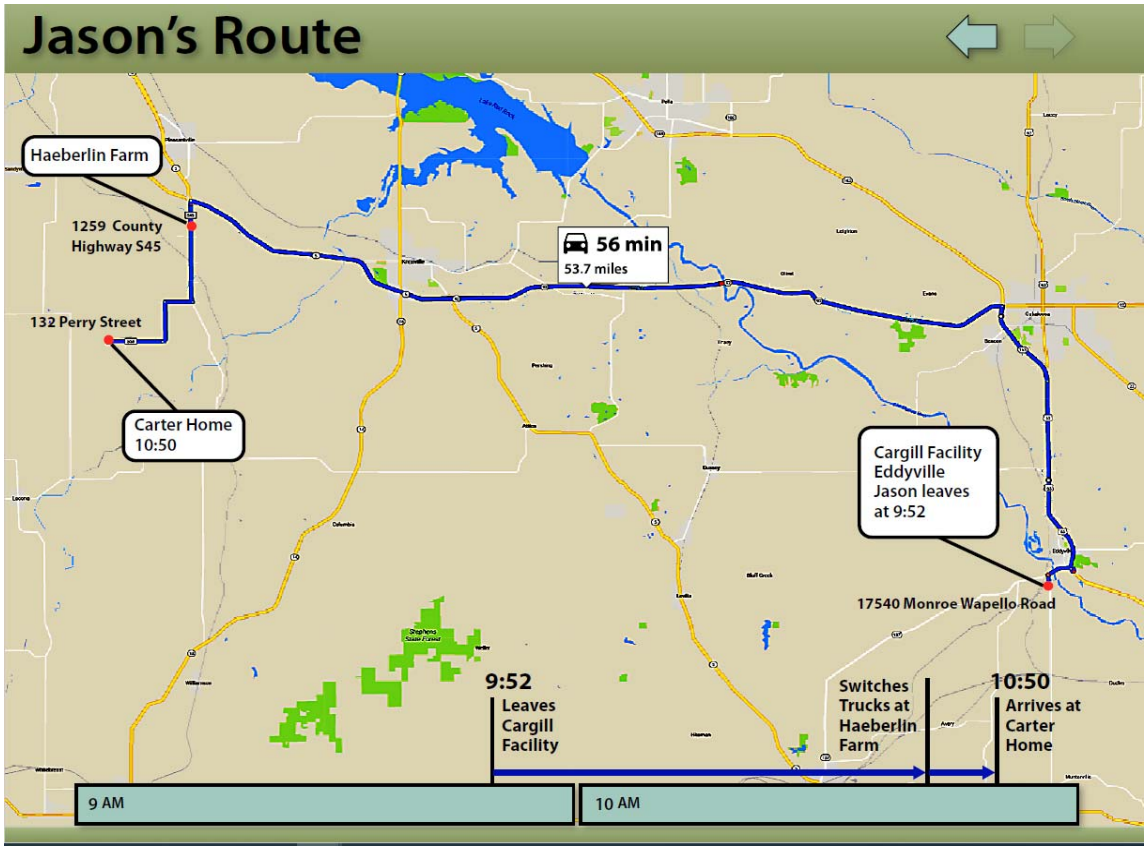
11 (Testimony of Jason Carter). Without objection, the jury saw three demonstrative aids, which are reproduced in this brief, that center around when Jason or Bill could have fired the rifle that killed Shirley. Bill's whereabouts as shown by the evidence were summarized for the jury by the demonstrative aid below.




Bill arrived at the Eddyville facility at 9:01 a.m. App. v. 2, pp. 685–686. He exited at 9:22 a.m. App. v. 2, pp. 685–686. Bill stopped at a convenience store at 9:54 a.m. App. v. 2, pp. 687–688. Bill then drove to the Myers farm where he reloaded his semi-truck with corn. 12/8/2017 Trial Tr. 76:14–21. As Bill was finishing, he received a phone call from his daughter,

Jana Lain, informing him that Jason called her and said that he found Shirley dead at home. *Id.* 80:15–23. Bill raced home. Back at his house by approximately 11:18 a.m., Bill found Jason standing on the porch and Shirley dead in the kitchen. *Id.* 81:12–24.

Jason's whereabouts, on the other hand, are shown below.



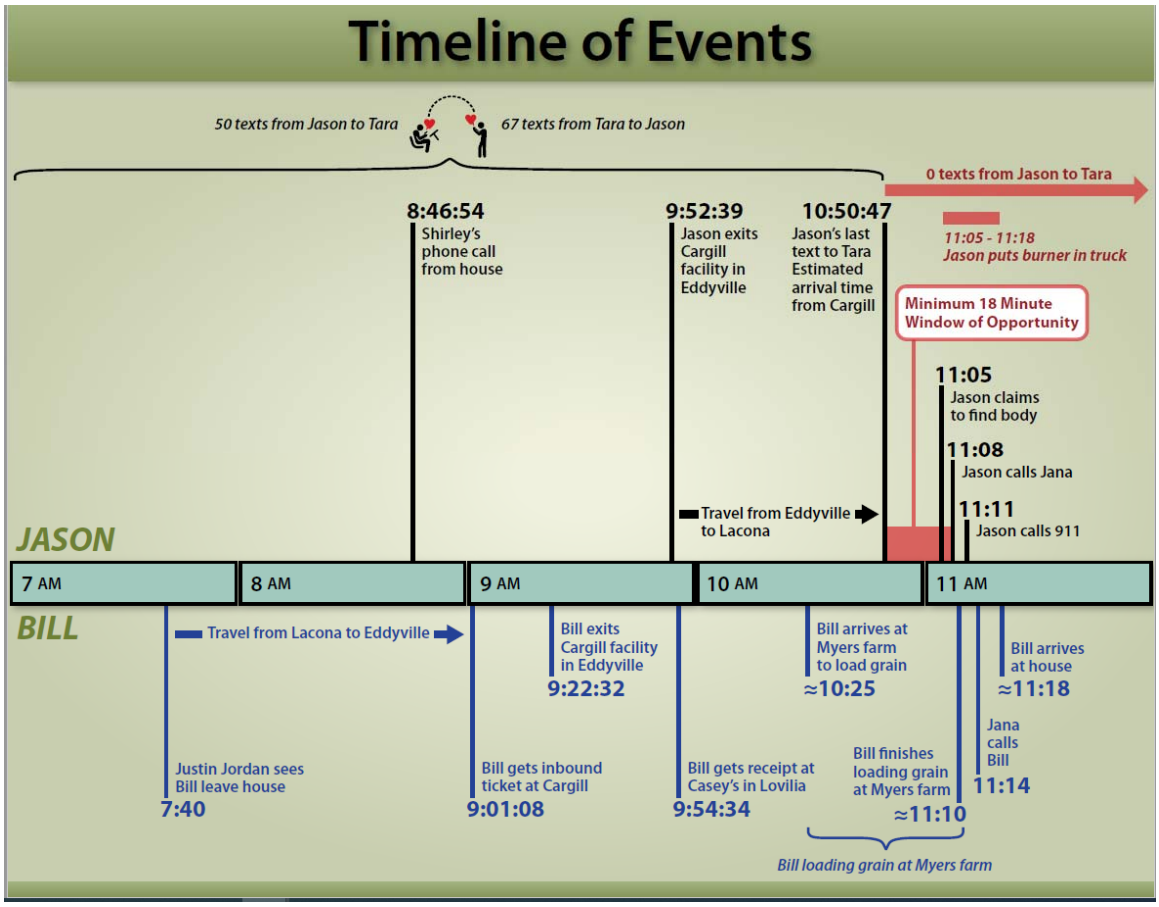

Jason left the same Cargill facility as Bill at 9:52 a.m. App. v. 2, pp. 250–251. His truck is seen exiting the facility a few minutes later. Jason then travelled back to the Haeberlin farm where he switched his semi-truck for a

pickup truck—but did not reload his semi-truck with grain—and proceeded to his parent's house. 12/12/2017 Trial Tr. 58–61.

Jason told law enforcement that he arrived at his parents' home at 10:50 a.m. 12/12/2017 Trial Tr. 62:7–63:16; Supp. Conf. App. 87–88. This comports with the travel time between Eddyville and Lacona.

It was also 10:50 when Jason abruptly stopped sexting with his mistress. 12/12/2017 Trial Tr. 48–49; App. v. 2, pp. 211–236. During the morning of July 19, Jason was feverishly texting a woman with whom he was having an affair. *Id*. 46–47.

Jason's timeline reveals an 18-minute window where Jason was alone at the Carter residence before he called anyone. Comparing Jason's timeline to Bill's timeline, a reasonable juror could have concluded that Jason was the only person who had the opportunity to kill Shirley.




Evidence Excluded Any Possibility of a Non-Party Assailant

Trial evidence excluded the possibility that some unknown person was responsible for Shirley's death. Jason did not contest the expert opinion of Nick Webb, a crime scene reconstructionist called by Bill. *Id.* 165:13–14 (Counsel for Jason Carter stating, "I think I agree with about everything that you say today."). Mr. Webb testified that Shirley knew her killer, that she was killed by a high-powered rifle that was stored at her home, that the house was ransacked to look like a robbery, and that the killer was lying in wait. 12/7/2017 Trial Tr. 162–165.

Jason called his own crime scene reconstructionist who agreed that the house had been staged to look like a robbery occurred. 12/13/2017 Trial Tr. 66:5–67:19; 72:8–20 (Testimony of Gary Rini). Pill bottles, guns, and Shirley's purse were left undisturbed and in plain view. *Id.*; Conf. App. pp. 107–08, 110, 111. If this were a robbery, the experts agreed, these things would have been stolen.[1]

The Murder Weapon and the Manner of Death

Important to the identification of Shirley's killer was the weapon that killed her and from where it was fired. Investigating officers recovered shell fragments from the scene. 12/7/2017 Trial Tr. 160:18–161:15 (Testimony of Nick Webb). The fragments had been fired from a high-powered rifle. *Id.* 162:20–25. Bill had received a .270 Remington high-powered rifle as a gift from his older son Billy years earlier. 12/6/2017 Trial Tr. 146:12–147:2

[1] Jason now attempts to sidestep the unanimity among experts that the robbery had been staged by saying that at the time of the trial, he did not have evidence from the State's criminal investigation that he claims implicates strangers in this murder. Appellant's Br. at 34 n.10. This is a non sequitur. The experts based their opinions on the physical facts of the scene as revealed by the scene photographs, which were available to both sides at trial and were the subject of testimony by the DCI agents who processed the scene. Nothing about the existence of rumors of stranger perpetrators would change those physical facts. Moreover, it bespeaks gamesmanship to suggest that Jason's expert's opinion of the scene photographs would have changed if Jason's theory of defense would have changed.

(Testimony of Billy Carter). It was stored in a gun safe in the dark basement of the house. 12/8/2017 Trial Tr. 184:24–185:8 (Testimony of Bill Carter). While the other weapons stored in that safe—presumably bounty for a burglar yet left undisturbed—were found at the scene, the .270 rifle was missing. 12/8/2017 Trial Tr. 186:6–18 (Testimony of Bill Carter); Conf. App. 107–109.

Upon this discovery, Bill led law enforcement agents to an earthen bank on his land into which he had fired that .270 rifle on one of the only times he ever fired it (unlike Jason, Bill was never a big game hunter). 12/8/2017 Trial Tr. 189:23–190:22; 186:1–5 (Testimony of Bill Carter). The agents recovered bullets from that earthen bank as known samples having been fired from the .270 rifle. 12/8/2017 Trial Tr. 109:3–15 (Testimony of Victor Murillo). While the fragments that killed Shirley could not be matched as coming from the exact same rifle Bill had stored in the safe, they did match as having come from the exact same make and model. 12/8/2017 Trial Tr. 101:25–102:15 (Testimony of Victor Murillo). The rifle was never found.

When the law enforcement investigation stalled, Bill hired two crime scene reconstructionists and a forensic pathologist to reconstruct the scene to determine how Shirley died. They analyzed the scene for two days and

concluded that, of all of the locations, indoors and out, from which gunshots could have originated, the shots that killed Shirley were fired into the kitchen from outside, behind a fence enclosing an outdoor deck as Shirley stood in or near a doorway to that deck. 12/7/2017 Trial Tr. 139:12–20 (Testimony of Nick Webb). It appeared the killer had lain in wait and fired more than once as Shirley entered the house from doing chores. *Id*. The killer had the presence of mind to pick up the shell casings he ejected, something the reconstructionist found highly distinctive. 12/7/2017 Trial Tr. 87:12–88:6 (Testimony of Nick Webb explaining that the rifle ejects shells); *id*. 166:5–14 (explaining the significance of missing shell casings).

Jason Made Incriminating Admissions

Jason's statements to law enforcement revealed information that only the killer could know, that were transparently designed to create an alibi, or that were inexplicably inconsistent. Here are some of the most important admissions from Jason:

- When Jason called 911 on the day of the murder, he said that his mother had been shot. Supp. Conf. App. 101. But neither Bill nor law enforcement personnel were able to see that Shirley had been shot based on their immediate observations. 12/8/2017 Trial Tr. 87:14–18

(Testimony of Bill Carter); 12/5/2017 Trial Tr. 109:7–9 (Testimony of Curt Seddon). Moreover, Jason already knew that a bullet had pierced the refrigerator in the kitchen where Shirley died, and he knew a gouge on the floor was from a bullet. Supp. Conf. App. 101. When Bill arrived, Jason knew a bullet fragment had damaged a clock high above the cabinets. 12/12/2017 Trial Tr. 77:1–14 (Testimony of Jason Carter).

- Jason told a 911 operator that Shirley had been dead for 2 hours when he claimed to have found her. Supp. Conf. App. 101. He later admitted that he had no basis in fact to make this claim. 12/12/2017 Trial Tr. 87:18–88:5.
- Jason's voice indicated hysteria when he called 911 but, inexplicably, in the minutes after he claimed to find his dead mother he had the presence of mind to hide his disposable "burner" phone (the phone he used exclusively for sexting with his mistress) under the hood of his truck in a fuse box. *Id.* 73–74.
- Of all the guns that could have killed Shirley—pistol, shotgun, semiautomatic rifle—Jason knew that the murder weapon was a bolt-action rifle, same as the missing .270. That is why on the day of the

murder Jason asked his brother, Billy, if the killer had to "rack another round," which is a marksmanship maneuver that is only necessary with a bolt-action rifle. 12/6/2017 Trial Tr. 145:9–17 (Testimony of Billy Carter). At the time, there was no way for anyone but the killer to know that a bolt-action rifle was used.

- Jason told law enforcement that he never touched the gun safe in the basement where the high-powered rifle was stored. 12/12/2017 Trial Tr. 93:21–94:17. In fact, his fingerprints were all over it. *Id*.; Conf. App. 439–441; *id*. 73–77.
- Jason called Marion County Sheriff Sandholt at 6:08 a.m. on Sunday morning after the murder to inquire about the status of the Remington .270 high-powered rifle that, much later evidence showed, was the murder weapon. 12/13/2017 Trial Tr. 171:22–172:11 (Testimony of Jason Sandholt). Yet Jason testified at trial that he did not see the search warrant inventory that alerted him to that rifle's absence from the home until hours later, on Sunday afternoon. 12/12/2017 Trial Tr. 97:10–99:19. And in his deposition, he denied handling that document. *Id*. The trial evidence showed Jason left 24 fingerprints and palm prints on those pages. *Id*. 99:15–19; Conf. App. 73–77.

- When discussing the murder with his sister Jana, Jason reenacted where his mother was when she was shot, and how. Of all of the locations bullets could have come from, Jason knew, and said, they came from the deck area outside—in the exact same "cone" of probable locations that the reconstructionists later determined in their two-day analysis. 12/12/2017 Trial Tr. 89:11–92:11 (Testimony of Jason Carter).

Despite this evidence, Jason took the witness stand to swear that he did not kill his mother. Jason told the jury, however, exactly how much weight they should give his testimony:

> Q. So for those fifteen months [before the murder], you learned to be able to lie over and over and over to the people close to you?
> A. Yes.
> Q. You became a practiced, skilled, and chronic liar?
> A. Correct.

12/12/2017 Trial Tr. 46:17–23.

Jason Had a Financial Motive

Jason and his wife were nearly broke on the day of the murder and were deeper in debt than they had ever been. App. v. 2, pp. 596–607, 43–47. With less than $100 in his bank account, Jason owed Wells Fargo more than $566,000. 12/6/2017 Trial Tr. 182:5–19 (Testimony of Shelly Carter). And that loan was on a "watch list" at Wells Fargo, in danger of being foreclosed.

12/13/2017 Trial Tr. 95:18–21 (Testimony of Jason Hoch). Jason stood to gain his parents' land if they both died, which was worth several million dollars at the time. 12/12/2017 Trial Tr. 43:23–44:6 (Testimony of Jason Carter). This murder was either a botched attempt to kill both Bill and Shirley or an effort to remove his mother from the equation. Testimony from Brandon Smith, an acquaintance of Jason, indicated that Shirley was perceived by Jason to be the obstruction to Jason having his father's financial and farming assistance. 12/11/2017 Trial Tr. 205:16–25 (Testimony of Brandon Smith); *see also id.* 6–7 (Testimony of Bill Carter explaining that Shirley wanted to farm while Bill wanted to begin to retire).

## ARGUMENT

### I. ISSUE I: THE DISTRICT COURT CORRECTLY DENIED JASON CARTER'S MOTION TO CONTINUE TRIAL.

*Error Preservation.* Error was not preserved. The Plaintiffs agree that Jason moved for a continuance of trial and that the continuance was denied. The stated grounds for a continuance described to the district court, however, do not resemble the grounds presented to this Court. The district court was told that it could not proceed to trial unless and until law enforcement "makes a final decision as to whether this case will be prosecuted or not [by law enforcement]." 12/5/2017 Trial Tr. 14:5. But Jason's brief takes the position

that a continuance should have been granted because the evidence obtained from the DCI was incomplete or, in his words, "cherry-picked." Appellant's Br. at 50.

Jason did not make an argument about incomplete evidence in the district court because he failed to issue a subpoena to the DCI to seek the categories of documents that he now describes as exculpatory evidence. Jason cannot now argue that a continuance is appropriate based on evidence that he did not attempt to obtain and on grounds he did not raise in the district court. *See* Iowa R. Civ. P. 1.924 ("[n]o other grounds [but those raised to the district court] ... shall be ... considered on appeal").

*Standard of Review.* The district court's denial of Jason's motion to continue trial is reviewed for abuse of discretion. The district court's discretion is "very broad" and "will not be interfered with on appeal unless it clearly appears that the trial court has abused its discretion, and an injustice has resulted therefrom." *State v. Grimme*, 338 N.W.2d 142, 144 (Iowa 1983) (internal quotations and citations omitted).

Under this standard, the district court's denial of a continuance is easily affirmed. First, Jason has abandoned the only ground for a continuance advanced in the district court. He sought a continuance on the ground that

law enforcement had not yet decided to prosecute him for murder. 12/5/2017 Trial Tr. 14:5. Such a rule would, obviously, sweep too broadly and be impossible to apply in practice because law enforcement might never announce its intentions.

Second, a continuance could not have "more nearly obtained" justice because Jason was not trying to get the documents that he now claims are exculpatory. Iowa R. Civ. P. 1.911(1). For the first time in this Court, Jason advances the notion that the DCI's criminal file had exculpatory evidence that rendered discovery incomplete, and therefore a trial continuance should have been granted. This argument goes nowhere because Jason did not issue a subpoena for the very same evidence that he now insists should have been included at trial.

## II. ISSUE II: JASON CARTER DOES NOT HAVE STANDING TO OBJECT TO A SUBPOENA DIRECTED TO THE STATE OF IOWA.

*Preservation of Error*. The Plaintiffs agree that error was preserved.

*Standard of Review*. The Plaintiffs agree that abuse of discretion is the standard of review.

Jason had no right to stop the DCI from producing information responsive to a civil subpoena. He points to Iowa Code § 622.11 and the polestar case construing it, *State* ex rel. *Shanahan v. Iowa Dist. Court for Iowa*

*County*, 356 N.W.2d 523 (Iowa 1984), but § 622.11 does not confer any rights on a private citizen.[2]

Section 622.11 provides: "A public officer cannot be examined as to communications made to the public officer in official confidence, when the public interests would suffer by the disclosure." This Court was plain about the purpose of the statute: "The interest of the public—public safety—is at stake, *not the interest of the officer or the person communicating in confidence*." *Shanahan*, 356 N.W.2d at 527 (emphasis supplied) (citing *State v. Hoben*, 102 P. 1000, 1004–05 (Utah 1909); *Agnew v. Agnew*, 218 N.W. 633, 636-37 (S.D. 1928)).

*Shanahan* was also a wrongful death case, but with the roles reversed. In *Shanahan*, the DCI sought protection from a civil subpoena seeking production of its investigatory file concerning a double murder in a hotel room. *Id*. at 527. The civil lawsuit contested whether the hotel's negligence was a proximate cause of the deaths, and the civil litigants subpoenaed the State's investigative file. The district court ordered the entire file produced.

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[2] Jason also cites Iowa Code § 22.7(5) but does not explain his reliance on that statute. This case does not involve an open records request, so § 22.7(5) has no application here.

*Id.* at 525–26.[3] This Court, on certiorari review, overruled the district court. *Id.* at 531. The *entire basis* for this Court's decision was the qualified law enforcement privilege created by § 622.11. *See id*. at 527–31.

Here, unlike *Shanahan*, the DCI reached an agreed resolution of the Plaintiffs' request for information from its investigatory file, meaning the State did not move to quash. Under § 622.11 and *Shanahan*, the State of Iowa may invoke the public interest to preclude production of information or testimony. Like similar statutes in other states, § 622.11 creates a privilege for law enforcement to invoke when it determines that the public interest would suffer from disclosing information pertaining to a criminal investigation. *See* 1 McCormick on Evid. § 108 (7th ed. 2016) (recognizing that law enforcement could legitimately invoke the privilege to protect confidential sources or to avoid hampering an investigation). *Shanahan* expressly recognizes that the interest does not belong to persons

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[3] *Shanahan* has one feature in common with the instant case: In *Shanahan*, too, the DCI produced part of its file voluntarily in response to a subpoena. 356 N.W.2d at 526. In fact, this Court in *Shanahan* recognized the prerogative of the DCI to release investigative information if it chose. This Court ruled that "[t]he district court should have sustained the State's motion for a protective order *to the extent that it sought to deny the civil litigants access to DCI file materials not already disclosed voluntarily to them*." *Id.* at 531 (emphasis suppled).

communicating information to public officers (or to anyone else), because it is law enforcement's job to protect the public's safety. *See Shanahan*, 356 N.W.2d at 527.

This simple distinction about whose interest is at stake, and thus who may object to a subpoena, nullifies Jason's argument that Iowa Code § 622.11 creates a right on which he can rely to quash a subpoena directed at the DCI. Jason's claim that *Shanahan* recognized rights for private litigants is an audacious misrepresentation of that case. Not one sentence of *Shanahan* suggests that the qualified privilege for law enforcement information belongs to anyone other than the State.

The *Shanahan* Court's recognition that Iowa Code § 622.11 confers a right on the State, not some third party that wants to substitute its view of the public interest, aligns with the policy of the Iowa Rules of Civil Procedure that strangers to a subpoena generally lack standing to object to the subpoena. Jason moved to quash the subpoena under Rule 1.1701(4)(d)(1) of the Iowa Rules of Civil Procedure. But Rule 1.1701(4) sets out standards for "[p]rotecting a person subject to a subpoena." Jason was not "subject" to a subpoena, and he has not identified any information in the DCI's control to which he has some personally protectable interest. *See* 9A Wright & Miller,

Fed. Prac. & Proc. § 2459 (3d ed. 2008) (collecting cases at footnote 6 and 7, and stating that "[o]rdinarily a party has no standing to seek to quash a subpoena issued to someone who is not a party to the action, unless the objecting party claims some personal right or privilege with regard to the documents sought.").

The policy implications of the rule Jason seeks to create out of whole cloth are particularly troubling. This Court need not strain hard to imagine the mischief a private party determined to interfere with a police investigation could create if that party had the right to use § 622.11 against law enforcement.

Jason complains that the DCI and the Plaintiffs discussed the scope of the subpoena and the information that the DCI was willing to produce. *See* Appellant's Br. at 53. Jason believes that such a discussion is evidence of some kind of impropriety or unfairness to him. This assertion, again, runs contrary to Rule 1.1701(4)(a) of the Iowa Rules of Civil Procedure. The party issuing the subpoena is under a "duty" to "take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." *Id.* The subpoenas actually served on the DCI, *see* App. v. 2, pp. 776–785, were the product of discussions between counsel for the Plaintiffs and counsel for the DCI, and therefore reflect the steps taken to protect the party subject to the

subpoena. *Accord* Iowa R. Civ. P. 1.501(3) (requiring parties to have "personally spoken" with the party on whom discovery is served to avoid unnecessarily burdening the courts with motion practice).

## III. ISSUES III AND IV: JASON CARTER KILLED HIS MOTHER.

*Error Preservation*. Error was preserved. The Plaintiffs agree that the district court denied Jason's motion for judgment notwithstanding the verdict and the first petition to vacate the judgment.

*Standard of Review*. Jason attacks the factual correctness of the proposition that he murdered his mother by appealing the district court's denial of his motion for judgment notwithstanding the verdict and the district court's denial of his first petition to vacate the judgment. The former argument asserts that the Plaintiffs produced insufficient evidence to generate a case submissible to the jury, while the latter argument incorporates a myriad of evidentiary and discovery rulings into a broad claim that newly-discovered evidence impeaches the verdict.

The standard of review regarding the denial of Jason's motion for judgment notwithstanding the verdict is for correction of errors at law. *Ferguson v. Exide Technologies, Inc*., 936 N.W.2d 429, 431 (Iowa 2019). In reviewing that ruling, this Court must view the evidence in the light most favorable to the nonmovant and in favor of the verdict. *Royal Indem. Co. v.*

*Factory Mut. Ins. Co.*, 786 N.W.2d 839, 846 (Iowa 2010). The district court's decision is affirmed if substantial evidence supports it. *Vogan v. Hayes Appraisal Associates, Inc.*, 588 N.W.2d 420, 423 (Iowa 1999). That is, this Court does not reverse the district court if a question of material fact was generated at trial. *Royal Indem.*, 786 N.W.2d at 846.

On the other hand, "the trial court is vested with considerable discretion when ruling on a petition to vacate judgment." *Embassy Tower Care, Inc. v. Tweedy*, 516 N.W.2d 831, 833 (Iowa 1994). "Its ruling is subject to reversal on appeal only upon a finding that discretion has been abused." *Id.* In particular, "[w]e do not favor motions for new trial based on newly discovered evidence. We will not disturb the trial court's ruling unless the evidence clearly shows the court has abused its discretion." *Benson v. Richardson*, 537 N.W.2d 748, 762 (Iowa 1995 (citing authority)).

Much of Jason's complaint regarding his first petition to vacate concerns the district court's evidentiary rulings. In general, decisions about the admissibility of evidence are reviewed for abuse of discretion; however, challenges to hearsay that implicate the interpretation of a rule of evidence are reviewed for correction of errors at law. *Hawkins v. Grinnell Regional Medical Center*, 929 N.W.2d 261, 265 (Iowa 2019).

### A. The Trial Record Supports the Verdict.

Jason's appeal of the denial of his motion for judgment notwithstanding the verdict would only merit substantial consideration if this Court were to limit itself to the version of the facts described in his brief. *See* Appellant's Br. at 24–30. But that account of the record is so cramped as to leave this Court struggling to understand what the trial was about. The facts discussed above speak for themselves. Plainly this case deserved to go to a jury.

In a case where the jurors are presented with a choice between two people accusing each other of the same act, the outcome of the trial will depend on the juror's assessment of credibility. "In our system of justice, it is the jury's function to determine the credibility of a witness." *State v. Dudley*, 856 N.W.2d 668, 677 (Iowa 2014). Jason's attorney invited the jury to focus on credibility during closing arguments, which makes overturning the jury's determination particularly difficult to overturn on appeal.

There is ample evidence to support the jury's judgment that Jason is the killer. First, there was no evidence to support that Bill, the only other potential culprit, was responsible. Bill had an unchallenged alibi for the time when the murder must have happened. He had no hint of a motive to kill Shirley, and the defense theory—that this was a sudden rage killing—was wholly inconsistent with the cold manner in which this murder occurred. Second, the

crime scene evidence demonstrated that the home was not robbed, that evidence suggestive of a robbery was faked, and that the killer carefully selected a murder weapon from inside the house. Third, the time line proved that Jason, and only Jason, had at least 18 minutes by which to commit the act. Fourth, only Jason stood to gain from killing Shirley, and he had an urgent need to change his farming and financial fortunes. Fifth, Jason was caught in lie after lie and admission after admission about how the murder occurred. A reasonable jury, therefore, had plenty of reasons to find Jason liable.

Finally, Jason's suggestion that the Plaintiffs failed to generate a jury question about Jason's intent, Appellants Br. at 55, is frivolous. Obviously, the jury was entitled to infer that when Jason shot his mother twice he intended to harm her. *See, e.g., State v. Rinehart*, 283 N.W.2d 319, 321–23 (Iowa 1979).

### B. Jason Carter's "New Evidence" Could Not Change the Trial Outcome.

This is not a case where the district court issued a perfunctory denial of the defendant's request for a new trial. Instead, the district court issued careful rulings that were based on specific factual findings. The district court held a three-day, in-person hearing with witnesses before issuing a ruling. The district court denied the first petition to vacate in a ruling dated January 31,

2019. App. v. 2, pp. 713–720. At Jason's request, the district court expanded its ruling following his acquittal. The final ruling on the first petition to vacate is dated June 7, 2019. App. v. 2, pp. 744–755.

The standard by which a court judges a petition to vacate a judgment in a civil case under Iowa R. Civ. P.1.1012 is settled:

> A party seeking a new trial on such grounds [newly discovered material evidence] must demonstrate three things: (1) the evidence is newly discovered and could not, in the exercise of due diligence, have been discovered prior to the conclusion of the trial; (2) the evidence is material and not merely cumulative or impeaching; and (3) the evidence will probably change the result if a new trial is granted.

*Benson,* 537 N.W.2d at 762 (citing *In re D.W.*, 385 N.W.2d 570, 583 (Iowa 1986)).

Recognizing how much trouble this standard causes for him, Jason instead espouses a different body of law, that being the obligation of the government to disclose exculpatory evidence in a criminal case under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, including, among several cases cited by Jason, *United States v. Bagley*, 473 U.S. 667 (1985), and *Harrington v. State*, 659 N.W.2d 509 (Iowa 2003). *See* Appellant's Br. at 70–74. The *Brady* doctrine, however, is irrelevant to this case. The Constitution in general, and *Brady* in particular, restrains the conduct of the government, not private litigants. Jason cites no case, and we can find none, applying

*Brady* to a lawsuit between private litigants. Even when the government is a party to a civil suit,

> …"courts have only in rare instances found *Brady* applicable in civil proceedings, mainly in those unusual cases where the potential consequences 'equal or exceed those of most criminal convictions.'" *Fox* ex rel. *Fox v. Elk Run Coal Co., Inc.,* 739 F.3d 131, 138–39 (4th Cir.2014) (quoting *Demjanjuk v. Petrovsky,* 10 F.3d 338, 354 (6th Cir.1993)); *see also Brodie v. Dep't of Health & Human Servs.,* 951 F.Supp.2d 108, 118 (D.D.C. 2013) ("*Brady* does not apply in civil cases except in rare situations, such as when a person's liberty is at stake.... With only three exceptions, ... courts uniformly have declined to apply *Brady* in civil cases.").

*United States v. Sierra Pacific Industries*, 100 F.Supp.3d 948, 959 (E.D. Cal. 2015). *See also State* ex rel. *State Highway Commission v. Texaco, Inc*., 502 S.W.2d 284, 289 (Mo.1973) ("*Brady v. Maryland* obviously applies only to criminal cases").

The settled test in *Benson v. Richardson* thus controls this case. Jason's petition failed this standard at multiple levels.[4]

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[4] Jason also argues that newly-discovered evidence should result in a new trial if it "might" alter the outcome at that trial based on *Henderson v. Edwards*, 183 N.W. 583, 584 (Iowa 1921), and one case citing *Henderson*. Appellant's Br. at 74. While this Court may not have explicitly overruled *Henderson*, there is no suggestion that, in the wake of *In re D.W*. and *Benson*, it is an accurate statement of current law.

*1. The Proffered Evidence Was Not Admissible.*

No matter how "new" evidence may be, that information cannot change the outcome at a new trial (*Benson* element #3) if the jury will never hear it. "It is, of course, well settled, and in fact it is elemental, that newly discovered evidence which will form the basis for a new trial must be such evidence as would be competent and admissible on such trial." *Nichols-Shepherd Co. v. Ringler*, 120 N.W. 640, 640 (Iowa 1909). *See also Frazier v. Burlington Northern Santa Fe Corp.*, 811 N.W.2d 618, 631 (Minn. 2012) ("[T]o warrant a new trial the newly discovered evidence must be relevant and admissible."); *United States v. Int'l. Brotherhood of Teamsters*, 247 F.3d 370, 392 (2d Cir. 2001) (for party to obtain relief from judgment based on newly discovered evidence, "the evidence must be admissible"); *Edwards v. Edwards*, 418 S.W.3d 757, 759 (Tex. App. 2013) (to warrant new trial, the "newly discovered evidence must also be competent and admissible").

Much of the evidence offered by Jason was plainly inadmissible. Most of the evidence was hearsay, usually at more than one level. To begin with, the evidence consisted of law enforcement officers either reciting out-of-court statements that had been made to them for the truth of the matters asserted, or introducing their investigative reports containing such statements. The entirety of the purported "stranger burglar" evidence that Jason offered came

from non-law-enforcement witnesses, yet Jason *did not call a single civilian witness* in support of that theory. The offered statements were thus plainly hearsay. *See* Iowa R. Evid. 5.801(c), 5.802. *See also* Iowa R. Evid 5.803(8)(B)(i) (investigative reports by police and other law enforcement personnel are not within the public records exception to hearsay rule).

Beyond that first level of hearsay, the evidence proffered consisted of additional levels of hearsay. That is, the witnesses whose out-of-court statements were being proffered did not witness Shirley Carter's murder or any facts proving the identity of the killer themselves; rather, they were quoting what other people said about that murder. That additional level of hearsay defeats the admissibility of the evidence. *See* Iowa R. Evid 5.805 (hearsay within hearsay is inadmissible unless a hearsay exception applies to every level of the hearsay).[5]

To these statements, at least, Jason offered a couple of justifications to the district court. First, he contended that they were statements against interest. Statements against interest are only exceptions to the hearsay rule,

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[5] Some of the statements involved even a third level of hearsay, *e.g.*, a law enforcement witness reciting the statement of a witness who recites the statement of a second witness who in turn quotes a third person as stating the fact that Jason claims is significant.

however, if the witness was unavailable to testify at the hearing. Iowa R. Evid. 5.804. Jason did not attempt that showing for even one of the hearsay declarants at the hearing. *See State v. Traywick*, 468 N.W.2d 452, 454–55 (Iowa 1991) (upholding exclusion of hearsay notwithstanding alleged statement against interest where proponent failed to produce "proof that the declarant… was unavailable as a witness").

Jason also argued that the statements would be admissible because they would be inconsistent with what the witnesses—people allegedly complicit in Shirley Carter's murder—would likely say at trial. But Jason made no evidentiary showing, even at the level of an offer of proof, of what those witnesses would in fact say at trial. And, in a broader sense, it does not matter. The law in Iowa prevents a party from calling a witness at trial, having that witness deny the content of a prior statement, and then "impeaching" that witness with the prior statement that is plainly hearsay but also the thing the proponent of the evidence really wants the jury to hear. *State v. Turecek*, 456 N.W.2d 219, 225 (Iowa 1990) (A party "is not entitled under Rule 607 to place a witness on the stand who is expected to give unfavorable testimony and then, in the guise of impeachment, offer evidence which is otherwise inadmissible. To permit such bootstrapping frustrates the intended application of the

exclusionary rules which rendered such evidence inadmissible on the [proponent's] case in chief."); *State v. Bush*, 791 N.W.2d 710 (Table), 2010 WL 4484401, at *4 (Iowa Ct. App. 2010) (reversing criminal conviction based on violation of *Turecek* rule).

*2. The Proffered Evidence Was Not Material.*

Apart from problems with admissibility, the evidence proffered does not satisfy the materiality element of the newly discovered evidence rule (*Benson* element #2). First, the little bit of admissible evidence proffered by the Appellant was merely impeaching or cumulative. *See Benson*, 537 N.W.2d at 762 (evidence does not support new trial if it is "merely cumulative or impeaching"). For example, evidence about whether and how Jason Carter placed fingerprints on either the gun safe from his parents' house or the property inventory prepared by law enforcement does not contradict the fundamental reason for the admission of the fingerprint evidence: to show that Jason lied at material points in the investigation. At best, the new evidence admitted on that issue impeaches the conclusion the jury drew from that evidence, but it does not contradict that conclusion. Likewise, tape recordings from Bill Carter regarding the condition of Shirley Carter's body or first responder Curt Seddon regarding what Jason said about bullet holes in the

house are merely impeaching of those witnesses' testimony on those topics at trial; they are not independent material evidence undermining the verdict.

Finally, Jason asserts that the totality of law enforcement's investigatory file may be admitted to critique the quality of law enforcement's investigation or for some other purpose like the effect on the listener or to explain a subsequent course of conduct. Appellant's Br. at 60, 64. The problem with this argument is that Jason did not at all make the quality of law enforcement's investigation an issue in the civil case. Nor could he have. While that may be a proper argument in a criminal case, where law enforcement is the defendant's litigation opponent, the Plaintiffs here are not law enforcement. This was not their investigation, nor did they possess anything like the full fruits of the investigation. Jason's brief thus offers no non-hearsay purpose that would make the evidence relevant in a second trial. This leads to the obvious conclusion that the "true purpose in offering the evidence was in fact to prove the statement's truth." *McElroy v. State*, 637 N.W.2d 488, 501–02 (Iowa 2001) (internal citations omitted). Jason's brief says nothing about how any excluded statement is "relevant to the purpose for which it is offered." *Id.* And, therefore, Jason has not demonstrated that the statements are admissible.

### 3. *The Proffered Evidence Changes the Defense's Theory of the Case.*

Even if Jason came forward with admissible and material evidence, that evidence was proffered in support of a theory that is radically different from the defense theory at trial. The defense theory at trial was that Bill killed his wife. The evidence proffered at the hearing is entirely in aid of the proposition that some stranger burglars committed the murder instead. The law does not, however, award a new trial based on newly discovered evidence to support a new defense theory when the first one failed.

*State v. Smith*, 573 N.W.2d 14 (Iowa 1997), is instructive. In *Smith*, a criminal defendant sought a new trial on charges of assault with intent to inflict serious injury and terrorism. The fighting issue at trial was whether he fired a gun at others in a public park. The defendant alleged that he had newly discovered evidence in the form of witnesses who said that they did not see the defendant at the park at the time of the shooting. This Court affirmed the district court's denial of the defendant's request for a new trial, among other reasons, on the basis that the alleged newly discovered witnesses testified inconsistently with the defendant's defense at trial, which was that he *was* present at the park during the shooting but did not fire a gun. *Id*. at 21–22. Here, the Appellant's change in theory is even more stark than the change that

was rejected in *Smith*, and the result is the same: Newly discovered evidence is out-of-bounds if it is in support of a different theory than the trial defense.

Even if newly discovered evidence contrary to the theory of the case could be considered, the trial court must not accept the new evidence uncritically. Rather, it must evaluate the credibility of that evidence. As the Seventh Circuit has stated:

> First, our most recent decisions regarding [new trial] motions are clear that the new evidence must be credible to warrant a new trial.… Second it is only logical that a district court weigh the credibility of evidence before granting or denying a [new trial] motion. [New trial] motions are decided by judges; not by juries. Credibility determinations are necessary to these decisions. To hold otherwise would mean that the district court would have to order a new trial no matter how incredible the new evidence.

*Daniels v. Pipefitters' Assoc. Local Union No. 597*, 98 F.2d 800, 803 (7th Cir. 1993) (citations omitted). *See also Crespin v. Largo Corp.*, 698 P.2d 826, 828 (Colo. App. 1984) ("In order for newly discovered evidence to serve as a basis for granting a new trial, it must be credible.") (citing authority).

Here, the district court explained why the hearsay would not make a difference, even if it was admissible. Judge Mertz wrote:

> Both the experts concluded, based on these and other facts, whoever killed Shirley Carter was not a burglar. However, in virtually every story provided by criminal defendants looking for a deal, the burglars were in search of drugs and the situation "went bad" and Shirley Carter ended up dead. Thus, it appears to

> the Court that the evidence Jason Carter wishes to offer, is not material to the outcome because of its inconsistency with other known facts of the case.

Order dated Jan. 31, 2019.[6]

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[6] Related to his new evidence claim, Jason makes a number of misleading and even false statements about alleged discovery violations. Appellant's Br. at 74–79. The allegations are so thin that it is tempting not to dignify them with a response, but the record should be clear. First, Jason claims that the district court did not address these alleged discovery violations. That is false. Pages 5 through 7 of the Ruling dated June 7, 2019 addressed these allegations and found them to be meritless. Second, the district court's ruling in that regard was correct. Jason's argument is that in a deposition a question was asked mentioning the name of one of the "new" suspects, and that counsel for Bill publicly criticized Jason's petition to vacate as presenting nothing new "of substance." Appellant's Br. at 76–77. To this alleged proof, the district court pointed out that Jason's counsel was audio recorded asking law enforcement about these very same so-called "new" suspects just before trial. 12/11/2018 Hearing Tr. 103:13–104:9 (Testimony of Reed Kious); 12/12/2018 Hearing Tr. 8:14–23 (admitted the audio recording); Ex. C6. The district court explained that Jason "cannot maintain his evidence is newly discovered if he had sufficient information about other suspects to be put on notice to investigate those individuals before the trial." 6/7/2019 Ruling at 7. Third, even if there were some factual basis for Jason's allegations, Jason's legal argument for why it all matters is based on a *Brady* case which, again, has no application in this civil lawsuit. *See* Appellant's Br. at 77 (citing *United States v. Bagley*, 473 U.S. 667 (1985)).

## IV. ISSUE V: THERE IS NO PLAUSIBLE ALLEGATION OF JUDICIAL BIAS TO SUPPORT RECUSAL.

*Preservation of Error*. The Plaintiffs agree that error was preserved.

*Standard of Review*. The Plaintiffs agree that abuse of discretion is the standard of review.

Jason's argument for recusal is insufficient on its face. He has failed to identify facts demonstrating an extrajudicial prejudice. It is not *extrajudicial* prejudice to preside over a wrongful death trial and come to believe that Jason is "guilty as sin." Appellant's Br. at 81. That is a judicial judgment based on facts, not some kind of prejudice.

The United States Supreme Court and this Court are clear that a firm conviction after a trial that the defendant is guilty is not a reason for a recusal:

> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task.

*State v. Jacobs*, 644 N.W.2d 695, 699–700 (Iowa 2001) (quoting *Liteky v. United States*, 510 U.S. 540, 550–51 (1994)).

The allegation that the trial judge was seen conversing with lawyers for the Plaintiffs, likewise, does nothing to justify a recusal. The *ex parte*

communication rule only bars attorneys from speaking to judges "as to the merits of the cause" or "relative to the matter pending." *Iowa S. Ct. Bd. of Prof. Ethics and Conduct v. Rauch*, 650 N.W.2d 574, 577 (Iowa 2002). The motion to recuse does not provide any reason to believe that the conversation apparently witnessed was about this case as opposed to being the sort of routine encounter that occurs commonly in the limited confines of a rural county courthouse.

## V. ISSUE VI: JASON CARTER'S SECOND PETITION FOR RELIEF WAS TIME BARRED.

*Preservation of Error*. The Plaintiffs agree that error was preserved.

*Standard of Review*. The Plaintiffs agree that correction of errors at law is the standard of review.

Jason acknowledges that his Second Petition to Vacate was filed outside of the one-year limitation period prescribed in Rule 1.1013 of the Iowa Rules of Civil Procedure. Appellant's Br. at 83. The judgment was entered on December 18, 2017. The Second Petition to Vacate was filed on August 30, 2019.

Jason argues that his Second Petition to Vacate should nonetheless be allowed to proceed in district court because of equitable principles. Equity, however, does not toll the statute of limitations for a petition to vacate because

the limitations period is jurisdictional. The Official Comment to Rule 1.1013 states, "Rule 253 [now 1.1013] limits the time for filing the petition under Rule 252 [now Rule 1.1012]. *Such time is jurisdictional*; the court being without power to entertain a petition filed thereafter: *Kern v. Lohr*, 234 Iowa 1321, 14 N.W.2d 687. Nothing can extend the time. . . ." (Emphasis supplied.)

When a statute of limitations is jurisdictional, equitable tolling is unavailable. *United States v. Kwai Fun Wong*, 575 U.S. 402, 409 (2015) (explaining that a court must apply a jurisdictional statute of limitations "even if equitable considerations would support extending the prescribed time period"). Iowa courts recognize that statutorily prescribed limitations periods, like the one here, may not be tolled when "the policy underpinnings of a specific statute might weigh against equitable tolling doctrines. . . ." *Mormann v. Iowa Workforce Dev.*, 913 N.W.2d 554, 569 (Iowa 2018) (citing *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990), for the proposition that "neither equitable estoppel nor equitable tolling applies to statutes of repose and to jurisdictional statutes of limitations.").

Here, the policy underpinnings weighing against application of equitable principles to permit a second bite at the apple are particularly clear. The Appellant had a three-day hearing into supposedly new evidence that he

believed justified his First Petition to Vacate. App. v. 2, p. 753. The trial court was not convinced. *Id.* As a matter of policy, this Court has said:

> [A] party is entitled to only one bite at the apple. There are sound reasons for this rule. Repetitive motions waste scarce judicial resources and increase the cost of using the court system. Furthermore, when parties are required to present all arguments on an issue at the same time, the court can comprehensively analyze the issue before it, rather than doing so in a piecemeal, serialized fashion.

*Boughton v. McAllister*, 576 N.W.2d 94, 96–97 (Iowa 1998).

The district court did not have jurisdiction to hear the Second Petition to Vacate because it was filed outside of the statute of limitations period, which cannot be tolled in these circumstances. The district court, therefore, lacked jurisdiction, and the Second Petition to Vacate was correctly dismissed as time barred.

## CONCLUSION

The Plaintiffs respectfully request that this Court affirm the judgment against Jason Carter.

## STATEMENT REGARDING ORAL ARGUMENT

The Plaintiffs agree with Jason's statement that this case is appropriate for oral argument, and they respectfully request the same.

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## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on August 19, 2020, I electronically filed the foregoing Proof Brief with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System which will send notice of electronic filing to the following. Per Rule 16.317(1)(a), this constitutes service of the document for purposes of the Iowa Court Rules.

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## CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 8,328 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Word 2010 in Times New Roman 14 pt.

Dated: August 19, 2020

/s/ Michele Baldus