IN THE IOWA SUPREME COURT
S.C. No. 18-0296
Marion County No. LACV095809

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

vs.

JASON CARTER,
Appellant.

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

APPELLANT'S PROOF REPLY BRIEF

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ROUTING STATEMENT REPLY

This case involves issues of "broad public importance." Plaintiffs' framing of Jason[1]'s appellate issues, however, is inaccurate.

First, Jason is not asserting Iowa Code § 622.11 gives a private citizen ability to control how law enforcement responds to subpoenas. Jason asserts it was improper to allow DCI to privately collaborate with a citizen-litigant to provide biased, incomplete, cherry-picked, piecemeal evidence while simultaneously preventing access to related evidence for defense. Core unfairness makes this error a matter of "broad public importance."

Second, Jason does not seek substantial change in the adjudication standard for motions to vacate civil judgments; it is unclear to what "substantial change" Plaintiffs refer.

Third, equitable tolling applies to motions to vacate judgment and was affirmed by this Court numerous times over the past century.

Plaintiffs incorrectly assert Jason presents "substantial questions of enunciating or changing legal principles" pursuant to Iowa R. App. P. 6.1101(2)(f). Jason relies on existing law. The importance of this case is not

[1] Because multiple parties have the name "Carter," Appellant is referred to as "Jason" throughout briefing.

based on related media attention, but on the need to follow existing law and public policy. Allowing violation of law and policy would open the door to collaboration between law enforcement and civil litigants – allowing law enforcement to circumvent Iowa Rules of Criminal Procedure and to unconstitutionally engage in discovery with a criminal suspect.

STATEMENT OF THE CASE

Jason's interlocutory appeal was denied October 25, 2017.

Jason requested this Court take judicial notice of criminal proceedings not for outcome of proceedings, but for the framework underlying the verdict. Both this district court and the criminal district court addressed whether new, material, exculpatory evidence was admissible. Contrary decisions address the same question about the same evidence, now presented to this Court.

STATEMENT OF FACTS

Plaintiffs make hay of "him or me" statements from the December 2017 trial while ignoring myriad newly discovered evidence eliminating that dichotomy. "Him or me" statements illustrate unfairness. Each statement was made without benefit of undisclosed evidence. Plaintiffs possessed and failed to disclose evidence. The State withheld evidence. Law regarding effect of newly discovered evidence requires consideration of how evidence would affect trial preparation and strategy. Jason's 2017 trial strategy accusing Bill

Carter was built on available evidence and would have metamorphosized based on evidence about "them."

Plaintiffs' statement "[Jason] specifically disclaim[ed] the possibility that an unknown person was to blame" is false. Jason asserted someone else was responsible for the homicide. (Am. App. I at 19 ¶ 25). In closing arguments, Jason's counsel told the jury they could find neither Jason nor Bill were responsible. (12/5/17 Trial Tr. 77:25-78:2).[2]

The Timeline Excludes Jason as a Suspect

Evidence suggests the homicide occurred while Jason was at Cargill. Even if the homicide occurred later in the morning, evidence eliminates Jason.

Plaintiffs again falsely claim "Jason left the [] Cargill facility at 9:52am." (Pl. Br. at 14.). For years, Plaintiffs possessed video showing Jason left Cargill at 9:58am. (Video Tr. Ex. K1). Plaintiffs allege Jason committed the homicide in an eighteen-minute timeframe; therefore, six minutes are crucial. Plaintiffs' repeated reference to a demonstrative exhibit indicating an incorrect time of departure from Cargill is misleading.

[2] Again, "him or me" arguments based on incomplete evidence illustrate likelihood of trial strategy change.

Jason *guessed* he arrived at Carter Farm "around" 10:50am. (12/12/17 Trial Tr. 62:19-63:16). A 10:50am arrival time at Carter Farm is *not* objectively supported by travel time from Eddyville to Carter Farm. Two witnesses testified the specific drive takes an hour. (12/11/17 Trial Tr. 66:7-10; 12/14/17 Trial Tr. 13:18-24). Video shows Jason leaving at 9:58am, which places him at Carter Farm at 10:58am – Jason also had an approximately five minute stop.

Considering the hour drive from Eddyville to Carter Farm and the five-minute stop, the earliest Jason arrived at Carter Farm is 11:03am. Jason called his sister at 11:08am. (12/12/17 Trial Tr. 67:16-17; 68:1-3). Jason called 911 at 11:11am. (*Id.*)

Plaintiffs highlight Jason's last text to Tara Hoch[3] is at 10:50am, but disregard Jason's 10:55am text requesting delivery to Carter Farm. (Am. App. II at 48). Plaintiffs disregard the time for Jason to park and walk to the home. Objective evidence indicates an approximate maximum time of three minutes between entering the home and making calls.

Laurie Goff testified the pool of blood surrounding the body was dry when she arrived at 11:33am. (12/13/17 Trial Tr. 158:12-14; 166:4-167:2) and Bill Carter stated the body was in rigor mortis when he arrived at around

[3] Plaintiffs consistently use "mistress" to identify Tara Hoch.

11:13-11:15am. (Conf. App. at 17, 18; 12/10/18 Trial Tr. 181:8-183:15; 189:5-14; Am. App. I at 1222; 12/11/17 Trial Tr. 83:13-16). It is impossible that Jason committed the homicide based both on the window between his arrival and call to his sister, and characterization of the body as cold, in rigor mortis, surrounded by drying blood.

Evidence Does Not Exclude a Non-Party Assailant

Plaintiffs argue because Jason did not contest one expert witness, he concedes there was no third-party assailant. Jason's understanding of the homicide was based on incomplete evidence. *Plaintiffs* were aware of a multitude of individuals who heard *confessions* to the homicide; Jason was not. (Conf. App. at 40, 44). Plaintiffs' expert did not have complete evidence when rendering his opinion. It is unknown if that opinion would have changed based on myriad now-known exculpatory evidence.

Plaintiffs argue expert opinions were based on crime scene renderings and would be unchanged by implication of other suspects. Evidence would have generated potential cross-examination questions like, "Does it matter that a witness heard a confession and statements that aligned with findings at the scene?" and "Does it matter that witnesses indicate the body was in rigor mortis and surrounded by dried blood?" Expert witness credibility would likely be questioned if corroborative statements from multiple witnesses

indicating drawers were ransacked, and Shirley surprised the culprits when she walked into the house would have no effect on conclusions.

Jason Did Not Make Incriminating Statements

Observations of Crime Scene. Plaintiffs state neither Bill nor law enforcement were initially able to observe Shirley was shot. Trial testimony differs. Curt Seddon testified that at the scene Bill said "Something's happened to her. She's been shot." (12/5/17 Trial Tr. at 106:21-107:1). At the First Petition for Relief, Jason offered a recording from June 19, 2015:

> **Seddon:** They made mention of there's, and I don't understand this, they said there's two holes in her, which is kind of confusing to me right now, and they said there's a hole in the refrigerator. So I don't know if they were referring to actually holes in the victim or if there's a place in the floor or a chunk of the floor is out, and of course you got that one hole in the fridge, so I don't know if they're referring to those two holes.
>
> **Law Enforcement:** Who was the one making, were they both making those comments?
>
> **Seddon:** I don't know who exactly said the two holes in her, they were both making comments to a hole in the refrigerator.
>
> (Conf. App. at 18).

911 Call. Plaintiffs state Jason told a 911 operator Shirley was dead for two hours when he found her. Jason actually stated, "it looks like she's been here for two hours." (Audio Trial Ex. 13). At that time, Jason had no reason to know such a statement would align with multiple witnesses (Ford, Goff,

Bill Carter, and Wecht) or that such a statement would align with other evidence in tower records and video recordings.

Gun Safe. Jason told law enforcement he had not touched the gun safe. Newly discovered evidence included pictures of Jason assembling the gun safe fifteen years earlier. (Am. App. II at 15). Bill was in possession of those photographs at the time of trial. (12/12/18 Trial Tr. 13:17-25). This evidence provides an explanation for Jason's fingerprints on the safe, *and* for Jason's lack of memory of the safe.

Call with Sheriff Sandholdt. Evidence of Sheriff Jason Sandholdt's call with Jason on June 21, 2015 has been questioned. Regardless, Agent Motsinger's narrative from June 22, 2015 shows Motsinger received a call from Jason about the Carter family recognizing a .270 rifle was missing. (Am. App I, 1738).

Plaintiffs' allegation Jason denied handling receipts was addressed in the First Petition to Vacate. Evidence shows Jason repeatedly told Agent Ludwick he viewed the receipts. (Conf. App. at 18; 12/10/18 Trial Tr. 193:6-24; Audio Exhibit E5).

Source of Bullets. Plaintiffs state Jason "knew, and said" bullets "came from the deck area outside." (Pl. Br. at 22). Jason refers the Court to testimony

Plaintiffs cite for that proposition, which contains no such statement. (12/12/17 Trial Tr. 89:11-92:11).

Jason Had No Financial Motive

Evidence showed Jason was not in financial trouble, and Plaintiffs' reliance on the $566,000 farm line of credit is a flawed representation of farm financing. Three people most familiar with Jason's financial status—his wife, his agricultural loan officer, and his tax attorney/certified public accountant testified Jason was financially comfortable. (12/13/17 Trial Tr. 81:10-82:1 (Jason Hoch); (*Id.* at 127:3-8; 128:8-11 (Barry Griffith); (12/7/17 Trial Tr. 12:3-8; 18:23-19:13; 19:16-23; 22:22-23:25; 24:6-11; 26:17-20; 27:4-11 (Shelly Carter). Another witness testified Jason's line of credit and farmland rental is common for farmers of Jason's age and experience. (12/14/17 Trial Tr. 19:9-23; 20:1-11).

Shirley Carter's Last Will and Testament transferred her estate to Plaintiff Bill Carter. (Am. App. II at 689). Although Plaintiffs alleged Jason intended to kill both parents, no evidence supports this empty allegation. Jason gained *nothing* financially from the homicide, and Jason *knew* he would gain nothing financially.

REPLY TO ARGUMENTS

ISSUE I: THE DISTRICT COURT ERRED BY DENYING JASON'S MOTION TO CONTINUE TRIAL.

Error Preservation. Plaintiffs assert error was not preserved, stating Jason's brief "takes the position that a continuance should have been granted because the evidence obtained from the DCI was . . . 'cherry-picked.'" (Pl. Br. at 24.) Plaintiffs argue Jason did not assert incomplete evidence because "he failed to issue a subpoena to the DCI to seek the categories of documents he now describes as exculpatory evidence." (*Id.*) The January 2019 ruling finds information from DCI was not available to Jason. (Am. App. II at 716). Jason agrees information was not available and could not have been obtained with due diligence; however, Plaintiffs are incorrect regarding error preservation. Subpoenas, motions to quash, and motions to continue along with related briefs and hearings show Jason argued unfairness of provision of select evidence and of proceeding to trial with a criminal investigation pending. Jason preserved error.

Factual Background. In July 2016, Plaintiffs served a subpoena for DCI's investigation file. (Am. App. II at 776). DCI moved to quash the July

2016 subpoena because the file was for an active homicide investigation.[4] (Am. App. I at 20). DCI asserted, without qualification, law enforcement investigative materials are confidential under Iowa law and argued confidentiality extends to civil litigation. (Am. App. I at 21-22 ¶ 1). DCI stated:

> Requiring the [r]elease of a law enforcement investigative file relating to a homicide to civil litigants, including persons who may well be the subject of the investigation not only defies common sense but finds no support in law.
>
> [ ] Iowa law is also in accordance with federal law with respect to obtaining such law enforcement investigative materials. In the federal system there is a common law privilege protecting law enforcement investigative materials from disclosure and, as here, "[t]he purpose of the privilege is to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witnesses and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and to otherwise prevent interference in an investigation." *Raz v. Mueller*, 389 F. Supp.2d 1057, 1062 (W.D. Ark. 2005), citing *Jones v. City of Indianapolis*, 216 F.R.D. 440 (S.D. Ind. 2003).

(Am. App *Id.* (*Id.* ¶¶ 1-2)).

[4] Although reports were withheld because investigation was "active" no investigation was completed between request and Jason's arrest in December 2017.

Jason consistently resisted provision of selected[5] evidence. DCI's response indicated Jason was unable to obtain the investigation file. DCI indicated it would refuse and would move to quash a request from Jason while the criminal investigation was "active". In a civil action, Jason did not have the unquestionable right to all exculpatory evidence that attends criminal prosecutions. *See Brady v. Maryland*, 373 U.S. 83 (1963).[6]

Jason Asserted His Interests. DCI initially was unwilling to provide the entire investigation file. In conversations to which neither Jason nor counsel were privy, DCI reached agreement with Plaintiffs to provide selected evidence. Jason continuously objected to admission of selected evidence, chosen by Plaintiffs and DCI because the entire investigative evidence was unavailable. Jason wanted none of the file or all the file.

Writing was on the wall - DCI would not provide the entire investigation file to Jason because he was a suspect and investigation was 'active'. DCI's unwillingness to provide the entire investigation file could not be overcome by due diligence. Jason had two ways to assert his interest: (1) resist provision or admittance of any of the file based on unfair prejudice; and

[5] To refrain from appearing snide, counsel refrains from additional use of "cherry-picked."

[6] Jason *does not* assert *Brady* required disclosure of the DCI investigative file. *See infra*.

(2) request continuance until criminal investigation was complete, eliminating DCI's privilege. Jason made both arguments.

After DCI moved to quash the July 2016 subpoena, Plaintiffs notified the district court they reached agreement with DCI regarding release of evidence. (Am. App. I, 26 (8/24/16 Notice)). Jason was not privy to this agreement nor to discussions regarding agreement, nor did he receive evidence. In April 2017, Plaintiffs served another subpoena on DCI requesting the predetermined selected information. (Am. App. I at 28). Jason resisted, stating:

> This is not *State v. Jason Carter*. The State's investigation into Shirley Carter's death is ongoing. It is not the place of a private citizen to conclude—*especially prior to the State closing its criminal investigation file into a murder*—that it is unhappy with the direction the criminal investigation is taking and attempt to use in a civil trial the materials from an ongoing criminal investigation.

(Am. App. I at 100). The Court decision noted agreement was reached between Plaintiffs and DCI regarding evidence DCI would provide to Plaintiffs. (Am. App. II at 696, 703).

Hearing. Jason's Motion to Quash and DCI's joinder were addressed at hearing on December 5, 2017. DCI's counsel stated DCI agreed to provide "certain information" and DCI's position was officer testimony should be limited to provided information. (12/5/17 Trial Tr. 8:8-9:5). Jason's counsel

reasserted the motion to quash, arguing no law enforcement officials should testify because Jason was not privy to discussions between Plaintiffs and DCI regarding evidence DCI would provide to Plaintiffs, and Jason did not have access to investigative evidence, which "may contain exculpatory evidence." (*Id.* at 13:5-14).

Motion to Continue. Jason's counsel moved to continue trial until the homicide investigation closed, providing parties access to the DCI file. (*Id.* at 14:1-5). The court denied Jason's motion. (*Id.* at 19:21-23).

Abuse of Discretion. Denial of Jason's motion to continue is reviewed for abuse of discretion. A court abuses its discretion when its decision is made on grounds or for reasons which are clearly untenable or to an extent clearly unreasonable. *State v. Bayles*, 551 N.W.2d 600, 604 (Iowa 1996).

Due process principles constrain discretion to manage trials. *In re Marriage of Ihle*, 577 N.W.2d 64, 67 (Iowa Ct. App. 1998). Litigants are required to be given a fair opportunity to resolve disputes. *Id.* The degree of constraint a trial court may exercise is dependent upon principles of due process, which include consideration of public and private interests, administrative burden implicated, risk of erroneous decision due to the nature of the hearing, and value of any additional safeguards. *Id.* (citing *In re*

Marriage of Seyler, 559 N.W.2d 7, 9 (Iowa 1997)); *see also United States v. Raddatz*, 447 U.S. 667, 677 (1980).

Abuse of discretion is clear. DCI withheld the majority of evidence because criminal investigation was "active." DCI reached a private agreement with Plaintiffs. DCI selected evidence with Plaintiffs while facially resisting subpoenas to "maintain some semblance of confidentiality." (Am. App. I at 2273). The district court abused its discretion by denying Jason's motions, which in effect allowed DCI to pick a side and strategize a criminal "test case." The court allowed a lopsided presentation of evidence and denied Jason access to complete evidence.[7]

Public and private interest in preventing *ex parte*[8] collaboration between a civil litigant and law enforcement is substantial. There was a public and private interest to be served in either (1) not releasing and admitting only selected evidence or (2) releasing and admitting all evidence. Allowing only selected evidence served no public interest. By choosing neither (1) nor (2), continuance was the remedy.

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[7] The district court admitted, without the DCI's investigative evidence, Plaintiffs "may have difficulty making a prima facie case." (Am. App. II at 700). Jason argued exactly that point in his Motion for Summary Judgment filed October 31, 2016. (Def. Mot. for Summ. J. at 3).

[8] Between law enforcement and one civil litigant.

Administrative burden on the trial court weighs in favor of continuance. Administrative burden depends on the nature of the proceedings. *In re Ihle*, 577 N.W.2d at 67. Administrative burden "cannot be painted with a brush so broad as to support the imposition of time limits as a matter of course." *Id.* There is minimal administrative burden by either (1) not releasing or admitting the DCI file, or (2) continuing trial until criminal investigation closed.

Arbitrary and inflexible time limits are a threat to due process. *Id.* at 68. "Thus, judges must not sacrifice their primary goal of justice by rigidly adhering to time limits in the name of efficiency." *Id.* Quality of decision making suffers when important evidence is excluded as a result of time limits. *Id.* at 68.

Essential and relevant evidence is considered by balancing probative value against possibility of unfair prejudice. Iowa R. Evid. 5.403. "The reason for this balancing process helps explain the disfavor courts often express towards the imposition of rigid time limits." *In re Ihle*, 577 N.W.2d at 68. Jason was prejudiced by allowing Plaintiffs and DCI to privately agree what evidence would be provided and by refusal to continue trial to provide Jason with access to evidence. The court abused its discretion by denying continuance.

ISSUE II: THE DISTRICT COURT ERRED BY DENYING JASON'S MOTIONS TO QUASH.

Jason Had Standing to Object. A party has standing to object to a subpoena if the party was "prejudiced by the claimed error." *Mundy v. Warrant*, 268 N.W.2d 213, 218 (Iowa 1978). "A party has standing to move to quash a subpoena addressed to another if the subpoena infringes upon the movant's legitimate interests." *United States v. Raineri*, 670 F.2d 702, 712 (7th Cir. 1982) (cited with approval in *State v. Russell*, 897 N.W.2d 717, 722 (Iowa 2017)). Iowa does not require the objecting litigant "to allege a violation of a private right and [does] not require traditional damages to be suffered. Instead, [Iowa] require[s] the litigant to allege some type of injury different from the population in general." *Godfrey v. State*, 752 N.W.2d 413, 420 (Iowa 2008). "Only a likelihood or possibility of injury need to be shown" to support standing. *Iowa Bankers Ass'n v. Iowa Credit Union Dep't*, 335 N.W.2d 439, 445 (Iowa 1983). Further, "our doctrine of standing in Iowa is not so rigid that an exception to the injury requirement could not be recognized for citizens who seek to resolve certain questions of great public importance and interest in our system of government." *Godfrey*, 752 N.W.2d at 425.

Jason has standing to assert public interest and his own interest in maintaining confidentiality of information protected under Iowa Code section 622.11. DCI originally objected to Plaintiffs' subpoena based on section

622.11. After private meetings, DCI agreed to give Plaintiffs selected evidence. Jason objected to piecemeal disclosure under a private agreement. Jason's interest was injured, as was the public's interest.

It is of public importance if law enforcement should be permitted to provide piecemeal evidence from a legally-protected file to one side in civil litigation. Allowing manipulation of the legal system sets a precedent ripe for violation of due process rights. All alleged victims could be encouraged to file civil suits using only inculpatory evidence from an investigation file and prosecution could participate in discovery from each defendant. Such a procedure is a clear deprivation of due process rights and allows law enforcement to end-run around constitutional safeguards.

Providing portions of the DCI file is prohibited. Iowa Code section 622.11 protects the State's criminal investigation files from disclosure to private litigants. It provides: "A public officer cannot be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure." Iowa Code § 622.11 (1983); *see also State ex rel. Shanahan v. Iowa Dist. Court for Iowa County*, 356 N.W.2d 523, 527 (Iowa 1984). This "cloak of protection" extends to a public officer being examined and prohibits disclosure of the protected information. *Shanahan*,

356 N.W.2d at 527. Moreover, communications made to DCI are confidential records under Iowa's freedom of information statute. Iowa Code § 22.7(5).[9]

State v. Shanahan provides guidance. In *Shanahan*, during investigation of a double homicide, one estate filed a wrongful death action against the hotel where the homicide occurred. *Shanahan*, 356 N.W.2d at 525-26. Both parties sought discovery of the State's ongoing homicide investigation file. *Id.* at 526. The court issued a subpoena for the DCI file and denied the State's motion for a protective order. *Id.* On appeal, this Court found an abuse of discretion as the statutory privilege of Iowa Code section 622.11 applied to protect the investigation file. *Id.* at 531.

The district court errantly distinguished *Shanahan* based on DCI's position. (Am. App. II at 696). First, the court noted DCI moved to quash the July 2016 subpoena, but not the April 2017 subpoena. Second, the court noted DCI reached agreement with Plaintiffs. The court's focus on DCI's negotiations was in error because complicity does not alleviate concerns addressed in *Shanahan* that releasing the investigative file would injure the defendant's rights or a party's rights.[10] *Shanahan*, 356 N.W.2d 523.

[9] Plaintiffs question citation to Iowa Code chapter 22. Chapter 22, just as chapter 622, protects a DCI investigation file.

[10] Jason is a party and eventual defendant.

Protections against disclosure of confidential information do not turn on whether law enforcement deigns to assert them.

Given *Shanahan's* guidance, this case presents additional considerations of importance. *Shanahan* focused on the public's interest in protecting integrity and confidentiality of criminal investigations in general, and not just in the specific crime. *Id.* at 529-30. Unlike *Shanahan*, both civil litigants were suspects in the homicide. One civil litigant was allowed to step into the State's shoes and use state resources to the exclusion of the other litigant. The State used a civil litigant as a conduit for prosecuting a crime against a defendant who had not been charged (and therefore did not have protections provided to a criminal defendant). The court's ruling permitted a prejudicial *ex parte* agreement between the State and Plaintiffs to use select inculpatory evidence for a trial test-run. Such an agreement violates Iowa Code, the Iowa Constitution, and *Shanahan*.

Testimony was additionally problematic. The district court's ruling limiting law enforcement testimony to facts known to the officer failed to adequately protect against disclosure of protected information. (Am. App. II at 706). For instance, uniformed officers referred to Jason as "suspect." Had the subpoena been quashed, that unfairly prejudicial testimony would have been unavailable. Had the entire file been produced, Jason could have investigated and emphasized numerous suspects.

In essence, Plaintiffs put on a criminal trial in a civil courtroom. Jason was denied benefit of exculpatory evidence. While a private citizen may bring a civil action, collusion with law enforcement to initiate and perpetuate the action is impermissible. It is equally (or more) offensive for the State to bypass criminal prosecution through collaboration with a civil litigant.

Finally, in addressing disclosure of criminal investigation files to private litigants, the court "must consider the adverse effect release of that information to the litigants may have on DCI criminal investigations in general, not just the possible adverse effect release may have on the investigation of this particular . . . homicide." *Shanahan*, 356 N.W.2d at 529. The legislature clearly intended to allow DCI to protect confidential investigation files from public disclosure. *Id.* Confidentiality may encourage witnesses to provide information about crimes, and may allow officers to discuss theories privately. *Id.* There is a public purpose in allowing criminal investigations to be conducted in relative secrecy. *Id.* Under the district court's rulings, criminal investigation files are no longer confidential, but subject to discovery by civil litigants who have some state actor on their "side".

Here, the district failed to protect a public officer from examination as to communications made to him in official confidence "when the public

interests would suffer by the disclosure." Iowa Code § 622.11.[11] (Am. App. II at 700). The ruling did provide a public interest in allowing such testimony.

ISSUE III:THE DISTRICT COURT ERRED BY DENYING JASON'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

Plaintiffs assertion "there was no evidence to support that Bill, the only other potential culprit, was responsible" is false, and Plaintiffs' statement he had "no hint of a motive" belies Plaintiffs' knowledge of: Bill Carter's history of domestic violence,[12] (*see* Exhibits A and B filed 11/22/17 in Resistance to Motion in Limine), financial gain at Shirley's death, and marital discord. Plaintiffs' assertion Bill was "the only other potential culprit" is puzzling given myriad evidence pointing to other culprits submitted with the First and Second Petitions for Relief.

December 2017 trial evidence indicated a staged burglary[13] and indicated Jason made questionable decisions (calling his sister first, being involved in an extramarital affair, making guesses about what occurred). Trial evidence included no forensic evidence (other than fingerprints explained by

[11] Puzzlingly, the district court held "[h]ere, not only will the public interest not suffer from the disclosure, but it may benefit from the exchange of information between DCI and Plaintiffs." This finding comports with the later comment that Jason was "guilty as sin," as addressed *infra*.

[12] That history was excluded by the district court (and is not on appeal).

[13] Current evidence contradicts that indication.

photos possessed by Bill Carter), no supported motive, no evidence of time of death, and wrong information about the timeline.

Plaintiffs' assertion Jason was "caught in lie after lie and admission after admission about how the murder occurred" is *false*; Plaintiffs fail to identify one lie or admission to support their assertion. There was not enough evidence pointing to Jason to generate a jury question. Jason's motion for judgement notwithstanding the verdict should have been granted.

ISSUE IV: THE DISTRICT COURT ERRED BY DISMISSING JASON'S FIRST PETITION FOR RELIEF.

Plaintiffs argue Jason is asserting a *Brady v. Maryland*, 373 U.S. 83 (1963) claim. Again, Jason was not constitutionally entitled to exculpatory evidence in the civil action; however, analysis of materiality of newly discovered evidence under a Rule 1.1012 claim is analyzed like a *Brady* claim.

Comparison between Iowa Rule of Civil Procedure 1.1012 and cited cases show elements to prove a newly discovered evidence claim under Rule 1.1012 mirror elements in cited cases. The district court ruled evidence was newly discovered and ruled it was not obtainable by Jason. (Am. App. II at 716). The question before this Court is whether evidence was material and justified vacation of judgment or a new trial.

Plaintiffs' arguments regarding *Brady* obfuscate Jason's citations to relevant cases and "bespeak[] gamesmanship" of which they complain. (Pl.

Br. at 17 n.1). First, Jason cites *Cornell v. State*, 430 N.W.2d 384, 386 (Iowa 1988), which provides specific guidance to determine whether newly discovered evidence is "material." Jason cites *Harrington v. State*, 659 N.W.2d 509, 523 (Iowa 2003) and *Strickler v. Greene*, 527 U.S. 263, 290 (1999) to illuminate parameters of a materiality inquiry. Materiality of newly discovered evidence is a necessary element in each case.

In a footnote, Plaintiffs challenge the standard in *Henderson v. Edwards*, 183 N.W. 583, 584 (Iowa 1921) for a motion for a new trial based on newly discovered evidence. (Pl. Br. at 35, n. 4.) *Henderson* has been the standard for nearly a century. However, this newly discovered evidence surpasses the level necessary to warrant a new trial under *Henderson* or under *In re D.W.*, 385 N.W.2d 570, 583 (Iowa 1986).

Plaintiffs assert the district court's ruling on the First Petition for Relief was correct because evidence was "not admissible." (Pl. Br. at 36). First, much testimony at that hearing was admitted without objection (not as an offer of proof) and therefore was "admissible." (12/10/18-12/12/18 Trial Tr.) Further, as in *Harrington*, 659 N.W.2d at 521, Jason did not need to provide admissible evidence at hearing; he only needed to show evidence had *potential* to qualify as material, admissible evidence. Evidence was admissible as non-hearsay where it was offered to explain the listener's subsequent course of conduct (or to show effect on the listener). The same evidence was admitted in Jason's

criminal trial, where the evidence was admitted to show law enforcement's failure to investigate. Evidence proffered by Jason met all necessary standards for admissibility in the context of a Rule 1.1012 motion.

Materiality Standard

Evidence is material for purposes of vacation of judgment or a new trial when "'there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.'" *Cornell v. State*, 430 N.W.2d 384, 386 (Iowa 1988) (citing *United States v. Bagley*, 473 U.S. 667, 683 (1985)). Here, we *actually have a jury ruling* where it is clear the result of the proceeding would have been different had the evidence been disclosed—the criminal jury had the opportunity to consider all evidence the civil district court ruled was inadmissible, and quickly came to a different conclusion than the civil jury.

This Court holds a "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Id.* (citing *Bagley*, 473 U.S. at 682). This Court held "[t]he *Bagley* inquiry requires consideration of the totality of the circumstances, *including the possible effects of nondisclosure on defense counsel's trial preparation*." *Id.* (emphasis added). This test does not require the defendant prove disclosure of the evidence 'would have resulted in his

acquittal."[14] *Harrington*, 659 N.W.2d at 523 (citing *State v. Romeo*, 542 N.W.2d 543, 551 (1996)). As the United States Supreme Court explained:

> [T]he materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. *Rather, the question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict*."

Strickler v. Greene, 527 U.S. 263, 290 (1999) (emphasis added). Evidence presented with Jason's First Petition to Vacate appreciably surpasses this test.

Proffered Evidence Was Admissible

Plaintiffs assert these admissibility arguments are not viable because "Jason did not at all make the quality of law enforcement's investigation at issue in the civil case." (Pl. Br. at 40). Obviously, Jason did not make that argument—he did not have evidence showing the failed investigation. That is *the point* of the First and Second Petitions to Vacate.

Agent Mark Ludwick and Detective Reed Kious offered testimony at hearing that was admitted without objection. This evidence is substantial, material, and lengthy; Jason refers the Court to his Post Trial Brief (Am. App. I at 1216) and the trial testimony of Ludwick and Kious on December 10-12,

[14] Jason *can* prove it would have resulted in acquittal—**because it did**.

2018 (12/10/18-12/12/18 Trial Tr.). Evidence of the failed investigation was admissible and was *admitted*.

The Evidence Was Not Offered for the Truth of the Matter Asserted

Plaintiffs assert the statements are offered for the truth of the matter asserted. The criminal court addressed that question and found:

> Iowa courts have recognized a failure on the part of law enforcement personnel to adequately and properly investigate a crime may constitute a viable defense. In *State v. Stone*, the Court analyzed the defendant's offered evidence to "determine if the purpose asserted by [defendant] can reasonably be found to be the real purpose for which the testimony was offered."[15] Because the Court in *Stone* concluded the defendant "made little effort to impeach the depth of the police investigation" the trial judge's decision to disallow the evidence was affirmed.
>
> By contrast, in the case now before the court, the Defendant is vigorously attempting to impeach the depth of the police investigation, not just with an isolated oversight on the part of investigators but with numerous examples of failure on the part of law enforcement personnel to follow up on leads during the investigation. While some of the evidence Defendant seeks to admit would constitute hearsay if offered to prove the truth of the matter asserted, Defendant is offering the testimony to establish the witness statements were made to the investigators without regard to whether the statements were true or false. As noted by the court in *Stone*, "if the testimony at issue is relevant only if true, it is hearsay and inadmissible unless it fits within a hearsay exception."
>
> The court finds in the case at bar that the out-of-court statements the Defendant seeks to offer have relevance whether they are true

[15] *State v. Stone*, 769 N.W.2d 812 (Table), 2008 WL 4724865, at *2 (Iowa Ct. App. 2008) (citing *State v. Hollins*, 397 N.W.2d 701, 705 (Iowa 1986)).

> or false. The relevance is to establish a failure on the part of investigators to properly follow up on leads they received during their investigation. That is the real purpose for which the testimony is offered.

(Am. App. II at 734-35).

The logic of the district court in Jason's criminal case is supported by *Harrington*, 659 N.W.2d 509. In *Harrington*, the defendant moved for a new trial based on eight police reports. *Id.* at 517. Seven of the eight reports pertained to investigation of another suspect. *Id.* Based on the contents, Harrington argued the newly discovered police reports warranted vacation of conviction. *Id.* at 518.[16] The district court found the reports were material, but would not have changed the outcome of the trial. *Id.* at 519. On review, this Court found:

> Having determined Harrington could not have raised these matters earlier, the only remaining task for the trial court was to decide whether there is a nexus between the undisclosed police reports and the recantation evidence on one hand and the defendant's conviction on the other. Clearly there is. Both classes of evidence are the type of facts having the *potential* to qualify as material evidence that probably would have changed the outcome of Harrington's trial. They are, therefore, relevant and, as such, meet the nexus requirement.

Id. at 521 (emphasis in original).

[16] Harrington asserted a *Brady* violation based on exculpatory evidence in newly discovered police reports. *Harrington*, 659 N.W.2d at 518. Jason cites *Harrington* for analysis of materiality and admissibility of newly discovered evidence.

As in *Harrington*, the reports offered below had potential to qualify as material evidence that probably would have changed the outcome of trial. If Jason knew of these reports, he would have called those witnesses, and he would have investigated claims in the reports. Under *Harrington*, this is sufficient admissibility for the purpose of a motion for a new trial, especially when considering police reports in conjunction with the admitted testimony of law enforcement officers during the hearing on the first petition for relief.

A New Defense Theory Based on Newly Discovered Evidence is Axiomatic.

Plaintiffs argue a new trial based on newly discovered evidence cannot be granted to support a new defense theory. This argument ignores the United States Supreme Court precedent set forth in *Bagley* (and reaffirmed by this Court in *Cornell*) mandating consideration of the totality of the circumstances, "including the possible effects of nondisclosure on defense counsel's trial preparation." *Cornell*, 430 N.W.2d at 386. Naturally, trial preparation is dependent upon available evidence. It logically follows trial strategy is based on available evidence.

Plaintiffs' reliance on *State v. Smith*, 573 N.W.2d 14 (Iowa 1997) is misplaced. *Smith* does not require newly discovered evidence match a defendant's prior theory of the case. In *Smith*, the Court found newly discovered evidence was cumulative. *Smith*, 573 N.W.2d at 21. Smith's

evidence was cumulative because it consisted of additional witnesses who would have provided similar testimony to prior testimony. *Id. Smith* merely acknowledges (in dicta) the cumulative newly discovered evidence did not match the defendant's prior theory and testimony. Unlike *Smith*, this newly discovered evidence is not cumulative. Jason's trial strategy was based on completely different evidence than that which Jason now possesses. The newly discovered evidence would have wholly changed counsel's trial preparation; yet another reason denial of the Rule 1.1012 motion was in error.

ISSUE V: THE DISTRICT COURT ERRED BY FAILING TO RECUSE.

Plaintiffs assert nothing about the actions of the district court support recusal because the *ex parte* communication rule only bars communication between judges and attorneys "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, 578 (Iowa 2002).

The standard and evidence in this case is whether a reasonable person would question the judge's impartiality. *State v. Haskins*, 573 N.W.2d 39, 44 (Iowa 1997); *see also McKinley v. Iowa Dist. Court*, 542 N.W.2d 822, 827 (Iowa 1996); *State v. Mann*, 512 N.W.2d 528, 532 (Iowa 1994) ("In other words, the test is not whether the judge self-questions [her] own impartiality, but whether a reasonable person would question it."). Stating Jason is "guilty

as sin" implies bias against Jason, and is improper because it was said while motions were pending before that judge.

That statement and actions *meet the standard cited by Plaintiffs*, as the statement shared by the judge was of the judge's own view on "the merits of the cause" for the motion for new trial in light of the totality of circumstances, as was "relative to the matter pending." *Rauch*, 650 N.W.2d 577, 578. Recusal was necessary based on the cases cited in Plaintiffs' brief, as the *ex parte* communications and opinions shared by the district court "'relative to a matter pending . . . might have the effect or give the appearance of granting undue advantage to one party.'" *Rauch*, 650 N.W.2d at 577, 578 (quoting *In re Conduct of Thompson*, 940 P.2d 512, 515 (Or. 1997)). Case law cited by all parties agree; the district court's statements to others would cause a reasonable person to question impartiality, especially when the court faced pending motions and was preparing to preside over a hearing to determine whether judgment should be vacated (the motion was denied). (Am. App. II at 744).

Although it is *de facto* improper for a judge to state a civil defendant is "guilty as sin" when that judge is presiding over pending motions from the same defendant, it also *appears* to be improper, the standard set forth in the Iowa Code of Judicial Conduct. Iowa Code of Judicial Conduct Preamble [2]; *id.* at 51:1.2.

Further, the judge speaking privately in a group comprised of the prosecutor (who sat in the civil trial, took notes, and ultimately charged Jason with murder) and Bill Carter's attorneys, without the presence of Jason's attorneys, is both improper and has the *appearance* of impropriety. People noticed it, as evidenced by the affidavit filed in support of Jason's Motion to Recuse. Recusal was necessary prior to hearing the second motion for relief and the district court erred by denying the recusal request.

ISSUE VI: THE DISTRICT COURT ERRED BY DISMISSING JASON'S SECOND PETITION FOR RELIEF.

Plaintiffs once again erroneously rely on *United States v. Wong*, 575 U.S. 402, 409 (2015) in an attempt to assert jurisdictional statutes of limitations cannot be equitably tolled. *Wong* only answers the question of whether a jurisdictional statute of limitations in a suit against the *government* may be equitably tolled.[17] Further, *Wong* itself provides

> time bars in suits between *private* parties are presumptively subject to equitable tolling. That means a court may pause the running of a limitations statute in private litigation when a party has pursued his rights diligently but some extraordinary circumstance prevents him from meeting a deadline.

Wong, 135 S. Ct. 1625 at 1630-31 (emphasis in original) (internal citation and quotations omitted).

[17] The *Wong* Court determined the statute of limitation at issue could be equitably tolled. *Wong*, 135 S. Ct. at 1638.

A party may file an action in equity to vacate a judgment or obtain a new trial after the one-year period in Iowa Rule of Civil Procedure 1.1013 has passed. *In re Marriage of Rhinehart*, 780 N.W.2d 248 at *2 (Iowa Ct. App. 2010) (Table); *Reimers v. McElree*, 238 Iowa 791, 795 (Iowa 1947)). The district court erred in failing to equitably toll the statute of limitations.

CONCLUSION

Jason requests this Court vacate judgment against him in the underlying matter, or remand this matter for a hearing on the merits of the second petition for relief before a different district court judge.

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CERTIFICATE OF FILING

The undersigned certifies on August 19, 2020, I filed this Defendant/Appellant's Final Reply Brief via the Iowa Judicial Branch EDMS system.

/s/ Dani Pigman

CERTIFICATE OF SERVICE

The undersigned certifies on August 19, 2020, I served this Defendant/Appellant's Final Reply Brief via the Iowa Judicial Branch EDMS system to the attorneys of record.

/s/ Dani Pigman

CERTIFICATE OF COMPLIANCE

The undersigned certifies:

1. This reply brief complies with the type-volume limitation of Iowa R. App. 6.903(1)(g)(1) because this proof brief contains 6,974 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.9903 (1)(g)(1).
2. This proof 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 Microsoft Word - Times New Roman 14 pt.

Dated: August 19, 2020

/s/ Dani Pigman