IN THE SUPREME COURT OF IOWA
Supreme Court No. 20-0630

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RANDALL HURLBUT,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR PLYMOUTH COUNTY
THE HONORABLE JEFFREY A. NEARY, JUDGE

APPELLEE'S BRIEF

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Authorities

Crosby v. United States, 506 U.S. 255 (1993)
Diaz v. United States, 223 U.S. 442 (1912)
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Barnett v. State, 512 A.2d 1071 (Md. 1986)
Com. v. Sullens, 619 A.2d. 1349 (Pa. 1992)
Ellis v. State, 227 S.E.2d 304 (S.C. 1976)
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Freeman v. State, 541 N.E.2d 533 (Ind. 1989)
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Pa. R. Crim. P. 602
Iowa R. Crim. P. 2.27
Iowa R. Crim. P. 2.27(2)
1 J. Roehrick, THE NEW IOWA CRIMINAL CODE: A COMPARISON 628 (1978)
2020 Annual Report Draft p.22–23 (available at https://www.iowacourts.gov/static/media/cms/2020_Annual_Report_Draft_011221_98A981BC903E8.pdf)
W. Mikell, Clark's Criminal Procedure 492 (2d ed. 1918)

ROUTING STATEMENT

The State's research does not reveal a prior Iowa appellate decision directly addressing whether a misdemeanor trial may proceed in the defendant's absence. However, the State believes this case presents a straightforward question of how to construe Iowa Rule of Criminal Procedure 2.27(1). And other jurisdictions have addressed the propriety of proceeding in absentia. *See People v. Liss*, 968 N.E.2d 154, 157–58 (Ill. App. Ct. 2012); *Fennell v. State*, 492 N.E.2d 297, 299–300 (Ind. 1986); *Ellis v. State*, 227 S.E.2d 304, 305–06 (S.C. 1976); *McKinney v. Com.*, 474 S.W.2d 384, 387 (Ky. 1971). Because of the fact-specific nature of this case and available legal authorities shed sufficient guidance to resolve this appeal, the State believes transfer to the Iowa Court of Appeals is appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

After he failed to appear at his serious misdemeanor jury trial, Randall Hurlbut appeals his conviction for operating while under the influence—first offense in violation of Iowa Code section 321J.2. The crux of this appeal is Hurlbut's claims the district court abused its discretion, legally erred, and violated his constitutional rights when it

proceeded to trial in his absence. The Honorable Jeffrey Neary presided.

Course of Proceedings

The State generally accepts the defendant's course of proceedings as essentially correct, but will address additional relevant information regarding the proceedings in Subdvision I(b)(2). *See* Iowa R. App. P. 6.903(3).

Facts

Around 10 a.m. on August 3, 2017, Randall Hurlbut called emergency dispatch and inquired why police vehicles were following him. Trial I Tr. p.9 line 16–p.10 line 7. No officer had been so assigned. Trial I Tr. p.10 line 7. Afterwards, other calls began coming in that a "white Roadmaster" was driving recklessly, "squealing tires and just acting crazy." Trial I Tr. p.10 line 8–17. One of those calls was likely from Dillon Kunkel.

Kunkel was personally familiar with Hurlbut. On August 3, he was working and watched as Hurlbut drove "flying in the shop and slammed on the brakes and told us to get the snowman off the top of his car. In August." Trial I Tr. p.13 line 6–p.14 line 2. There, of course, was no snowman on the vehicle. It was a clear and warm August day.

Trial I Tr. p.53 line 23–p.54 line 4. When Hurlbut revved his engine and "took off flying out of there," Kunkel called police. Trial I Tr. p.14 line 3–15.

Officers were dispatched, including then Le Mars Police officer Rick Singer. Trial I Tr. p.10 line 18–24; p.50 line 17–20; p.53 line 7–22. Singer saw a vehicle matching the callers' description parked in a parking lot and pulled in behind it. Trial I Tr. p.54 line 11–24. As he was about to run the plates on the vehicle, it took off at a high rate of speed. Trial I Tr. p.55 line 2–6. Singer watched as it went between two oncoming vehicles, nearly causing a collision. Trial I Tr. p.55 line 6–7; p.56 line 4–p.57 line 4. He initiated his emergency lights and pursued. Trial I Tr. p.55 line 7–8; p.57 line 21–p.58 line 15.

The vehicle did not comply. Instead, it left the roadway and drove through a yard and some pine trees. Trial I Tr. p.55 line 9–19. Singer did not pursue off-road. Instead, he waited for the vehicle to return to the road. Trial I Tr. p.55 line 20–24. When it did, he again followed it until it returned to the parking lot where the pursuit began and Singer ordered the driver out. Trial I Tr. p.55 line 21–p.56 line 3; p.58 line 19–25. The driver was Hurlbut. Trial I Tr. p.59 line 14–p.60 line 9. When Singer asked "Randy, what are you doing?" Hurlbut

responded he was trying to "get the individual off the roof of his vehicle." Trial I Tr. p.60 line 20–p.61 line 7.

Almost immediately into their interaction, Singer believed Hurlbut was under the influence of controlled substances. Trial I Tr. p.68 line 16–p.69 line 5. Singer had specialized training in methamphetamine manufacture and experience working with individuals abusing methamphetamine. Trial I Tr. p.51 line 1–p.52 line 1. He observed that Hurlbut had a "sunken-in" face and was grinding his teeth. Trial I Tr. p.61 line 23–p.62 line 4; p.52 line 10–18. He was unkempt and continued making "off-the-wall comments." Trial I Tr. p.62 line 4–6. He repeatedly asked for water which was another indication of substance use. Trial I Tr. p.63 line 8–16. Based on his observations of Hurlbut, Singer requested the assistance of an officer with superior drug recognition training. Trial I Tr. p.63 line 17–23. That examination was cut short when Hurlbut stated he just wanted to give a urine sample. Trial I Tr. p.78 line 5–p.79 line 15. The sample was collected and submitted to the Department of Criminal Investigations for testing.

Testing revealed Hurlbut's urine contained amphetamine and methamphetamine. Trial I Tr. p.31 line 6–p.32 line 21; p.33 line 6–

20; p.46 line 4–p.47 line 1; Exhs. 9, 9A; App. 56–57. A DCI lab technician expressed doubt that the sample was tainted as the examination the DCI performs examines whether the human body's metabolites of methamphetamine are present—"just putting the drug into the urine would not give the same results." Trial I Tr. p.33 line 21–p.35 line 15.

ARGUMENT

I. Under the specific facts of this case, Hurlbut relinquished his presence rights to this misdemeanor trial.

Preservation of Error

From the State's review, Hurlbut's appeal presents six grounds for reversal related to his failure to appear at his trial. Appellant's Br. 16, 17, 18, 21–22, 27–29, 20–21, 23, 24–25, 26. He alleges violations of his rights to confrontation, due process, assist his counsel in his defense, select his jury, that the district court incorrectly interpreted Rule 2.27(1), and that he was not sufficiently advised that trial would proceed in his absence. Hurlbut urges his pretrial request for a continuance and mid-trial objection preserved error. Appellant's Br. 16. The State disagrees in part and contests error preservation. Only three of these grounds was preserved—the district court's

interpretation of Rule 2.27(1), and Hurlbut's generalized due process and confrontation claims.

When it became apparent Hurlbut was not present for trial, defense counsel sought a continuance. 2/4/2020 Voir Dire Tr. p.2 line 10–p.5 line 8. The district court denied the request based on the facts before it and its interpretation of Iowa Rule of Criminal Procedure 2.27(1). 2/4/2020 Voir Dire Tr. p.5 line 9–p.6 line 4. Defense counsel voiced his concerns "regarding due process and the right to confront the accuser." 2/4/2020 Voir Dire Tr. p.16 line 6–p.17 line 6. The district court acknowledged these concerns, and that "there's not been any in-depth discussion as to how the constitutional concerns apply to misdemeanors," but made no ruling on the issue:

> I understand that completely and acknowledge that you're essentially arguing that in addition to just the convenience factor of the defendant being available, that there are some constitutional concerns that you've raised.

2/4/2020 Voir Dire Tr. p.17 line 7–19.

Midtrial, Hurlbut's counsel re-objected to proceeding without his client's presence generally without citation to any particular authority. Trial Vol.I p.84 line 2–8. The district court denied the motion "based upon the record that was made before the actual voir

dire and selection process . . . the Court will stand by its earlier ruling." Trial Vol.I p.85 line 23–p.86 line 6.

The next day after the close of evidence the defense renewed its objection "to proceeding with the defendant not being present for trial at this time . . . [f]or all the reasons previously stated as if they fully restated at this time." Trial Vol.II p.14 line 9–21. Absent any new argument or authority, the district court unsurprisingly left its ruling unchanged. Trial Vol.II p.14 line 22–p.15 line 15.

After trial, defense counsel filed a motion in arrest of judgment raising three claims: that (1) Hurlbut's rights to due process under the Iowa and Federal Constitutions had been violated, (2) Hurlbut's right to confrontation under the Iowa and Federal Constitutions had been violated, and (3) Hurlbut's conduct did not rise to the level necessary for removal under *Illinois v. Allen*, 397 U.S. 337 (1970) or voluntary absence under *Taylor v. United States*, 414 U.S. 17 (1973). 2/28/2020 Motion in Arrest of Judgment p.2–4.

The court mused that it "expected that we would have an issue with regard to a couple of these matters because we talked about them at the time of trial," yet its ruling on the motion at sentencing contained no explicit resolution of any of Hurlbut's constitutional

challenges—in fact, the court's explanation of its ruling indicated it believed it was deciding a weight of the evidence challenge under *State v. Ellis*, 578 N.W.2d 655 (Iowa 1998). *Compare* Sent. Tr. p. 4 line 4–p.5 line 12 *with* 2/28/2020 Motion in Arrest of Judgment. But the district court's act of overruling when coupled with its statements showing it recognized the issues were before it was sufficient to preserve error on these claims. *Lamasters v. State*, 821 N.W.2d 856, 863–64 (Iowa 2012) ("Where the trial court's ruling, as here, expressly acknowledges that an issue is before the court and then the ruling necessarily decides that issue, that is sufficient to preserve error."); *see State v. Webster*, 865 N.W.2d 223, 231–32 (Iowa 2015) (noting defendant's failure to cite specific constitutional provision and district court's ruling grounded on rule of procedure meant constitutional claims advanced on appeal were not preserved). Error was only preserved—and this Court need only address—Hurlbut's challenge on appeal to the district court's interpretation of Iowa Rule 2.27(1) and his generalized Confrontation and Due Process claims.

In doing so, this Court should keep in mind the nature of his challenge below and his advocacy on appeal. Though he cites them, Hurlbut raises no distinct interpretation nor authority regarding the

scope of the Iowa Constitution. Appellant's Br. 17; *see State v. Lilly*, 930 N.W.2d 293 (Iowa 2019) (when party does not advance a different state constitution framework, Iowa Supreme Court applies general federal framework). He expands his due process arguments and lists other associated trial rights in his appellate brief, yet the district court was not asked to consider these grounds either before or after trial. *See* Appellant's Br. 21, 23–26. It is hardly fair to fault the district court for failing to anticipate Hurlbut's subsequently expanded advocacy. *State v. Pickett*, 671 N.W.2d 866, 869 (Iowa 2003). Even so, there is no need to decide the matter on constitutional grounds. The State believes construction of Rule 2.27(1) is sufficient to resolve the appeal. *See Wengert v. Branstad*, 474 N.W.2d 576, 578 (Iowa 1991) ("We regularly decline to address constitutional questions unless their answers are necessary to dispose of the case.").

Standard of Review

There is an open question as to the applicable standard of review. The State agrees this Court ordinarily reviews constitutional questions de novo. *See* Appellant's Br. 16; *State v. Shipley*, 757

N.W.2d 228, 231 (Iowa 2008). Yet Hurlbut's brief raises additional issues and different standards of review apply to each.

Hurlbut's brief alleges the district court erred in its construction of Iowa Rules of Criminal Procedure 2.27(1) and (2). Appellant's Br. 18, 21–22, 27–29. This Court reviews the district court's application and interpretation of the rules of criminal procedure for correction of errors at law. *State v. Sanders*, 623 N.W.2d 858, 859 (Iowa 2001).

To the extent Hurlbut is challenging the facts and circumstances of his waiver and supporting the district court's decision to proceed with trial, the abuse of discretion standard is appropriate. *State v. Moore*, 276 N.W.2d 437, 440–41 (Iowa 1979) (examining district court's exercise of discretion as to when "an accused's conduct necessitates warning and ultimately removal"); *State v. Edwards*, 507 N.W.2d 393, 399–400 (Iowa 1993) (quoting and applying *Illinois v. Allen* in affirming district court's means of resolving disruptive defendant; "trial judges . . . must be given sufficient discretion to meet the circumstances of each case"); *see also United States v. Tortora*, 464 F.2d 1202, 1210 (2nd Cir. 1972) ("It is obviously desirable that a defendant be present at his own trial. We do not here lay down a general rule that, in every case in which the

defendant is voluntarily absent at the empanelment of the jury and the taking of evidence, the trial judge should proceed with the trial. We only hold that this is within the discretion of the trial judge, to be utilized only in circumstances as extraordinary as those before us. Indeed, we would add that this discretion should be exercised only when the public interest clearly outweighs that of the voluntarily absent defendant. Whether the trial will proceed will depend upon the trial judge's determination of a complex of issues.") *abrogated by Crosby v. United States*, 506 U.S. 255 (1993). This Court may review the facts before the lower court under the de novo standard. *See State v. Hendren*, 311 N.W.2d 61, 62 (Iowa 1981) (reviewing de novo facts before the lower court before determining the trial court had discretion to proceed with trial in his absence).

Merits

Hurlbut criticizes the district court's decision to hold his trial without his personal presence. His trial rights are provided by the State and Federal Constitution and are encapsulated by the Iowa Rules of Criminal Procedure. The relevant rule authorizes trial to occur without the presence of a misdemeanor defendant, so long as counsel is present. Hurlbut's constitutional rights were not violated

because they were relinquished by his conduct—the trial record supports the finding he was voluntarily absent from trial. And the facts before the district court supported its discretionary decision to proceed. Although misdemeanor trials in absentia should be a rare event, reversal is not warranted here.

A. Rule 2.27(1)'s text is clear. In a misdemeanor prosecution where counsel is present, the defendant's presence is not required.

Every criminal defendant possesses the right to due process through presence at his trial and the right to confront the State's witnesses against him. U.S. Const. Amend. V, VI, XIV; Iowa Const. Art. I, §§ 9, 10. Iowa Rule 2.27 implements the constitutional presence right. *State v. Meyers*, 426 N.W.2d 614, 616 (Iowa 1988) (discussing then-numbered Rule 2.25). Subsection (1), titled "felony or misdemeanor" states:

> In felony cases the defendant shall be present personally or by interactive audiovisual closed circuit system at the initial appearance, arraignment and plea, unless a written arraignment form as provided in rule 2.8(1) is filed, and pretrial proceedings, and shall be personally present at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule. *In other cases the defendant may appear by counsel.*

Iowa R. 2.27(1) (emphasis added). The rule's distinction between those charged with felonies and misdemeanors is unmistakable. Its thorough treatment of the instances in which a felony defendant need not be actually present contrasts sharply with its summary treatment of misdemeanor prosecutions. *Id.* So long as counsel is present, the rule does not necessitate the defendant's personal presence at any point in misdemeanor prosecutions. The district court so found. 2/4/2020 Voir Dire Tr. p.5 line 9–21. This was not error.

1. Iowa precedent and legislative history confirm the rule's plain language permits misdemeanor trials without the defendant's presence.

The Iowa Supreme Court has previously acknowledged the rule says what it means—a misdemeanor defendant may appear at trial by counsel alone. *State v. Counehan*, 10 N.W. 677 (Iowa 1881) (discussing Iowa Code § 4351 (1873) the predecessor statute to Rule 2.27(1): "Under this statute it was competent for the defendant to appear by counsel and demand a trial. It was error for the court to refuse the defendant a trial and order a forfeiture of the bond"). To the extent he believes the district court was confused about the scope of the rule, it is Hurlbut who is mistaken. *Compare* Appellant's Br. 21–22 *with Wright v. Denato*, 178 N.W.2d 339, 342 (Iowa 1970)

(considering predecessor statute Iowa Code § 775.2 "which provides a defendant must be personally present when arraigned on a Felony but may appear for arraignment by counsel in 'other cases.' The 'other cases' referred to can only be indictable misdemeanors."). His interpretation of the rule deletes the final sentence of 2.27(1), a construction this Court should avoid. Appellant's Br. 27–29; *see generally State v. Osmundson*, 546 N.W.2d 907, 910 (Iowa 1996) (when interpreting a statute, court is to give effect to all words in the statute unless no other construction is reasonably possible).

Former versions of the rule confirm the district court's construction. Prior to the adoption of Rule 2.27 (originally rule of criminal rule of procedure 25) successive provisions of the Iowa Code held that so long as counsel was present to act on the defendant's behalf, the misdemeanor defendant's personal presence was not required during trial. *See* Iowa Code § 777.19 (1977) ("If a felony is charged, the defendant must be personally present at the trial, but the trial of a misdemeanor may be had in his absence if he appears by counsel."); § 775.2 ("ARRAIGNMENT OF DEFENDANT—PERSONAL PRESENCE—WHEN NECESSARY: A person charged with a felony, or in custody without an attorney, must be personally

present for arraignment, but in other cases he may appear therefor by counsel."); *see also* Iowa Code § 13806 (1924) ("If a felony is charged, the defendant must be personally present at the trial, but the trial of a misdemeanor may be had in his absence, if he appears by counsel."); Iowa Code § 5338 (1897) (same); Iowa Code § 4351 (1873); Iowa Code § 4706 (1860) ("If the indictment be for a misdemeanor, the trial may be had in the absence of the defendant, if he appear by counsel . . . ").

Hurlbut suggests that the rule's amendments over time and its current failure to explicitly reference "misdemeanors" indicates a substantive change. Appellant's Br. 28–29. This is not so. In construing then-section 775.2, the Iowa Supreme Court in *Wright* found that the "other cases" clause refers to misdemeanors. *Wright*, 178 N.W.2d at 342. Contemporary commentary shows that rule 2.27(1) was an adoption of prior law. 1 J. Roehrick, THE NEW IOWA CRIMINAL CODE: A COMPARISON 628 (1978); Appellant's Br. 28–29. That longstanding law did not require the defendant's presence at arraignment, trial, or sentencing—so long as counsel was present. *See State v. Hughes*, 4 Iowa 554, 1857 WL 176 (Iowa 1857) ("The second error alleged is in rendering judgment in the absence of the defendant. It does not appear clearly that this was the case; but if it

were so, the offense charged being a misdemeanor, judgment could be rendered in the defendant's absence . . ."); *State v. Young*, 53 N.W. 272, 273–74 (Iowa 1892) (reversing misdemeanor conviction where defendant was tried in absentia and no attorney appeared on his behalf for the trial).

This construction of the rule is also in harmony with other current rules of criminal procedure permitting court proceedings in misdemeanor prosecutions to occur without the defendant's presence. Iowa Rs. Crim. P. 2.8(2), 2.27(3)(b), 2.24(5); *State v. Sutton*, 853 N.W.2d 284, 288–89 (Iowa Ct. App. 2014); *State v. Barnes*, 652 N.W.2d 466, 468 (Iowa 2002); *see also State v. Danly*, No. 09-1013, 2010 WL 200040, at *2–*3 (Iowa Ct. App. Jan. 22, 2010) (finding "this is a misdemeanor case, where the Iowa Rules of Criminal Procedure specifically provide that the defendant's personal presence at a suppression hearing is not required" and reversing the lower court for summarily denying suppression motion as a sanction where defendant did not appear).

And Iowa is not alone in permitting misdemeanor trials to proceed without the defendant's presence. Several states have similar statutes and rules of procedure. *See* 725 Ill. Comp. Stat. § 5/113-4(3);

5/115-4.1; Kan. Stat. Ann. § 22-3405(a), (b); Ky. R. Crim. P. 8.28(4); Miss. Code. Ann. § 99-17-9; Mont. Code Ann. § 46-16-122(1), (2); Pa. R. Crim. P. 602; Va. Code Ann. § 19.2–258. Other states' rules are drafted to preclude proceeding to trial without the defendant's request or authorization. *See* Alaska R. Crim. P. 38(a), (b)(2); Cal. Penal Code § 1043(e); Fla. R. Crim. P. 3.180(d); Mo. R. Crim. P. 31.03(a). Rule 2.27(1) has no such language.

Two cases touching on the Iowa rule warrant discussion—*State v. Brandt*, 253 N.W.2d 253 (Iowa 1977) and *State v. Davis*, 259 N.W.2d 812, 813–14 (Iowa 1977). Addressing the latter first, in *Davis*, the defendant sought to absent himself from a pretrial deposition. 259 N.W.2d at 813. Likening and extending his right to presence and confrontation at trial to depositions, he urged he possessed the right to waive his presence at the deposition. *Id.* The Iowa Supreme Court disagreed, and argued in part

> The defendant has a duty as well as a right to be present at his trial. He may not absent himself without the permission of the court. It is even said that a statute authorizing trial of misdemeanor cases in the absence of the accused does not mean that one charged with a misdemeanor has a right to be absent at trial and to appear only by counsel. . . . [E]ven where his right to be present can be waived, this does not amount to a right to be absent, since the

> prosecution has a right to require his presence for purposes of identification by its witnesses and of receiving punishment if found guilty.

Id. at 814.

Likewise, in *Brandt*, the Iowa Supreme Court reviewed a lower court decision dismissing a prosecution on speedy trial grounds, partially relying on the ground that the "defendant's presence was not required for the State to proceed with a misdemeanor prosecution." 253 N.W.2d at 259. When the State had filed a trial information against the defendant arrest warrants had not immediately issued. *Id.* Brandt had already retained counsel. Several unsuccessful attempts were made to effectuate his arrest; Brandt had never been arrested nor arraigned in person when speedy trial deadline arrived. *Id.* at 254–55. Aware of the pending charges, he left the jurisdiction. *Id.* He was ultimately arrested three days after speedy trial deadline had passed. *Id.* Brandt subsequently filed a motion to dismiss, which the lower court granted. *Id.*

On appeal, the Iowa Supreme Court reversed. After finding other dispositive grounds for reversal, it commented upon the magistrate's suggestion that trial could have proceeded without the defendant because the State had charged him with a misdemeanor:

> It should first be noted we are not concerned with a simple misdemeanor. The offense charged here is a white-collar crime which upon conviction could result in a year's imprisonment in the county jail. It is obvious such an imprisonment, imposed without defendant ever having been before the court, would pose grave constitutional issues.

Id. at 259–60. Davis had an attorney, but the attorney had never appeared in the case until he filed the motion to dismiss. *Id.* at 255. Like the *Davis* court, the Iowa Supreme Court held that neither the rule of procedure nor the right to presence encompassed a right to be absent: "The basic flaw in defendant's reasoning is his attempt to bootstrap statutes which at the most give a trial court discretion to determine whether to proceed in absence of the accused into a statutory right not to be present in court when charged with an indictable misdemeanor." *Id.* at 260.

Neither this holding, nor the holding in *Davis* are surprising or require reversal here. Iowa has long rejected the notion defendants may weaponize rules of criminal procedure to their benefit. *See State v. Cennon*, 201 N.W.2d 715, 718 (Iowa 1972) (holding Iowa's speedy trial statute was "intended to provide a shield for the defendant, not a sword"). Each case stands for the proposition that even though the rule permits a defendant to waive his presence at trial, the ability to

do so is not an irrefutable right—a defendant may not absent himself and claim a right to do so in order to avoid the consequences. They do not support Hurlbut here, where an attorney was present to defend his interests when he failed to appear for trial.

2. *Independent of the rule, policy concerns support leaving decisions on whether to proceed in absentia to the district court.*

Instances of trial in absentia should be rare. But there are troubling policy implications in casting aside rule 2.27(1) and holding misdemeanor criminal trials cannot proceed where a misdemeanor defendant knowing and voluntarily does not appear for trial. The 2020 Iowa Judicial Branch annual report indicated over 155,000 simple and indictable misdemeanor cases were filed in 2020 alone. Iowa Judicial Branch, 2020 Annual Report Draft p.22–23 (available at https://www.iowacourts.gov/static/media/cms/2020_Annual_Report_Draft_011221_98A981BC903E8.pdf). This made up more than 25% of all cases filed. *Id.* Iowa should not place the power over whether trial proceeds in the defendant's hands alone. Especially where reversing on these facts would permit willful defiance of the judicial system:

> A contrary rule . . . would be a travesty of justice. It would allow an accused at large upon bail to immobilize the commencement of a criminal trial and frustrate an already overtaxed judicial system until the trial date meets, if ever, with his pleasure and convenience. It would permit a defendant to play cat and mouse with the prosecution to delay the trial in an effort to discourage the appearance of prosecution witnesses . . . . A defendant has a right to his day in court, but he does not have the right unilaterally to select the day and hour.

Com. v. Sullens, 619 A.2d. 1349, 1352 (Pa. 1992) (quoting *Government of Virgin Islands v. Brown*, 507 F.2d 186, 189-90 (3d Cir. 1975) *abrogated by Crosby*, 506 U.S. 255).

3. Hurlbut's remaining arguments and reliance on Crosby v. United States *cannot win the day.*

Hurlbut's other arguments are also unpersuasive. Observing that Rule 2.27(2) permits proceedings to occur outside the defendant's continued presence after he absents himself, Hurlbut argues that because he was never initially present this portion of the rule is not satisfied. Appellant's Br. 18–19, 22–23. The State agrees. Rule 2.27(1) controls here, and 2.27(2) is inapplicable.

Hurlbut also relies upon Federal Rule of Criminal Procedure 43 and the United States Supreme Court's interpretation of that rule

absentia in *Crosby v. United States*, 506 U.S. 255 (1993) to preclude trial in Iowa. He is again mistaken.

In *Crosby*, the defendant was part of a multi-defendant mail scheme defrauding elderly individuals. 506 U.S. at 256. At the time set for trial, the Crosby's co-defendants and counsel appeared, Crosby did not. *Id.* A search of his home "looked as though it had been 'cleaned out'" and a neighbor reported events consistent with moving out. Five days later, the district court permitted trial to proceed after explaining its finding "Crosby had been given adequate notice of the trial date, that his absence was knowing and deliberate, and that requiring the government to try Crosby separately from his codefendants would present extreme difficulty for the Government, witnesses, counsel, and the court." *Id.* This ruling was affirmed on appeal to the Eight Circuit, but on review, the United States Supreme Court reversed.

The Court found that under the controlling federal rule of procedure, a felony trial could not proceed in absentia where the defendant was not *initially* present: "the language, history, and logic of Rule 43 support a straightforward interpretation that prohibits the trial in absentia of a defendant who is not present at the beginning of

trial." 506 U.S. at 261–62. Basing its ruling on the rule rather than the Constitution, it found the "language and structure" of Rule 43 "could not be more clear." *Id.* at 259, 262 ("Because we find Rule 43 dispositive, we do not reach Crosby's claim his trial in absentia was also prohibited by the Constitution."). The rule requires a defendant's presence at "arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule." Fed. R. Crim. P. 43(a). No exception for those instances in which a defendant fails to appear for trial is authorized. *See* Fed. R. Crim. P. 43(b)–(c). The Court pointed out the rule was intended to restate existing law to the effect "'the personal presence of the defendant is essential to a valid trial and conviction on a charge of felony. . . . If he is absent, . . . a conviction will be set aside.'" *Crosby*, 506 U.S. at 259 (quoting W. Mikell, Clark's Criminal Procedure 492 (2d ed. 1918)). It rejected the government's argument that Rule 43's exceptions were not exhaustive and reversed.

But the Supreme Court's interpretation of this federal rule assists Hurlbut little. Instantly distinguishing this case, the government had charged Crosby with a felony. 506 U.S. at 256. The

federal rule explicitly authorizes "arraignment, plea, trial, and sentencing to occur by video teleconferencing or in the defendant's absence" for misdemeanor offenses; it does not do so for felony crimes. Fed. R. Crim. P. 43(b)(2). Even for misdemeanor offenses the rule requires the defendant's "written consent" prior to proceeding in absentia—Iowa's does not. *Compare* Iowa R. 2.27(1) *with* Fed. R. Crim. P. 43(b)(2); Fed. R. Crim. P. 43 Advisory Committee Note 3. And the Federal Rule's exceptions where presence is not required or is waived includes no provision for instances in which the defendant is not initially present. *See* Fed. R. Crim. P. 43(b), (c); *Crosby*, 506 U.S. at 258–60. The State does not dispute that other states have followed *Crosby* in interpreting their rules or that Iowa courts have previously suggested portions of Iowa's rule on presence is similar to its federal counterpart, but on this issue and the relevant portion of Iowa's rule, *Crosby* holds little sway. *See generally State v. Bell*, No. 19-0161, 2020 WL 2487608, at *4 (Iowa Ct. App. May 13, 2020) (noting possible grounds of distinction from *Crosby* and preserving claims relating to trial of defendant in his absence for postconviction

relief proceedings)[1]; *see also Meadows v. State*, 644 So.2d 1342, 1346 (Ala. Crim. App. 1994) (applying *Crosby* and holding felony defendant who is not present at the start of trial cannot be tried in absentia); *Jarrett v. State*, 654 So. 2d 973, 975 (Fla. Dist. Ct. App. 1995) (distinguishing presumption created by voluntary absence mid-trial from absence from trial altogether); *State v. Hammond*, 854 P.2d 637, 641 (Wash. 1993) (adopting and applying *Crosby's* interpretation of federal rule to state rule and concluding the rule does not permit a trial to begin in the defendant's absence).

Finally, *Crosby*'s commentary on the rule is not dispositive of what procedures the Federal Constitution prohibits; federal courts have held Rule 43's protections are actually broader than those the Federal Constitution actually provides. *See United States v. Ornelas*, 828 F.3d 1018, 1021 (9th Cir. 2016); *United States v. Alikpo*, 944 F.2d

[1] *Bell* bears facial similarities to this case. In the case Bell was incarcerated and declined to appear at his trial for sex offender registry violations. The district court found Bell's absence to be knowing and voluntary. On appeal, Bell challenged the district court's interpretation of Rule 2.27. However, the claim had not been preserved and the appellate court concluded the record was insufficient to resolve his ineffective assistance of counsel alternatives. Although unpublished opinions can provide persuasive authority, the State does not believe any helpful decision was made by the *Bell* panel's procedural resolution to the appeal. Iowa R. App. P. 6.904(2)(c); *Bell*, 2020 WL 2487608, at *1–*2, *4.

206, 209 (5th Cir. 1991). *Crosby* provides scant support for Hurlbut's constitutional challenges because the opinion expressly made no ruling on the constitutionality of proceeding *in absentia*. *Crosby*, 506 U.S. at 262.

4. Conclusion

In sum, the district court's interpretation of Rule 2.27(1) was correct. Hurlbut does not allege the rule is unconstitutional. The district court did not err. The next question is whether the facts supported its decision to proceed. The State urges this Court to find they did.

B. Under the specific facts of this case, Hurlbut's failure to appear relinquished his constitutional rights of presence. The record establishes Hurlbut had notice of the trial date yet failed to appear. Trial could proceed in his absence.

Hurlbut alleges his absence was insufficient to sustain a finding waived his right of presence and confrontation. Appellant's Br. 20–21, 23. The State disagrees. When examined in light of the facts of this case, Hurlbut's knowing absence from trial abandoned his trial rights. And, given the State's evidence, the State believes his absence was harmless.

1. Hurlbut's constitutional rights were not violated. Iowa law holds that trial rights can be lost through voluntary conduct.

Again, it is axiomatic a criminal defendant possesses the rights to due process through presence at his trial and confronting the State's witnesses against him. U.S. Const. Amend. V, VI, XIV; Iowa Const. Art. I, §§ 9, 10. But there is no United States Supreme Court precedent barring a state from trying a misdemeanor defendant in absentia based on the Federal Constitution. *See Tacon v. Arizona*, 410 U.S. 351, 351–52 (1973) (per curium denial of writ of certiorari, declining to reach issue of constitutional limit of a state to try defendant in absentia based on failure to preserve issue before Arizona courts); *see also Diaz v. United States*, 223 U.S. 442, 455 (1912). The Supreme Court has noted that historical practice reflects the right of presence was "somewhat relaxed" for misdemeanor prosecutions. *Lewis v. United States*, 146 U.S. 370, 372 (1892); *see also Diaz*, 223 U.S. at 455 (recognizing distinction "As the offense in this instance was a felony, we may put out of view the decisions dealing with this right in cases of misdemeanor").

In suit, other states have concluded that trial of a misdemeanor charge in the defendant's absence—in itself—does not violate the

Constitution. *People v. Liss*, 968 N.E.2d 154, 157–58 (Ill. App. Ct. 2012); *Fennell v. State*, 492 N.E.2d 297, 299–300 (Ind. 1986) (affirming district court's decision to proceed where defendant intentionally left jurisdiction to avoid trial); *Pinkney v. State*; 711 A.2d 205, 211–14, 216–17 (Md. 1998) (requiring trial court to "both (i) find a knowing and voluntary waiver of the right to be present at trial and (ii) exercise sound discretion in determining whether to proceed with the trial of an absent criminal defendant" prior to proceeding; and reversing where district court erred in finding defendant's absence was waiver); *McKinney v. Com.*, 474 S.W.2d 384, 387 (Ky. 1971); *Ellis v. State*, 227 S.E.2d 304, 305–06 (S.C. 1976).

Certainly the rights to due process and confrontation are fundamental, but they are not absolute. Federal and Iowa law have long recognized the defendant's actions can result in a loss of these trial rights and that trial may occur in the defendant's absence. *See Taylor v. United States*, 414 U.S. 17, 18–20 (1973); *Allen*, 397 U.S. at 338; *Moore*, 276 N.W.2d at 440; *Hendren*, 311 N.W.2d at 62. Trial courts are not required to engage in any "formalistic sequence of warnings and record proof of defendant's knowledge of his confrontation right and that trial would continue in his absence" prior

to finding waiver. *Moore*, 276 N.W.2d at 440 (citing *Taylor*, 414 U.S. at 19–20); *Barnett v. State*, 512 A.2d 1071, 1077–78 (Md. 1986) (rejecting claim that voluntary absence from trial did not satisfy *Johnson v. Zerbst*-style waiver). The State believes the rationales applied to a defendant's absence mid-trial apply in equal part to a misdemeanor defendant's failure to appear at trial altogether.

This is in part because the defendant does not have the exclusive interest in their criminal trial; the State also has an interest in the orderly disposition of justice. Voluntary failure to appear thwarts that process:

> The deliberate absence of a defendant who knows that he stands accused in a criminal case and that the trial will begin on a day certain indicates nothing less than an intention to obstruct the orderly processes of justice. No defendant has a unilateral right to set the time or circumstances under which he will be tried.

Tortora, 464 F.2d at 1208–10; *abrogated by Crosby*, 506 U.S. 255.

Whatever the term applied, a relinquishment—or waiver, abandonment, loss, forfeiture—of trial rights are constitutionally tolerable under the appropriate circumstances because the law should not permit the accused to benefit from their own wrongful act. *Diaz*, 223 U.S. at 445; *see generally Reynolds v. United States*, 98 U.S. 145,

158 (1878) (observing in the context of a confrontation clause claim that "[t]he Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts"). So long as a misdemeanor defendant has had notice of when trial is to occur, his or her voluntary absence at trial can relinquish the rights attendant to presence.

Lacking any authority creating a per se bar to trying a misdemeanor defendant, the relevant inquiry is whether Hurlbut's conduct in this case relinquished his rights.

2. The record establishes Hurlbut had notice of the trial date yet failed to appear. He voluntarily relinquished his constitutional presence rights.

Ordinarily, Iowa courts presume against waiver of a right unless otherwise established. *See Moore*, 276 N.W.2d at 440 (applying *Allen*, 397 U.S. 337 and placing burden upon the State "to show a valid waiver by a preponderance of the evidence"). Other courts considering this issue have found waiver is established where a defendant is absent at trial without explanation and there is evidence the defendant was aware of the trial date. *State v. Finnegan*, 784 N.W.2d 243, 247 (Minn. 2010); *Freeman v. State*, 541 N.E.2d 533, 535 (Ind. 1989); *State v. Davis*, 498 P.2d 202, 203–04 (Ariz. 1972)

("Once a defendant's knowledge of the trial date is shown, the defendant has the burden of persuading the court that his absence was not voluntary."). *But see Pinkney*, 711 A.2d at 216 (trial court improperly found waiver where unrepresented defendant failed to appear after being properly informed trial date and defendant was not incarcerated). Because Iowa law establishes that no formal colloquy is required—*Moore*, 276 N.W.2d at 440—the question is whether the record before the district court supported its decision to proceed in Hurlbut's absentia. It did. Hurlbut knew that trial was occurring, yet he failed to appear. Confronted with troubling behavior from Hurlbut prior to trial and no subsequent explanation for his failure to appear after trial, the district court did not abuse its discretion.

Hurlbut was a recidivist with a significant criminal record and familiarity with the criminal justice system. *See generally* Exh. 16; App. 66; 69–76; 78–87; 90–94. At the time of his February 2020 trial, this case had been pending for over two years, with charges originally filed in August 2017. 8/18/2017 Trial Inf.; App. 5–6. There were many reasons for this delay, much of them directly attributable to Hurlbut.

After the public defender withdrew from representing him, attorney Roehrich was appointed. The week before trial, Roehrich sought replacement counsel stating Hurlbut would not speak to him about the case and in no uncertain terms told him to withdraw: "You're not doing anything for me. Fuck you. I want you to step down . . . Fuck yes. I want you to withdraw. I don't want you as my attorney you piece of shit." 10/10/2017 Motion to Withdraw; App. 8–9. At this time, Hurlbut was being held in the State's custody for a separate crime. During a telephonic hearing on his counsel's motion to withdraw, Hurlbut unilaterally "chose to hang up and left the room and went back to his cell." 10/11/2017 Order; App. 10–11. When transportation later came to bring him to trial, he refused and "advised . . . he was not going to come to the trial." 10/19/2017 Order p.1; App. 13. The district court then granted Hurlbut a new attorney, Williams. *Id.*

Soon Hurlbut asked to replace that attorney as well. 1/29/2018 Hearing Tr. p.2 line 9–p.4 line 2. Like Roehrich, Williams indicated Hurlbut was an abnormally difficult client—"Ordinarily I don't have that kind of a problem because the client will listen and contribute so that we have some very coordinated mutual understanding of how to

proceed. It's really very rare for me for this level of recalcitrance by the defendant contributes to this kind of problem." 1/29/2018 Hearing Tr. p.5 line 1–19. Counsel indicated that despite these difficulties he was "all for" preparing a "valid and persuasive defense" and did not believe the standard for withdrawal was met. 1/29/2018 Hearing Tr. p.5 line 11–19. The district court denied the motion for new counsel admonishing Hurlbut "I told you the last time that I would not accept his same kind of conduct by you regarding your attorney and it's time to go to trial." 1/29/2018 Hearing Tr. p.9 line 13–p.10 line 2; 1/29/2018 Order ("This court had a similar hearing with the defendant in this case two to three months ago where the court did grant the defendant's request for new counsel. the court informed the defendant at that time that the court would not put up with his antics once new counsel was appointed."); App. 22–23.

Despite attorney Williams's pursuit of a suppression motion, the relationship continued to deteriorate "to the extent that attorney has no control over the client and that client is not trusting of anything that the attorney utters." 8/7/2018 Motion; App. 28–29. The district court then granted a renewed motion to withdraw and Hurlbut's next attorney, Brock, was appointed. 8/9/2018 Order;

8/13/2018 Appointment; App. 32. Trial was necessarily continued again, which Hurlbut indicated was to everyone's benefit: "It would work out better for anybody—everybody so they didn't have to transport me, and I could *show up on my own*." 8/9/2018 Hearing Tr. p.4 line 21–p.5 line 10 (emphasis added).

Hurlbut asked to appear for the next hearing by phone. Now paroled, he was living in Des Moines and was "unable to drive and despite efforts up to and including this morning, has been unable to secure transportation . . . to Plymouth County." 2/27/2019 Motion; App. 34–35. At the hearing Hurlbut proposed the district court "revoke his bond and have him arrested" so that he could attend the scheduled March 2019 trial. 2/28/2019 Order; App. 36. The district court declined to do so as Hurlbut's release was not conditioned on a bond and cautioned him "he will need to arrange for his own transportation to LeMars for the jury trial." *Id.* The rescheduling order set new trial and final conference dates and advised "Counsel for both sides shall personally appear at that time and *the defendant must also appear in person at the final pretrial conference*." 4/9/2019 Order; App. 38. Hurlbut failed to appear and a warrant was issued. 7/12/2019 Order; App. 40.

The matter was eventually once again set for trial. But Hurlbut did not appear for the January 31, 2020 final pretrial conference. That proceeding was not recorded and so the district court made a record regarding Hurlbut's presence the day prior to trial:

> THE COURT: And I have indicated to counsel informally—but I'll do this on the record—my plan would be irrespective of whether or not Mr. Hurlbut shows up tomorrow, that we would—we would proceed and try this case, even if he's not here. And the only reason I say that is that he wasn't present on Friday as you informed me and he isn't here today, but you did, in fact, hear from him today, Mr. Brock, about—your office did anyway? Would you put that in the record, please?
>
> MR. BROCK: Certainly, Your Honor. I was told by my secretary earlier this morning that Mr. Hurlbut had called into the office while I was here at court on another matter. And was—at least when he spoke to my secretary—was saying he was planning to be here tomorrow for the pretrial conference. She did correct him that it's actually trial tomorrow, but from my communications with my secretary this morning, it sounds like Mr. Hurlbut is planning to be here at court tomorrow.

2/3/2020 Hearing Tr. p.14 line 15–p.15 line 12. He was not. After this hearing, counsel spoke with Hurlbut directly. 2/4/2020 Voir Dire Tr. p.2 line 20–p.3 line 8. At that time, Hurlbut told counsel he was residing in Fort Dodge and could not find transportation to trial. *Id.*

When the court asked whether counsel had "a conversation with him about the fact that trial would or could proceed without him being present," counsel indicated he had. Trial I Tr. p.88 line 8–17. The prosecutor resisted continuing trial again; pointing out Hurlbut knew trial was coming, anticipated being at what he believed would be a pretrial conference, yet suddenly was unable to attend "once he finds out its set for trial." 2/4/2020 Voir Dire Tr. p.3 line 18–p.4 line 17. Faced with these facts, the district court proceeded to trial.

Even then, the district court did not rush the trial to completion. The judge paused the proceedings after the presentation of the State's case and waited until the next day "to see if Mr. Hurlbut wishes to come and testify, or add to this process." Trial I Tr. p.88 line 16–p.89 line 13. He failed to appear then, too.

On appeal, Hurlbut alleges his absence was insufficient to sustain a finding waived his right of presence and by extension, confrontation and that the record "indicates that he was unable, not unwilling to attend the trial." Appellant's Br. 20–21, 23. He chides the district court's failure to do more, suggesting it should have contacted him by phone and "fully advised him of the consequences . . . flowing from his absence at trial." Appellant's Br. 23. The State disagrees. The

lack of a prior warning is immaterial. Akin to the Supreme Court's commentary in *Taylor* that

> It is wholly incredible to suggest that petitioner, who was at liberty on bail, had attended the opening session of his trial, and had a duty to be present at the trial, entertained any doubts about his right to be present at every stage of his trial. It seems equally incredible to us . . . 'that a defendant who flees from a courtroom in the midst of a trial—where judge, jury, witnesses and lawyers are present and ready to continue—would not know that as a consequence the trial could continue in his absence.'

Taylor, 414 U.S. at 20 (citation omitted). Just so here, it is eye-opening to suggest even though Hurlbut was aware of the date of trial, he was somehow unaware there would be consequences to his failure to appear. Especially given his experience with Iowa's criminal justice system, his previous refusal to attend and decision to abandon court proceedings, his prior failures to appear for proceedings, and his general demeanor with the court and counsel. Tellingly, defense counsel acknowledged his voluntary choice in closing argument: "you cannot hold it against the defendant that he chose not to testify, or even that he chose not to be present for trial today." Trial II Tr. p.10 line 1–8. The record before the district court supports finding his absence at trial was knowing and voluntary. It bears repeating: the

parties agree Hurlbut was aware of the date of his trial and failed to appear—twice. Trial I p.88 line 16–p.89 line 13; Trial II Tr. p.2 line 6–13; Appellant's Br. 20, 23. The district court did not abuse its discretion in proceeding and this Court should conclude that under these facts, Hurlbut's knowing absence was a relinquishment of his trial rights.

3. Even if this Court were inclined to find the district court abused its discretion, the harmless error doctrine applies here.

Past Iowa cases have recognized that a defendant's absence from portions of trial are subject to the constitutional "beyond a reasonable doubt" harmless error analysis. *See State v. Atwood*, 602 N.W.2d 775, 781 (Iowa 1999); *State v. Blackwell*, 238 N.W.2d 131, 136–37 (Iowa 1976) (holding defendant's absence from a stage of trial would require a new trial if the absence "prejudiced his case, weakened his defense, or was otherwise harmful to his interests"). The presumption of prejudice is rebuttable; "Only under exceptional circumstances is a per se rule of prejudice applied." *Atwood*, 602 N.W.2d at 781. In fact, earlier Iowa absence cases required *the defendant* to establish actual prejudice. *See State v. Wood*, 17 Iowa 18, 20–21 (Iowa 1864) (assuming that even if defendant had not been

present for trial, harmless error analysis applied and the burden was upon the defendant to establish actual prejudice); *State v. Decklotts*, 19 Iowa 447, 452 (Iowa 1866) (defendant's absence at ruling on motion for new trial did not warrant reversal; defendant was not actually prejudiced where he declined an offer of the district court to reargue the motion). The record is sufficient to prove Hurlbut was not prejudiced by his absence.

Here, the State presented a clear and overwhelming case of operating while intoxicated. Witnesses observed Hurlbut's erratic behavior and dangerous driving; testing of his urine confirmed the presence of methamphetamine and its metabolic byproducts in Hurlbut's body at the time he was driving. *Compare* Trial I Tr. p.13 line 6–p.14 line 2; p.31 line 6–p.35 line 15; p.53 line 23–p.54 line 4; p.55 line 2–19; p.57 line 21–p.58 line 15; p.59 line 14–p.61 line 7; p.61 line 23–p.62 line 6; p.63 line 17–23; p.68 line 16–p.69 line 5; Exhs. 9, 9A; App. 56–57; Exh. 1; *with* Iowa Code § 321J.2(1)(a), (b). It appears the jury weighed this evidence and reached its verdict in minutes. Trial II Tr. p.14 line 5–p.15 line 10. It is informative that at sentencing, Hurlbut alleged his rights had been violated but did not touch on his right to presence at trial. Instead he relitigated his

inability to retest his urine and his inability to actively participate in pretrial depositions. Sent. Tr. p.9 line 3–22; *see Finnegan*, 784 N.W.2d at 251 (affirming denial of postconviction relief where applicant did not avail himself of opportunities to build record as to why his absence from trial was involuntary). Neither he nor his counsel offered any additional reason why he was not at trial. And the jury was specifically instructed to "draw no conclusion or inference from the fact that the defendant is not present" and his "absence shall not be considered by you in determining your verdict." Exh. 1000; App. 59.

The State acknowledges Hurlbut's presence during trial would have permitted him to interact with his attorney and suggest courses for counsel to pursue. But in light of Hurlbut's conduct prior to trial, the State's evidence at trial, the jury's swift verdict, and Hurlbut's failure to make any record explaining the circumstances of his absence following trial, the record supports a finding that Hurlbut's absence at trial was harmless beyond a reasonable doubt. *C.f. State v. Morris*, No. 10-1245, 2011 WL 1584374, at *4 (Iowa Ct. App. Apr. 27, 2011) (finding error was not harmless where defendant was not

present for in chambers hearing on reports defense counsel was intoxicated at trial). This Court should affirm.

CONCLUSION

The district court in this case was confronted with two-year old misdemeanor case involving a defendant who had already refused to appear at court proceedings. The record before the district court indicated Hurlbut knew trial was occurring yet he failed to appear. His attorney was present and provided a defense. The district court's legal interpretation of Iowa Rule of Criminal Procedure 2.27(1) was correct and the record supports finding that Hurlbut relinquished his right to presence at trial. This Court should affirm.

REQUEST FOR NONORAL SUBMISSION

The State does not request oral argument and joins Hurlbut's request for nonoral submission. Appellant's Br. 30. If the Court believes oral argument would assist in the resolution of the case, the State would be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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