IN THE SUPREME COURT OF IOWA

No. 22-0581

JOSHUA VENCKUS

Plaintiff-Appellee,

vs.

CITY OF IOWA CITY and ANDREW RICH

Defendants-Appellants.

APPEAL FROM THE IOWA DISTRICT COURT
FOR JOHNSON COUNTY
HONORABLE CHAD KEPROS, JUDGE

APPELLANT'S FINAL BRIEF

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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because it presents "substantial constitutional questions" that are fundamental issues of broad public importance requiring ultimate determination. Iowa R. App. P. 6.1101(2)(a) and (d).

STATEMENT OF THE CASE

NATURE OF THE CASE: This action comes before this Court on a grant of summary judgment. The case arises out of the wrongful investigation and prosecution of Joshua Venckus. The wrongful investigation was conducted by Andrew Rich, an investigator with the Iowa City Police Department.[1] The wrongful prosecution was instigated or procured by Rich. Venckus alleges that Rich was aware of evidence that exonerated Venckus but continued the wrongful prosecution causing him financial and emotional harm that continues to this day.

Venckus asserts a common-law claim of malicious prosecution and Iowa Constitutional tort claims. (App. Vol. I, pp. 29-30).

[1] Venckus will refer to the Defendants collectively as "Rich."

COURSE OF PROCEEDINGS: On March 15, 2018, Venckus filed suit against Rich. (App. Vol. I, p. 7). Rich filed a Motion to Dismiss on April 5, 2018 (City Motion to Dismiss). After the District Court denied Rich's Motion, Rich filed an Application for Interlocutory Appeal which was granted. This led to the Court's decision in *Venckus v. City of Iowa City*, 930 N.W.2d 792 (Iowa 2019) (*Venckus I*). On remand, the court dismissed the remaining claim against the County defendants. That dismissal has not been appealed.

The case proceeded through discovery and on October 27, 2021, Rich filed a Motion for Summary Judgment. (App. Vol. I, p. 34). On November 24, 2021, Venckus resisted the motion. (App. Vol. I, p. 67). On January 31, 2022, the district court granted summary judgment. (App. Vol. I, p. 640). On February 14, 2022, Venckus requested reconsideration. (App. Vol. I, p. 657). On March 7, 2022, the district court denied the motion to reconsider. (App. Vol. I, p. 674. Venckus appealed on March 30, 2022. (App. Vol. I, p. 677).

STATEMENT OF FACTS[2]

The Crime: Sometime before 445am on Saturday, February 16, 2013, a woman ("L.M.") was raped and beaten inside 516 S. Van Buren St,

[2] The facts are taken from the Statement of Facts in resistance to the Motion for Summary Judgment and is abridged to comply with the word limits.

Iowa City ["the residence"]. L.M. was encountered by a passerby, John Munn, just outside the residence when she ran out. (App. Vol. I, p. 69). Mr. Munn saw a single male figure that fit the description of Ryan Markley. At trial, Mr. Munn selected the physical description that matched Markley. (App. Vol. I, p. 69-70).

Only One Attacker: Andrew Rich (herein "Rich") was employed as an Investigator for the City of Iowa City Police Department. Det. Rich was the lead investigator on the rape investigation. (App. Vol. I, p. 70). L.M. only identified one person as being the attacker. Initially, Detective Rich assumed only one attacker and admitted that there was initially no evidence that there was more than one attacker. (App. Vol. I, p. 70-71).

The Prime Suspect: The prime suspect was Ryan Markley. His wallet was recovered at the scene of the crime, he took an item that belonged to a resident of the property, and his DNA was found on the body of the victim. Markley was not a resident of the property. (App. Vol. I, p. 71).

Joshua Venckus in Chicago: On February 15-17, 2013, Venckus lived at the residence. However, Venckus left for Chicago on Friday, February 15 and did not return to Iowa until Sunday, February 17. During that weekend, Venckus stayed at his parents' home in Chicago. (App. Vol. I, p. 71-72). Venckus did not have a license or a vehicle during the weekend.

During that weekend, Michael Concannon served as Venckus' driver to and from the State of Illinois. (App. Vol. I, p. 71-72).

The Party at the Residence: On Friday, February 15, Venckus' roommates hosted a themed party at the residence. L.M. attended the party, became extremely intoxicated and incapacitated. Partygoers tended to L.M. and made her comfortable on a couch in the living room of the main level of the residence. (App. Vol. I, p. 72).

L.M. was covered with a blanket retrieved from Venckus' bedroom. Markley attended the same party. Venckus did not know either L.M. or Markley. The blanket covering L.M. was replete with Venckus' DNA. (App. Vol. I, p. 72-73).

The party broke up around 3:30am on Saturday, February 16, and all residents and any remaining guests went to sleep. Ryan Markley then broke into the residence, burglarized it, and perpetrated a sexual assault upon L.M. All residents reported that Venckus was in Chicago and not at the party. No one identified him as being present during the party. (App. Vol. I, p. 73).

A Second "Suspect": DNA evidence that corroborated Markley's presence at the crime scene, also identified the DNA of a second male, known as "Male B." Up until the DNA evidence showed a second male contributor, Rich believed that there was only one offender. All males

known to be present at the party were tested for DNA and were excluded. Rich sought out Venckus to request his DNA. Venckus volunteered his DNA and it matched "Male B." Up until then, Rich believed that Venckus was not present in Iowa City. (App. Vol. I, p. 73-74). All the occupants of the home were immediately interviewed separately, and every single one of them claimed that Venckus was in Chicago. (App. Vol. I, p. 74).

The Arrest: On January 24, 2014, Venckus was interviewed by Rich and Det. Gonzalez. Venckus told the detectives he was in Chicago over the weekend and was never at the party. Despite a long lecture on the importance of getting out ahead of the DNA evidence, Venckus held firm. During the interview, Gonzalez conceded the potential of transfer of DNA. Venckus offered Rich his phone and bank records. He was then arrested. (App. Vol. I, p. 74-75).

The Duty to Investigate the Alibi Defense: Det. Rich admitted that an investigator has a duty to investigate an alibi claim and to seek out exculpatory evidence. (App. Vol. I, p. 75).

The Chicago Lawyer: During a September 4, 2015 deposition in the criminal defense, Chicago lawyer Nehad Zayyad confirmed that Venckus met with him Friday afternoon, February 15, relating to a separate legal matter. Rich would later admit that this piece of information convinced him

that Venckus went to Chicago on Friday. (App. Vol. I, p. 75-76).

Birthday Weekend: In addition to going to Chicago to see the attorney, Venckus went home to celebrate his mother (Jeanine's) birthday. The family had a party Saturday afternoon and evening, to include playing cards, a well-known family tradition. (App. Vol. I, p. 76).

The Trip to The Movie Theater: On Friday night, Jeanine, her daughter Rebecca, and Venckus went to see the movie *Lincoln* in LaGrange, Illinois. Rich conceded that Venckus went to the movie. The movie (*Lincoln)* began at 915pm on Friday night and lasted 2 hours and 30 minutes. (App. Vol. I, p. 76-77). Venckus' debit card, which was used as payment for the tickets, was posted at 945pm. The movie theatre was 30 minutes away. They all returned to the Chicago home after 1230pm on Saturday, February 16. (App. Vol. I, p. 76-77).

The Testimony of The Family: Jeanine confirmed her son's presence that weekend and that Venckus went to the movie. Jeanine also stated that she awoke at 8am the following day, drove her own vehicle to work and would have left her home at 9am. She also confirmed that her daughter went with her father in her father's vehicle to Rebecca's new job for a drug test. Jeanine also noted that the poker/birthday party started around 2pm. (App. Vol. I, p. 77).

Rebecca confirmed that she picked up her brother at Mike Concannon's house, and that Josh went with them to the movie. She also confirmed that they got home around 12:30-1am and went to bed around 1am. Rebecca then woke up around 8am and saw her brother in the same bed. At trial, Rebecca narrowed that time even further to 6am as she was able to review her phone records and found that she exchanged texts with a friend at around that time. Rebecca also testified that she had to go to orientation for her new job Saturday morning, was driven by her dad, and returned around 1030am to find her brother eating. (App. Vol. I, p. 77-78). Rich admitted that he never interviewed Josh's parents, family, or Chicago friends. His reasoning was that they would lie for Venckus. (App. Vol. I, p. 78).

The Lack of Transportation: There were only two vehicles available on the Chicago property: Jeanine's and her husband's. Neither vehicle was available for Joshua to drive to Iowa City. When Jeanine went to work Saturday morning, both vehicles were there. (App. Vol. I, p. 78-79).

Concannon went to Chicago on Friday so he could see a hockey game and gave Venckus a ride home. Rich eventually conceded that Concannon drove Venckus to Chicago on that Friday. (App. Vol. I, p. 79).

Rich's Criminal Trial Concessions: At the criminal trial, Rich made

two crucial concessions: First, Venckus left Iowa City for Chicago on Friday, February 15; and secondly, any drive to or from Iowa City and Chicago would take approximately 3 ½ hours. The concession that Venckus went to Chicago caught the prosecutor by surprise. (App. Vol. I, p. 79-80).

Rich's Deposition Concessions: At Rich's deposition, he conceded that Venckus was in the Chicagoland area until after he got to his parents' home after watching the movie *Lincoln*. He also conceded that Venckus would have needed a vehicle and could not explain how Venckus would have returned to Iowa City. (App. Vol. I, p. 80).

Rich's Theory of The Crime: Rich testified in the criminal trial that Venckus went to Chicago but decided to return to Iowa City in the middle of the night, but could not explain how Venckus did that. (App. Vol. I, p. 81). During his civil deposition, Rich claimed that Venckus wanted to get back to be at the party in Iowa City and would then plan to return to Chicago to be at his mother's party. (App. Vol. I, p. 82-83).

Rich's Unreasonable Belief: Rich's belief was unreasonable because:

1. By conceding that Venckus left for Chicago on Friday and went to a movie, returning to his parents' home around 1am on Saturday, Rich was left with an *impossible timeline* to place Venckus in Iowa City at 430am (to commit the crime) and Chicago between 7am and 8am (to return his parents'

vehicle).

2. Venckus did not have access to a car. Both his parents needed their vehicles: mom to go to work, and dad to take his sister to her job orientation. If he took either of his parent's vehicle at 1:00am, he would need to bring that vehicle back in time for that parent to use a vehicle somewhere between 700 and 800 AM. To have the vehicle back to Chicago by 7:00 am, he would have to leave Iowa City by 330 am. But the assault did not occur until 430-445am.

If he were present at 430-445am, then he did not have time to return the vehicle to his parent by 7am. In short, Venckus could not be in two places are the same time.

3. Moreover, if Venckus wanted to return to Iowa City to be at the party, he would not have gone to the movie at 9pm.

4. The Iowa City party ended at 330am. There were no phone calls or texts around the time that Venckus allegedly left Chicago to inquire whether the party was still going on and how long it would last.

5. Further, there are no phone calls or texts to establish that he borrowed a friend's vehicle. Common sense would argue that if he were interested in returning to Iowa City, he would have been looking for a vehicle much earlier than 100am in the morning. There is no evidence that

he either looked for another vehicle or that he had any inclination to return to Iowa City.

6. If you humor yourself by following Rich's belief that Venckus wanted to return to Iowa City for one party, and then return to Chicago for another party, there would be no time for sleep. (App. Vol. I, p. 83-84).

Transfer of DNA: Venckus retained Angela Butler, an expert on DNA. Transfer of biological material can occur in several ways, regardless of whether the substance is wet or dry. A wet liquid can transfer more easily than a dry one. Moisture, pressure, and friction can facilitate transfer.

DNA transfer has been scientifically confirmed. Any fabric that contains biological material, if rehydrated and friction is applied, can result in the transfer of the biological material to another object or person. If the blanket encountered a wet penis/finger which is later inserted into the victim's vagina is an explanation as to how a small quantity of sperm was found in the cervix without ejaculation. (App. Vol. I, p. 84-85).

Rich conceded that transfer was a possible explanation for how Venckus' DNA was found on the victim, including in her cervix. It was discussed during Venckus' police interview. Further, as early as July 2014, Detective Rich consulted with DCI on the possibility of transfer and the DCI confirmed that dry biological material, if rehydrated, can transfer. (App. Vol.

I, p. 85).

The Fateful Deposition of Detective Rich and the Fallout: On April 1, 2016, Rich gave a second deposition during which he made several significant admissions relating to the sexual assault of the victim. He admitted that he could find no connection between Markley and Venckus. Further, he conceded that *only one person* sexually assaulted L.M. and that person was Venckus. This caught the prosecutors by surprise. Because of Rich's admission, the prosecution of Markley for sexual assault was doomed. (App. Vol. I, p. 86-87).

Two weeks later, the District Court granted a Motion to Sever the two defendants at trial. The Court continued the trial of Venckus into September 2016, while ordering the trial of Markley to proceed for late May 2016. Since Rich had already undermined the sexual assault charge against Markley, the ruling severing the trials dealt the prosecution against Markley a significant blow. (App. Vol. I, p. 87).

The fallout led to a plea agreement with Markley on May 4, 2016. The plea agreement included a willingness by Markley to proffer testimony that could potentially be used against Venckus. The lead prosecutor, Anne Lahey, was opposed to the plea agreement. (App. Vol. I, p. 87-88).

Rich claimed that he was not involved in the plea negotiations and only

heard about them from Lahey. (App. Vol. I, p. 88). This testimony was untruthful as Ms. Lahey testified that, not only was Detective Rich present for the plea negotiations, Rich argued in favor of the plea agreement. (App. Vol. I, p. 88, 93-94). Lahey was so unhappy with the plea agreement that she stated her disagreement on the record at Markley's plea hearing. (App. Vol. I, p. 88).

Markley's sentencing was delayed until after the trial against Venckus. Despite Markley's willingness to talk, no one talked to Markley before he pled guilty to the sweetheart deal that was brokered by Rich. (App. Vol. I, p. 89).

Markley was eventually interviewed on August 30, 2016, about one week before the trial against Venckus, and it was determined by Lahey that his testimony was not credible. (App. Vol. I, p. 89).

The DNA Evidence Exculpating Venckus: On July 6, 2016, Angela Butler issued a second report. Her report resulted in several key findings:

> a. DNA belonging to the victim was found in the epithelial fraction as the major contributor of DNA on the *inside fly* of Markley's jeans.
>
> b. L.M.'s blood was identified on a rivet on the *inside of Markley's jeans*. The blood did not bleed-through from the outside of the jeans.
>
> c. Two sperm (later determined to originate from Venckus) were microscopically observed on the right pant leg area of the

> jeans between the ankle and shin area. The area was *negative for seminal fluid*.
>
> d. Y-STR testing done on Cervical Swab Extracts showed the presence of skin cells *in the cervix of L.M*. consistent with Markley or someone of his paternal lineage. These same types of cells are consistent with cells that can slough off a penis or a finger.
>
> In a prior report, Butler documented finding saliva on L.M.'s underwear. Markley's saliva was found on the left shoulder of L.M.'s dress where she was bit.
>
> e. While Venckus' sperm was found throughout many samples, the quantity of sperm found is not consistent with a "neat semen" sample which means not directly from a penis.

(App. Vol. I, p. 89-90).

From this report, as well as other work that Ms. Butler had done, one can reasonably conclude the following:

> a. Venckus' sperm and the lack of evidence of semen does not support the conclusion that he ejaculated or left fresh sperm or semen on the victim.
>
> b. Rather, it supports the conclusion that Venckus' sperm was transferred from one source on to another. For example, from the blanket to other locations, including the victim's cervix.
>
> c. There were no skin cells belonging to Venckus on any item.
>
> d. Markley's skin cells were found in the victim's cervix.
>
> e. The victim's blood <u>was</u> on the inside fly of Markley's jeans.
>
> f. Finally, <u>the victim's</u> skin cells were found on the inside fly of his jeans.

(App. Vol. I, p. 90).

All this information was in the July 6, 2016 report provided to Rich. This report undermined Rich's testimony (and theory) of April 1, 2016 that Markley had not committed sexual assault, but that Venckus was solely responsible. (App. Vol. I, p. 91).

The Change of Opinion: In his deposition, Rich claimed that he first became convinced that Venckus had gone to Chicago when he learned about the Chicago attorney and his testimony. Zayyad's testimony was taken in September 2015. Yet, at his April 1, 2016 deposition, Rich continued to press the claim that Venckus never left Iowa City. But by the time of trial, Rich changed his testimony and now conceded that Venckus had left on Friday to go to Chicago. Somewhere between April 1, 2016 and September 7, 2016, Rich changed his opinion that Venckus never left Iowa City. (App. Vol. I, p. 91).

The Google Drive: On August 20, 2015, and on a continuous basis up until trial in September of 2016, Rich had access to a Google Drive that had all the evidence that Venckus was relying upon to prove his innocence. (App. Vol. I, p. 92-93).

Acquittal: Venckus was acquitted after a trial that began on September 7, 2016. (App. Vol. I, p. 93).

Rich's Involvement with the Prosecution: Rich was heavily involved in all aspects of the prosecution of Venckus. Despite his denial, Rich was involved in the plea discussions with Markley and voiced support for the plea, over the objection to Lahey. (App. Vol. I, p. 93-94).

Rich kept track of all the evidence placed on the Google Drive and specifically asked to review that drive shortly before trial. Rich even tried to get Attorney Cole to withdraw a witness the day before trial began. During trial, he sought three search warrants from a different judge about the Venckus case resulting in an argument over his conduct and the Court permitting the defense to call Rich in their case in chief. (App. Vol. I, p. 104).

Rich admitted to the significant level of his involvement when he stated that he entered "*into an agreement with the County Attorney's office that we could take this thing to trial and try to prove it beyond a reasonable doubt*." (App. Vol. I, p. 94-95).

Rich never talked to the County Attorney about the obvious proof problems with the criminal charges against Venckus or ask to dismiss the charges against Venckus. Rich conceded that if he had approached the County Attorney's office, they would have listened to him. This was proven with the

plea agreement with Markley over the objection of the lead prosecutor. (App. Vol. I, p. 95).

Expert Testimony: Venckus retained William Harmening to review the work done by Det. Rich. Harmening concluded that Rich failed to meet his obligation to eliminate Venckus' involvement in the crime. (App. Vol. I, p. 95-97).

ARGUMENT

I. THIS COURT HAS RECOGNIZED CONTINUING MALICIOUS PROSECUTION CLAIMS. BY THE SPRING AND SUMMER OF 2016, DET. RICH NO LONGER HAD PROBABLE CAUSE TO CONTINUE WITH THE PROSECUTION OF VENCKUS.

Preservation of Error.

Notice of Appeal was filed on March 31, 2022, from the Order dated March 7, 2022, reconsidering the grant of Summary Judgment filed on January 31, 2022. Venckus preserved error for review.

Standard of Review.

"We review grants of summary judgment for correction of errors at law. *McKee v. Isle of Capri Casinos, Inc.*, 864 N.W.2d 518, 525 (Iowa 2015).

Merits.

A. Continuing Prosecution: The elements of malicious prosecution are: (1) a previous prosecution, (2) instigation or procurement thereof by defendant,

(3) termination of the prosecution by an acquittal or discharge of plaintiff, (4) want of probable cause, (5) malice in bringing the prosecution on the part of the defendant and (6) damage to plaintiff. *Vander Linden v. Crews*, 231 N.W.2d 904, 905 (Iowa 1975). This tort has its genesis in the common law. *Wheeler v. Nesbitt*, 65 U.S. 544, 550 (1860) ("Undoubtedly, every person who puts the criminal law in force maliciously, and without any reasonable or probable cause, commits a wrongful act."). It is now outlined in the *Restatement (Second) of Torts, §653.*

Rich contends that such a claim is limited to the point of the *arrest*. That argument would make malicious prosecution a redundant claim for false arrest. The *Restatement (Second) of Torts* provides for "Wrongful Prosecution of Criminal Proceedings (Malicious Prosecution)" at §§653-671. Specifically, §655, entitled "Continuing Criminal Proceedings", provides as follows:

> A private person who takes an active part *in continuing or procuring the continuation of criminal proceedings initiated by himself or by another* is subject to the same liability for malicious prosecution as if he had then initiated the proceedings.

(Emphasis added). Comment b provides further support: "[T]his Section …applies also when the proceedings are initiated by a third person, and the

defendant, knowing that there is no probable cause for them, thereafter takes an active part in procuring their continuation."

In *Johnson v. Miller*, 47 N.W. 903, 904 (Iowa 1891), this Court stated "It is good faith that excuses *from wrongfully commencing or continuing the criminal prosecution*. Certainly, one cannot be said to act in good faith who causes the prosecution of another on a charge of which he does not believe him guilty." (Emphasis added).

In *Sisler v. Centerville*, 372 N.W.2d 248, 251 (Iowa 1985), an action against two police officers, the Court cited with approval the definition of probable cause found at *Restatement (Second) of Torts § 662*, which utilizes the word "continues" and "continuing" as elements.

Further, in *Wilson v. Hayes*, 464 N.W.2d 250, 259 (Iowa 1990), this Court found no distinction between claims for malicious prosecution in civil or criminal cases. The *Restatement (Second) of Torts* also makes no distinction between criminal cases initiated or continued (see §§654 and 655) and the initiation or continuation of civil proceedings (see §674). The *Restatement (Second) of Torts*, §672 also recognizes "continued" or "continuing" criminal proceedings.

Notwithstanding, the District Court concluded that such claims are limited to the initiation of the prosecution. That finding was error.[3]

Defendants cite to *Yoch v. City of Cedar Rapids*, 353 N.W.2d 95, 103 (Iowa 1984). *Yoch* supports Venckus. Yoch brought claims for false arrest and malicious prosecution against two detectives arising out of criminal charges for theft. A judge acquitted her. The civil jury found against her on

[3] Other states have similarly held that continuation of a criminal proceeding can constitute malicious prosecution. For example, see *Swick v. Liautaud*, 169 Ill. 2d 504 (Illinois 1996); *Raine v. Drasin*, 621 S.W.2d 895 (Kentucky 1981); *Trussell v. GMC*, 53 Ohio St. 3d 142 (Ohio 1990); *Peasley v. Puget Sound Tug & Barge Co.*, 125 P.2d 681 (Washington 1942); *Smith-Hunter v. Harvey*, 95 N.Y.2d 191 (New York 200); *Sundeen v. Kroger*, 355 Ark. 138 (Arkansas 2003); *Del Rio v. Jetton*, 55 Cal. App. 4th 30 (California 1997); *Montgomery Ward v. Wilson*, 339 Md. 701 (Maryland 1995); *Weissman v. K-Mart Corp*., 396 So. 2d 1164 (Florida 1981); *Simmons v. Telecom Credit Union*, 177 Mich. App. 636 (Michigan 1989); *Pera v. Kroger Co*., 674 S.W.2d 715 (Tenn. 1984); *Carter v. Bryant*, 429 S.C. 298 (South Car. 2020); *Maniaci v. Marquette University*, 50 Wis. 2d 287 (Wisconsin 1971).

the false arrest claim, but in favor of her on the malicious prosecution claim. And therein lies the distinction between false arrest claims and malicious prosecution claims. The jury was permitted to find that the initial arrest was appropriate but that the continuing prosecution was without probable cause.

Without such a distinction, there would only be one claim available, false arrest; if the probable cause standard was assessed solely at the time of arrest, there would be no malicious prosecution claim separate from a false arrest claim. The law recognizes that one can initially have probable cause but eventually lose it.

Rich also argues that he is not a private person under the *Restatement (Second) of Torts, §655*. In support, he cites to *Craig v. City of Cedar Rapids*, 826 N.W.2d 516 (Iowa App. 2012). That case involved a claim made by an employee against only the municipality. Here, the claim is made against Rich, who is a private person for purposes of a malicious prosecution claim. The fact that the officer is a public employee only affects the level of proof regarding malice. *Vander Linden* at 906.

B. Probable Cause: Probable cause is defined as the good faith and reasonable belief that an individual has committed a criminal offense.

Children v. Burton, 331 N.W.2d 673 (Iowa 1983); *Kraft v. Bettendorf*, 359 N.W.2d 466 (Iowa 1984).

"Probable cause… must be determined on the particular facts of each case. If pertinent facts relating to the existence of probable cause are in dispute, the existence of probable cause is a jury question. *Kraft* at 470.

"Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge, *and of which they had reasonably trustworthy information*, [are] sufficient in themselves to warrant a man of reasonable caution to the belief that' an offense has been or is being committed." *Children* at 679 (Emphasis added).

In assessing whether a police officer has probable cause, law enforcement should consider evidence that contradicts their perceptions. *Kansas v. Glover*, 140 S. Ct. 1183 (2020).

C. The Lack of Probable Cause: The moment that Rich recognized the overwhelming evidence that Venckus left Iowa City was the moment when any perceived probable cause ceased to exist. Rich was then obligated to investigate whether Venckus could have returned in order to place him at the scene of the crime.

While DNA evidence can tell an investigator that an individual's DNA is present, it does not tell you how it got there. From the start, Rich

recognized that DNA can be transferred from one location or item to another location or item. While Rich may be permitted to initially doubt Venckus' claim that he was in Chicago at the time of the crime, that permission was lost when he knew that Venckus had left for Chicago, remained there until *at least* 1 o'clock in the morning, and was never seen at the party in Iowa City.

It was incumbent upon Rich to establish how Venckus' DNA was found at the scene when he was in Chicago as late as 1:00am on Saturday morning, with the inability to return to Iowa City in time to both commit the crime and return any family vehicle to its original location for use by his parents. However, it appeared Rich was content to risk an innocent man facing consequences for the wrong of another. As he conceded at trial:

> Q. Right. My question to is to you is the crime happened on Saturday morning?
>
> A. Yes. I believe Josh came back to Iowa City in the middle of the night on Saturday, and the attack occurred at the house, and he fled back to Chicago.
>
> Q. My question is how?
> A. *That's a great question, we don't know.*

(App. Vol. I, p. 81, emphasis added). This inability haunted him in his deposition in this case:

> Q. So tell me, what's the holes in that theory that you have? What are the problems with that theory?
> …

> A. Well, I think the one thing – *the hole that we couldn't -- one of the holes we couldn't fill was how exactly he got back to Iowa City, that was something that we always questioned*.

(App. Vol. I, p. 80, emphasis added).

There was no evidence that Venckus would have either the desire to return in the middle of the night, nor the means to do so. Rich's belief that Venckus wanted to return to Iowa City to take part in the party was undermined by the fact that when given an opportunity to return to Iowa City on Friday evening, he chose to go to a movie with his mother and his sister. If Venckus had wanted to return, all he had to do was tell his mother and sister that he did not want to go to a movie but preferred to return to Iowa City. Of course, even if Venckus wanted to return, he did not have the means available to return unless he borrowed a vehicle from one of his parents or contacted a friend to borrow a vehicle. Again, this assumes that he had any interest in returning. There were no phone calls or texts reflecting that desire, and no phone calls or texts after 1:00am inquiring whether the Iowa City party would still be going on if he made the 3 ½ hour trip back to Iowa City.

Which brings us to the second problem with Rich's belief. How could Venckus, who did not have his own vehicle, nor a driver's license, borrow a vehicle at 1am to return to Iowa City? He could not borrow his parents'

vehicles because they both needed them in the morning, and he would not have enough time to return the vehicle in time for his parents to use. Therefore, Rich was left with establishing that he had another vehicle available to him. He theorized that he could have borrowed a vehicle from a friend, but the phone records showed no contact with anyone during the morning hours of Saturday, February 16.

Not only would he need to find someone willing to loan him a vehicle, but he would have to gain access to that vehicle in sufficient time to be able to drive back to Iowa City in time to commit the crime between 430am-445am. By his own admission, Detective Rich placed Venckus in Chicago at 100am with a 3 ½ hour drive ahead of him. That means that Venckus would have to find a vehicle by 100am in order to make it back in time to be physically present when the victim was raped.

So, it should not come as a surprise that Rich was unable to establish how Venckus got to Iowa City after 100am.

D. DNA Evidence Belonging to Venckus: Another problem for Rich was the quantity and quality of the DNA evidence relating to Venckus. As noted by Angela Butler, there were no Venckus skin cells found on the victim. Further, there was the absence of seminal fluid in the samples belonging to Venckus. The only DNA evidence was a nominal amount of sperm cells that

could only be explained by transfer of DNA. So, the only DNA attributable to Venckus was the presence of a small amount of sperm without any corresponding skin cells or seminal fluid. How can someone leave just sperm without any seminal fluid or evidence of skin cells? The only reasonable answer is transfer.

E. DNA evidence belonging to Markley: In contrast, Markley's skin cells were located inside the cervix of the victim. While one could imagine a scenario where transfer places some of Venckus' sperm in the cervix of the victim, one cannot explain the presence of skin cells belonging to someone who did not reside in the house absent actual contact. Only actual contact between Markley and the victim can explain its presence. Further, the victim's blood was found on the outside of the jeans belonging to Markley, as well as on the inside of Markley's jeans in the fly of the pants. The DNA evidence pointed to Markley being the individual that sexually assaulted L.M. His saliva was also located on the area of L.M.'s shoulder where L.M. was bit. Reasonably, one can conclude Markley was the one who bit L.M. while sexually abusing her

Rich admitted that Ms. Butler's report made his theory uncertain: "I think the water got a little more muddy as we get closer to trial." (App. Vol. I, p. 288, 342).

F. Significance of Rich's April 1, 2016 Testimony: Rich conceded that only one individual sexually assaulted the victim. Then, Rich pronounced that Markley did not sexually assault L. M; he pointed a finger at Venckus as the assaulter. This caught both prosecutors by surprise. (App. Vol. I, pp. 348, 353-54). Further, Rich continued to proclaim that Venckus never left Iowa City.

Aside from being wrong on both counts, his testimony on April 1, 2016 is important because Rich claimed that he first believed Venckus had left Iowa City on that Friday when he learned of the testimony from the Chicago attorney. Attorney Zayyad was deposed in September 2015. To believe Rich, one would have to conclude that he learned of the importance of Zayyad in the fall of 2015. But that does not comport with his testimony on April 1, 2016, when he continued to argue that Venckus never left Iowa City, pointed a finger directly at Venckus and away from Markley as the individual who sexually assaulted the victim.

G. Change of Opinion: Rich was untruthful when he testified that he first came to that conclusion in the fall of 2015. He clearly had not because he was still proclaiming Venckus never left Iowa City during his deposition in April 2016. But, by the time of trial, he had changed his opinion and now proclaimed that Venckus was in Chicago on Friday afternoon and evening.

Therefore, Rich changed his opinion about who assaulted whom and the role of Venckus after April 1, 2016. Because he had changed his opinion, he now had to produce an explanation for how Venckus could have been in Chicago as late as 100am on Saturday morning and still commit this crime at 430am. Even though Rich was unable to explain because there was no evidence to support any such explanation, Rich continued to push and pursue this prosecution.

H. Misrepresentations: There are two pieces of information offered by the defense that warrant special comment because they reflect Rich's desperation that is the hallmark of the criminal charges against Venckus. The first is a recording of a conversation between Sgt. Paul Batcheller and Venckus' roommate Kyle Luzzi. The defense offered this recording as evidence that there was a reference made to a "Josh" being at the party when the police were first called.[4] But, Batcheller testified that the "Josh" in the recording was a different "Josh". (App. Vol. I, pp. 238, 240-242).

The second piece of evidence is a debit card transaction at Panda Express in Iowa City. Rich testified at trial that this commercial transaction found in Venckus' bank records suggested that he had never left Iowa City.

[4] This even though by the time of trial Rich has conceded that Josh went to Chicago.

(App. Vol. I, pp. 403, 430). However, it was shown during his cross-examination at trial that Rich had been provided with additional information before trial regarding that transaction which disputed its authenticity. (App. Vol. I, pp. 403, 488-493). Rich confirmed this during his deposition in this civil case. (App. Vol. I, pp. 288, 338-339).

In both instances, Rich had information during his investigation that undermined the accuracy and relevance of both pieces of information, yet that evidence was offered at trial as part of the prosecution's case in chief and again as a defense in this case. In both instances that information was untrue, but Rich still testified to it. These "misrepresentations" further support a conclusion that Rich knew *in advance of trial* that he did not have proof of Venckus' guilt but was willing to mislead the jury to support a prosecution that he knew did not have probable cause.

I. Actual Malice: In a malicious prosecution claim against a public official, a plaintiff must produce substantial evidence to establish that the defendant acted with actual malice. *Vander Linden at* 906. ("[A]n affirmative showing defendant's instigation of criminal proceedings against plaintiff was primarily inspired by ill-will, hatred or other wrongful motives.").

Rich acted with wrongful motive. Rich was willing to recognize DNA transfer as a reality and willing to use it so long as it gave him leverage for the

purposes of obtaining a confession from a suspect to a crime. However, when presented with overwhelming evidence of a provable alibi, along with evidence of DNA transfer, both from his own laboratory and a second laboratory, Rich refused to acknowledge such a possibility because it did not fit the narrative of the story he had already created. He had believed that Markley was not the rapist, and therefore he had supported a favorable plea agreement to Markley. But then he realized that he had been wrong. Now what was he to do? He could admit his mistake and accept the fallout. Or he could make Venckus the scapegoat. He chose the latter. This wrongful motive is evidenced in the events of April 1, 2016 through September 7, 2016.

1. April 1, 2016 to September 7, 2016: Rich surprised the prosecuting team by undermining the allegations against Markley. Rich asserted that the sexual assault of the victim was done by only one person and pointed the finger at Venckus and away from Markley. To do so, Rich purposefully and intentionally overlooked the overwhelming evidence that Venckus had left the State of Iowa on Friday afternoon. At his April 1, 2016 deposition, he continued to claim that Venckus had never left Iowa City. To make matters worse, Rich downplayed any evidence of physical contact between Markley and the victim, to the point of claiming that the evidence was exclusively more compelling regarding the sexual assault by Venckus than by Markley.

This was a serious misstep for three reasons. First, by failing to disclose his anticipated testimony to the prosecution team, he left it surprised that he would limit the claim against Markley. Secondly, two weeks after his testimony, the District Court granted a Motion to Sever the defendants and ordered the trial of Markley before the trial of Venckus. Given the concession made by Rich that Markley had not sexually assaulted the victim, the prosecution against Markley took a fatal blow. This resulted in a very favorable plea agreement for Markley, which Rich pushed with the hope that the State would use Markley as a witness, all over the objection of the lead prosecutor. Imagine having to tell the victim that the person that raped you is now getting a sweetheart deal on the rape charge? Anne Lahey did not have to imagine: "I said, *how am I going to explain this to the victim. I remember specifically I was told not to contact the victim."* (App. Vol. I, pp. 348, 360-361) (Emphasis added).

The third reason it was a serious misstep was when the report of Angela Butler placed the rape squarely on Markley and cast substantial doubt on the DNA evidence that had been the sole support for any perceived probable cause. Rich got the bad news on July 11, 2016. At this point, Rich knew that Markley was the rapist, Venckus' DNA could be reasonably explained by transfer, and there was no doubt that Venckus was in Chicago over the weekend. By then, Detective Rich had been the driving force behind the lenient plea agreement on

behalf of the rapist as well as the same driving force against an innocent man. Despite this knowledge, Rich forged on.

2. Wrongful Motive: If it had not yet dawned on Rich that he had screwed up this case, it was now plainly in front of him. The proper thing to do was to go to the prosecutor and request dismissal of the charges against Venckus. But to do so would be to admit that he was wrong in his April 2016 testimony; that he was wrong to push for the plea agreement for Markley; that it was wrong to keep the plea agreement away from the family; to tell the family that the person that they thought had raped their daughter had not; and that the person that had raped their daughter had gotten away with the rape.

Whatever one calls the human response to the debacle that was now the handling of the criminal investigation of the rape of L.M., it was wrongful to continue in the face of the overwhelming evidence that Venckus had not been present when this young woman was victimized.

Rather than do the proper thing, he opted to double down on the prosecution of Venckus, because his priority was to save face. He lobbied for the continuing prosecution of Venckus:

> I think our theory was good; whether good is 75%, 65%, I mean, we felt that it was good enough to take us beyond probable cause and ***into an agreement with the County Attorney's office*** *that*

> *we could take this thing to trial and try to prove it beyond a reasonable doubt. So that was what we had moving forward, and Anne agreed we would present it to the jury and see what the jury thought, and, obviously, the jury thought something different*.

(App. Vol. I, pp. 94-95, emphasis added). A reasonable jury could conclude that Rich had a wrongful motive to continue the prosecution of Mr. Venckus.

J. Conclusion: A jury can reasonably conclude that by conceding that Venckus went to Chicago on Friday, any pre-existing belief that there was probable cause gave way to overwhelming doubt about the existence of probable cause. With an inability to establish a timeline that would have permitted Venckus to both be in Chicago and at the crime scene in Iowa City, Rich was left grasping at straws. His "theory" that Venckus waited until 100am to decide to return to Iowa City for a party that would end at 330am and without communicating with anyone at the party regarding a desire to return or inquiring whether the party was still going on, both lacked evidentiary support and common sense. In short, it was an unreasonable belief on his part. To establish probable cause, you have to have a reasonable belief developed in good faith. Neither of those exist here.

II. *GODFREY* CLAIMS APPLY TO MUNICIPALITIES OR THEIR EMPLOYEES.

Preservation of Error.

See Section I. Venckus preserved error for review.

Standard of Review.

"We review the legal issues necessary for resolution of the constitutional claims presented within the context of the summary judgment proceeding *de novo*." *Godfrey v. State*, 898 N.W.2d 844, 847 (Iowa 2017). ("*Godfrey II*").[5]

Merits.

A. District Court Ruling: The District Court concluded that this Court has only permitted "direct constitutional claims… against the State of Iowa and its employees." (App. Vol. I, pp. 649-650). Venckus disagrees. This case presents the Court with the opportunity to confirm its prior rulings.

B. Existing Law on Constitutional Claims against Municipalities:

This Court has recognized a "tort claim *under the Iowa Constitution* when the legislature has not provided an adequate remedy." *Godfrey II* at 880

[5] The shortcut names for *Godfrey* and *Baldwin* follow the numbering system utilized by this Court in *Wagner v State of Iowa*, 952 N.W.2d 843 (Iowa 2020). This numbering system is different than the system this Court used in *Baldwin I*.

(emphasis added) In *Godfrey II*, the Court allowed claims for violations of article I, §§6 and 9. *Id*. at 871-72. The Court stated "[w]hen a constitutional violation is involved, more than mere allocation of risks and compensation is implicated. The emphasis is not simply on compensating an individual who may have been harmed by illegal conduct, but also upon deterring unconstitutional conduct in the future." *Id.* at 877. "The focus in a constitutional tort is not compensation as much as ensuring effective enforcement of constitutional rights." *Id.*

In *Baldwin v. City of Estherville*, 915 N.W.2d 259 (Iowa 2018) (*"Baldwin I"*), this Court found that *Godfrey II* claims applied to article, I, §§1 and 8, subject to an affirmative defense of qualified immunity. *Baldwin I* at 260-61. This Court summarized its holding and the basis for its holding as follows:

> We believe instead that qualified immunity should be shaped by the historical Iowa common law as appreciated by our framers and the principles discussed in *Restatement (Second) of Torts section 874A*.
>
> This means due care as the benchmark. Proof of negligence, i.e., lack of due care, was required for comparable claims at common law at the time of adoption of Iowa's Constitution. And it is still the basic tort standard today. See *Restatement (Second) of Torts § 874A* (discussing reliance on analogous tort standards).
>
> Because the question is one of immunity, the burden of proof should be on the defendant. Accordingly, to be entitled to qualified immunity a defendant must plead and prove as an affirmative defense that she or he exercised all due care to comply with the law.

> We find support for our approach in a recent and thoughtful critique of *Harlow* [*v. Fitzgerald*, 457 U.S. 800 (1982)]. See John C. Jeffries Jr., *The Liability Rule for Constitutional Torts*, 99 Va. L. Rev. 207 (2013). Professor Jeffries notes, "The basic and essential remedy for most constitutional rights is the opportunity to assert them defensively against government coercion." *Id*. at 242. Nevertheless, Professor Jeffries concludes that "damages are appropriate to the vindication of constitutional rights, absent countervailing concerns, of which the most important and obvious would be superseding remedial legislation." Id. at 259 (footnotes omitted). "[C]onstitutional tort actions are presumptively appropriate." Id.
>
> In the end, Professor Jeffries condemns *Harlow* as "an overly legalistic and therefore overly protective shield," but advocates for a more straightforward "protection for reasonable error." *Id*. at 258-60. "The problem with current law is its implicit equation of reasonable error with the space between decided cases." *Id*. at 260.
>
> We agree. Constitutional torts are torts, not generally strict liability cases. **Accordingly, with respect to a damage claim under article I, sections 1 and 8, a *government official*** whose conduct is being challenged will not be subject to damages liability if she or he pleads and proves as an affirmative defense that she or he exercised all due care to conform to the requirements of the law.

Baldwin I at 280-81 (emphasis added). Further, this Court stated the following regarding the application of immunities in Iowa Constitutional claims:

> Iowa's tort claims acts already protect ***government officials*** in some instances when they exercise due care. See, e.g., Iowa Code § 669.14(1)…; § 670.4(1)(c)…. The problem with these acts, though, is that they contain a grab bag of immunities reflecting certain legislative priorities. Some of those are unsuitable for constitutional torts.

Baldwin I at 279-280. (Emphasis added). This Court did not distinguish between State and Municipal officials in describing “government officials.”

In *Baldwin v. City of Estherville*, 929 N.W.2d 691(Iowa 2019) ("*Baldwin II*"), this Court answered additional certified questions. The Court concluded that a municipality could assert qualified immunity as a defense. *Baldwin II* at 695-98. It also found that punitive damages are not an available remedy in constitutional tort actions against a municipality, but "common law attorney fees" can be awarded "if the opposing side 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Baldwin II* at 698-700.[6] In doing so, this Court reaffirmed the existence of Iowa Constitutional tort claims against municipalities and their employees.

Further, this Court made clear that Constitutional claims against municipalities fall within Chapter 670, citing to the language of the statute itself (Iowa Code § 670.1(4)) to support its conclusion. *Baldwin II* at 697.

This Court's most recent pronouncement on Iowa Constitutional claims is *Wagner v. State*, 952 N.W.2d 843 (Iowa 2020). Justice Mansfield summarized the case law involving Iowa Constitutional claims relevant to municipalities as follows:

> The following term, the *Baldwin* case came before us for the first time. *Baldwin* was a federal court proceeding against a city and city officials where we were called upon to answer certified questions. In 2018, in *Baldwin I*, **we addressed whether a qualified immunity defense was available for a direct constitutional claim under article I, section 8**

[6] However, punitive damages are available against municipal employees. Iowa Code 670.12.

> **of the Iowa Constitution**. We declined to strictly follow the immunities in the Iowa Municipal Tort Claims Act (IMTCA)—or for that matter the ITCA. … [W]e determined that an official who had exercised "all due care" should not be liable for damages, a standard that bears resemblance to one of the immunities set forth in the ITCA and the IMTCA. *Baldwin I* expressly left open whether other provisions of the ITCA and the IMTCA would apply to constitutional tort claims against public officials and public agencies.
>
> **In 2019, in *Baldwin II*, we answered that open question as to the IMTCA. We held that the IMTCA generally governs constitutional tort damage claims against municipalities and municipal employees acting in their official capacities. Summing up, we said that "the IMTCA applies to Baldwin's Iowa constitutional tort causes of action."**…
>
> Just a few weeks later in *Venckus* [*v. City of Iowa City*, 930 N.W.2d 792 (Iowa 2019)], another 2019 case involving claims against municipalities and municipal officials, **we reiterated that "[c]laims arising under the state constitution are subject to the IMTCA." Applying the IMTCA, we held in *Venckus* that the two-year statute of limitations in Iowa Code section 670.5 governed constitutional tort actions against a municipality and its employees acting in their official capacity.**

Wagner at 851-852 (Emphasis added in bold).

Wagner held that the Iowa Tort Claims Act (Chapter 669) applied to Iowa Constitutional claims against the State of Iowa but limited its application to procedural matters, including the statute of limitations. *Wagner* at 858-859.

C. Application of Law to District Court Ruling: The District Court's conclusion is contradicted by the line of cases beginning with *Baldwin I*. If the District Court is correct, then this Court established an affirmative defense (qualified immunity), limited punitive damages, prohibited attorney fees, and

established a statutory process for municipal constitutional claims for a claim that does not exist. There is absolutely no need to evaluate these issues if a cause of action is not available under the Iowa Constitution. For example, no one needs qualified immunity for a non-existent cause of action.

It is hard to imagine how the District Court could have misunderstood the following clear statement made by this Court in *Wagner*:

> In 2019, in *Baldwin II*… [W]e held that the IMTCA generally governs constitutional tort damage claims against municipalities and municipal employees acting in their official capacities. Summing up, we said that "the IMTCA applies to Baldwin's Iowa constitutional tort causes of action."

Wagner at 852.

Nevertheless, it is necessary for this Court to state unequivocally that the Iowa Constitution is worthy of protection from all government officials, not just those who work for the State. Accordingly, Venckus requests that this Court reverse the District Court and state that Venckus is permitted to assert Iowa Constitutional tort claims against municipalities and their employees or agents.

III. THIS COURT HAS ALREADY RECOGNIZED CONSTITUTIONAL TORT CLAIMS UNDER ART. I, §1 AND ART. I, §8 OF THE IOWA CONSTITUTION.

Preservation of Error.

See Section I. Venckus preserved error for review.

Standard of Review.

See Section II.

Merits.

A. District Court Ruling: In addition to finding that there is no Iowa Constitutional tort claim available against municipalities and their employees, the District Court also concluded that article I, §1, and article I, §8 are not self-executing and therefore direct claims cannot be made. (App. Vol. I, pp. 650-51).

B. Existing Caselaw on Constitutional Claims: *Baldwin I* involved claims under both §§1 and 8 of article I of the Iowa Constitution and this Court permitted such claims, subject to the affirmative defense of qualified immunity. Further, *Wagner* involved a claim for excessive force under art. I, §8 (as well as a claim under article I, §9) and held that such claims are procedurally governed by the Iowa Tort Claims Act (Chapter 669).

In *Godfrey*, the Court made the following statement:

> For the reasons expressed below, a majority of the court concludes that *Bivens* claims are available under the Iowa Constitution and that the claims raised by plaintiff in Counts VI and VII were improperly dismissed.

Id. at 847. The reference to *Bivens* is to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). That case involved a Fourth Amendment claim for *unlawful search and seizure*. The United States

Supreme Court concluded that an individual alleging a violation of the search and seizure provisions of the United States Constitution can assert a claim against a Federal official. *Bivens* at 397 ("The very essence of civil liberty certainly consists in the right of every individual to claim protection of the laws, whenever he receives an injury. …[W]e hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment.").[7]

Iowa's version of the Fourth Amendment is art. I, §8. Accordingly, a claim for the violation of an individual's right to be free from improper search or seizure is a claim akin to *Bivens* and therefore self-executing. It would be incongruent to conclude that *Godfrey* claims for violation of art. I, §8 are not cognizable as *Bivens*-type claims when the *Bivens* claims itself was for the same violation.

There is no case that holds to the contrary and this Court has established a line of cases that makes clear that Iowa Constitutional claims exist against those entities and government officials (State or Municipal) that violate constitutional rights. It is also noteworthy that this Court has stated

[7] Bivens has been extended to "the full panoply of rights contained in the Constitution." Rosen, *The Bivens Constitutional Tort: An Unfulfilled Promise*., 67 N.C.L. Rev. 337, 342.

that "neither the ITCA nor the IMTCA itself creates a cause of action." *Wagner* at 853.

Similarly, *Baldwin I* recognized a claim against a municipality for a violation of article 1, §1 of the Iowa Constitution. *Baldwin I* at 281. Known more commonly as the Inalienable Rights provision of the Iowa Constitution, it is the first section of the first article of the Iowa Constitution. It is the heart of the Iowa Constitution. It outlines the premiere importance of life, liberty, property and the pursuit of happiness.[8] Often, this section is partnered with article I, § 9, the due process section of the Iowa Constitution and much of the case law focuses on §9. Pettys, *The Iowa State Constitution*, p. 67 (2018). Nevertheless, the inalienable rights provision can be separate support for the conclusion that arbitrary and unreasonable conduct by the government can violate this section of the Iowa Constitution. *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168 (Iowa 2004); *State v. Osborne*, 154 N.W. 294, 299 (Iowa 1915).

In *Gacke*, this Court noted that the inalienable rights provision "is not a mere glittering generality without substance or meaning." It was "intended to secure citizens' pre-existing common law rights (sometimes known as "natural rights") from unwarranted government restrictions." *Gacke* at 176.

[8] The U.S. Constitution 5th Amendment makes no mention of the pursuit of happiness. See Grodin, *Rediscovering the State Constitutional Right to Happiness and Safety*, 25 Hastings Const. L.Q. 1 1997-1998.

Accordingly, to assert a claim under article I, §1, the plaintiff must establish that the right asserted is protected and that the conduct of the government is arbitrary and capricious, and not a reasonable exercise of the state's police power.

C. Application of Law to District Court Ruling: The District Court's conclusion that there is no claim available under article I, §1 or §8 is incorrect. This Court has recognized claims under each of these Constitutional provisions.

IV. THERE IS A GENUINE ISSUE OF MATERIAL FACT WITH REGARD TO VENCKUS' IOWA CONSTITUTIONAL TORT CLAIMS.

Preservation of Error.

See Section I. Venckus preserved error for review.

Standard of Review.

See Section II.

Merits.

The facts and argument outlined in Section I are applicable to Venckus' constitutional tort claims. The article I, §1 claim requires proof of arbitrary conduct. Pursuing a meritless criminal investigation and prosecution of Venckus is the definition of arbitrary conduct. The article I, §8 claim requires proof of a "seizure." Venckus was subject to restriction on his movement

throughout the prosecution and was prevented from traveling without court order. The wrongful allegations made and continuing prosecution by Rich caused Venckus to be continually seized. He knew that Venckus was innocent but continued to press for his prosecution all to protect his own reputation. *State v. Naujoks*, 637 N.W.2d 101, 107 (Iowa 2001) ("The essential purpose of the Fourth Amendment 'is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents in order 'to safeguard the privacy and security of individuals against arbitrary invasion' ").

The article I, §9 claim requires more analysis. Article I, § 9 provides that "no person shall be deprived of life, liberty, or property, without due process of law." The law demands the highest level of protection for this right and demands the government respect this right and not to interfere in it absent compelling evidence. It is not subject to interference based on a gut feeling in the face of reliable exculpatory evidence.

"Generally speaking, '[s]ubstantive due process principles preclude the government "from engaging in conduct that 'shocks the conscience,' or interferes with rights 'implicit in the concept of ordered liberty.'" *Zaber v. City of Dubuque*, 789 N.W.2d 634, 640 (Iowa 2010); *County of*

Sacramento v. Lewis, 523 U.S. 833, 845-47 (1998) (utilized in §1983 litigation).

> What "shocks the conscience" means is not as clear.
>
> Thus, attention to the markedly different circumstances of normal pretrial custody and high-speed law enforcement chases shows why the deliberate indifference that shocks in the one case is less egregious in the other…. *As the very term "deliberate indifference" implies, the standard is sensibly employed only when actual deliberation is practical*, and in the custodial situation of a prison, forethought about an inmate's welfare is not only feasible but obligatory under a regime that incapacitates a prisoner to exercise ordinary responsibility for his own welfare.

Lewis at 848-851 (emphasis added).

There are two points to take away from *Lewis:* First, the constitutional analysis at the federal level treats constitutional claims as something other than tort claims[9] and accordingly demands a greater standard of care than negligence, such as "deliberate indifference"; secondly, the term "shocks the conscience" is by its nature a flexible term depending on the circumstances, such as whether there is time for reflection and investigation, as opposed to split-second decision-making sometimes involved in the police setting.

[9] See *Baker v. McCollan*, 443 U.S. 137, 142 (1979) ("Respondent's claim is that his detention in the Potter County jail was wrongful. Under a tort-law analysis it may well have been. The question here, however, is whether his detention was unconstitutional.").

These two points become important in analyzing this case. First, Iowa constitutional claims have been deemed *constitutional tort claims*. *Godfrey* at 880; *Baldwin I* at 280 ("Constitutional torts are torts, not generally strict liability cases."). Because they are constitutional tort claims, the foundation for the "shocks the conscience" test is not involved. Concepts applicable to tort claims can be utilized in assessing Iowa Constitutional violations. The truest example is the "all due care" standard in assessing qualified immunity. *Id*. at 280. This is also reflected in the Court's language in *Baldwin*:

> This means due care as the benchmark. Proof of negligence, i.e., lack of due care, was required for comparable claims at common law at the time of adoption of Iowa's Constitution. And it is still the basic tort standard today. See *Restatement (Second) of Torts § 874A* (discussing reliance on analogous tort standards).

Baldwin I at 280.

Venckus contends that the "shocks the conscience" test is not applicable in this setting to analyze substantive due process claims under the Iowa Constitution. It is inconsistent with *Godfrey* and *Baldwin*, and the underlying basis for using that test in the State of Iowa. In addition, it would make qualified immunity moot in any case involving proof beyond negligence. If defendants' conduct "shocks the conscience", qualified immunity would be unavailing. For a comprehensive assessment of the "shocks the conscience" test and the need for a new test, the court is referred

to Levinson, *Time to Bury the Shocks the Conscience Test*, 13 Chap. L. Rev. 307, 308 (2010); *see also* Tepker, *The Arbitrary Path of Due Process,* 53 Okla. L. Rev. 19 (2000).

Secondly, if the Court requires Venckus to establish that Rich's conduct "shocks the conscience", then the court must consider that there was nothing about the deliberative process available to Rich that required any form of split-second or immediate decision. He had months to consider the overwhelming evidence that Venckus was in Chicago at the time of the assault.

Rich also had months to consider DNA testing performed by Angela Butler that established Markley as the individual who sexually assaulted the victim, and established the lack of evidence of any skin cells and lack of seminal fluid belonging to Venckus. He had months to consider that these pieces of information established that any DNA evidence belonging to Venckus was a product of transfer, the only reasonable explanation for why Venckus' nominal sperm cells would be present when he was 3 ½ hours away in his Chicago home. Between the lack of reliable DNA evidence, the premise that there was only one perpetrator, the clear evidence of a sexual assault by Markley, the overwhelming evidence that Venckus had left Iowa City for Chicago on Friday and showed no inclination to return, the lack of an opportunity for Mr. Venckus to return in time to commit the crime, and the

need to be present back in Chicago by 700am, it was intentional and reckless of Rich to persist in seeking the conviction of Venckus. Overall, there is substantial evidence from which a jury could conclude that the conduct of Rich was arbitrary and without evidentiary support.

Assuming arguendo that the Court requires the "shocks the conscience" test, there is nevertheless substantial evidence to meet that standard. The Iowa Court of Appeals discussed the standard to be used in §1983 litigation involving reckless investigations. *Sheeler v. Nev. Cmty. Sch. Dist.*, 2018 Iowa App. LEXIS 715 (Iowa App. 2018):

> Circumstances indicating a failure to investigate that shocks the conscience include "(1) evidence that the state actor attempted to coerce or threaten the defendant, (2) ***evidence that investigators purposefully ignored evidence suggesting the defendant's innocence***, [and] (3) ***evidence of systematic pressure to implicate the defendant in the face of contrary evidence***." *Akins v. Epperly*, 588 F.3d 1178, 1184 (8th Cir. 2009).)

Sheeler at *7-8 (Emphasis added). In that case, the plaintiff did not argue for a different analysis under the Iowa Constitution. *Sheeler* at *8.

In *Akins v. Epperly*, 588 F.3d 1178 (8th Cir. 2009), the Eighth Circuit noted that "In *Wilson v. Lawrence County* [260 F.3d 946, (8th Cir. 2001)], we recognized a substantive due process cause of action for reckless investigation in circumstances in which the state actor had the opportunity to consider 'various alternatives prior to selecting a course of conduct.' … Akins

must show that Trammell and Vaughan 'intentionally or recklessly failed to investigate, thereby shocking the conscience.' *Akins* at 1183-84 (Citing *Wilson* at 956-57).

Venckus' claim is premised on a shocking decision to ignore the overwhelming evidence that he was in Chicago at the time of the event, that the crime was committed by one person, and that the one person was Markley. All of which occurred with the opportunity to consider "various alternatives prior to selecting a course of conduct." Venckus has established substantial evidence to submit the article I, § 9 claims for substantive due process to the jury.

V. JUDICIAL PROCESS IMMUNITY DOES NOT APPLY TO VENCKUS' CLAIMS.

Preservation of Error.

See Section I. Venckus preserved error for review.

Standard of Review.

Review of the interpretation of immunity statutes is for errors at law. *Schneider v. State*, 789 N.W.2d 138, 144 (Iowa 2010). As for its application to constitutional claims, see Section II.

Merits.

Judicial Process immunity is another attempt to avoid malicious prosecution and Constitutional tort claims. In *Thomas v. Gavin*, 838 N.W.2d

518, 522 (Iowa 2013), this Court held that Chapter 669 immunities do not apply to Chapter 670 claims. In short, "there is no counterpart in section 670.4 to the ITCA's exception for claims based on assault, battery, false arrest, or malicious prosecution." If the legislature wanted to immunize officers from malicious prosecution claims, the legislature could have provided for such immunity.

In their argument, defendants seek to apply judicial process immunity which generally applies to testifying in a judicial proceeding. In *Venckus I*, this Court stated that this defense "does not give government officials carte blanche to engage in misconduct. [It] is narrowly tailored to immunize only conduct 'intimately associated with the judicial phase of the criminal process.'" *Id* at 802-03. Venckus' claim is focused on a reckless investigation that continued up until the commencement of trial and the decision to proceed with criminal charges despite the lack of probable cause tied to that investigation. This Court has never granted absolute immunity to a complaining witness or to an official performing investigatory acts. *Minor v. State*, 819 N.W.2d 383, 389 (Iowa 2012). Here, Rich was the lead investigator and the individual who filed a complaint against Venckus. Therefore, he is not entitled to absolute immunity. He can assert qualified immunity, but it would not protect him from a reckless investigation. *Minor*

at 400. If the court were to extend the judicial process immunity as requested by the defendant, there would be no ability to hold people accountable for reckless investigations or the pursuit of unsupported criminal charges/prosecutions.

VI. DISCRETIONARY FUNCTION IMMUNITY DOES NOT APPLY TO VENCKUS' CLAIMS.

Preservation of Error.

See Section I. Venckus preserved error for review.

Standard of Review.

See Section V.

Merits.

Discretionary function immunity does not apply to a claim for malicious prosecution. The legislature prohibited such claims against State officials, but not against municipal officials. *Thomas* at 524 ("expressio unius est exclusio alterius."). There the Court noted that other immunity provisions of Chapter 670 do not undermine common-law torts that have not been immunized by the legislature. *Thomas* at 625.

The Court should not be required to analyze each individual act of a police officer under the discretionary function immunity when the legislature

has otherwise failed to immunize police officers for acts that constitute malicious prosecution.

Moreover, discretionary function immunity or any other immunity set forth in Chapter 670 has not been applied by this Court to Iowa Constitutional tort claims. In *Wagner*, the Court permitted the use of Chapter 670 for procedural aspects of claims but refused to apply the immunities therein on a blanket basis. *Id. at* 859.

Discretionary function immunity is inapplicable to this case.

VII. FOR THE SAME REASONS, CHAPTER 670 IMMUNITIES CANNOT APPLY TO VENCKUS' CLAIMS.

Preservation of Error.

See Section I. Venckus preserved error for review.

Standard of Review.

See Section V.

Merits.

Rich also raised immunity defenses under Iowa Code §670.4(1)(d) and §670.4(1)(j). For the same reasons discussed in the sections above, these provisions are not applicable. The argument that one cannot make a malicious prosecution claim because the prosecutor ultimately decides whether to dismiss charges, ignores the fact that malicious prosecution claims are permitted notwithstanding that potential. For such a claim,

Venckus must establish that Rich had the ability to influence the prosecution. As note earlier, Rich did just that. (App. Vol. I, p. 335). If he could influence the decision to go to trial as he admitted to, he could influence a decision not to go to trial.

Venckus contends that Rich committed a recognized common-law tort not subject to immunity. The fact that there may be other persons that relied upon and acted upon the wrongful conduct of this Detective does not provide immunize Rich. Moreover, statutory immunities should not apply to Iowa Constitutional tort claims. The issue of causation is one for a jury. Iowa R. App. P. 6.904(3)(j).

This Court should reject the statutory immunity arguments described above.

VIII. IOWA CODE §670.4A DOES NOT APPLY RETROACTIVELY, AND, EVEN IF IT DID, THE STATUTE IS UNCONSTITUTIONAL.

Preservation of Error.

See Section I. Venckus preserved error for review.

Standard of Review.

See Section V.

Merits.

Iowa Code §670.4A seeks to overrule this Court's holding in *Baldwin I* and impose a legislative definition of "qualified immunity" that mirrors the definition used in *Harlow v. Fitzgerald, 457 U.S. 800 (1982).*

There are two problems with this statute. First, it cannot be applied retroactively since the events and the claim pre-date the enactment of this statute. Secondly, *Harlow* immunity was rejected by this Court in *Baldwin I* and this Court is the "final arbiter of the meaning of the Iowa Constitution." *State v. Wright*, 961 N.W.2d 396, 402 (Iowa 2021).

A. The New Statutory Language Is Not Retroactive

§670.4A does not have retroactive effect before its effective date of June 17, 2021. This Court has held that it "is well established that a statute is presumed to be prospective only unless expressly made retrospective. [Citing] Iowa Code § 4.5." *Baldwin v. Waterloo*, 372 N.W.2d 486, 491 (1985).

Acts of the general assembly, passed during a regular session, take effect on "July 1 following its passage unless a different effective date is stated in an act of the general assembly…." Iowa Const. art. III § 26. In §670.4A, the Legislature did not use language that permits retroactivity. It only establishes an effective date of June 17, 2021, and does not mandate retroactive application.

Moreover, even if the statute permitted retroactive application, the change in the qualified immunity standard is not a procedural change. The language specifically impacts Venckus' substantive rights. "Statutes which specifically affect substantive rights are construed to operate prospectively unless legislative intent to the contrary clearly appears from the express language or by necessary and unavoidable implication." *Matter of Chicago, Mil., St. P. & Pac. R.R.*, 334 N.W.2d 290, 293 (Iowa 1983). "Substantive law creates, defines and regulates rights." *State ex rel. Turner v. Limbrecht*, 246 N.W.2d 330, 332 (Iowa 1976). Procedural law, on the other hand, "is the practice, method, procedure, or legal machinery by which the substantive law is enforced or made effective." *Id*. at 332.

This Court made qualified immunity an affirmative defense which requires the defendants to plead and prove that they acted with "all due care." *Baldwin I* at 280-81. Iowa Code §670.4A is an attempt by the Iowa legislature to overturn the *Baldwin I* holding. The statute alters the standard thereby affecting Venckus' substantive rights. *See Wagner* at 859 ("In *Baldwin I*, we shaped and refined the independent damages claim for constitutional violations we had just recognized in *Godfrey II*. The immunity question we decided was one of substantive law."). In this

instance, the amendments to Iowa Code §670.4A, if constitutional, are prospective only.

Finally, Venckus' claim was vested at the time of the events and when he filed his lawsuit. The application of the new statute to his tort and constitutional claims would constitute a violation of his due process rights under art. I, §9 of the Iowa Constitution and the Fifth Amendment to the U.S. Constitution. *Thorp v. Casey's General Stores, Inc*., 446 N.W.2d 457, 463 (Iowa 1989) ("[W]e believe that plaintiff had a vested property right in her cause of action against Casey's and that the retroactive application of the 1986 amendment destroyed that right in violation of due process under both the federal and state constitutions.").

The holding in *Thorp* demonstrates that Iowa Code §670.4A cannot be applied to this case since Venckus had a vested interest in his claims at the time of the events and when he filed suit. Since the legislation would impact the application of existing law to his vested property right, the statute would be unconstitutional as applied to him. *Id*. at 462.

B. The New Statute Relating to Qualified Immunity Is Unconstitutional

The Iowa legislature is acting outside the scope of its authority in attempting to define the meaning of the Iowa Constitution. "There is no question as to a legislature's power to retroactively cure defects in existing

statutes or to modify them to restrict or expand their reach. The general rule is that a legislature may do anything by curative act which it could have done originally." *Schwarzkopf v. Sac County Bd. of Supervisors*, 341 N.W.2d 1, 4 (Iowa 1983). But, defining the meaning of the Iowa Constitution is not something the legislature has authority to do. That is the exclusive role of the courts, particularly the Iowa Supreme Court. This Court made that clear recently: "None of the departments of our state government are authorized—by bill, order, rule, judicial decision, or otherwise—to make law or legalize conduct infringing upon the minimum rights guaranteed in the Iowa Constitution…. This court is the final arbiter of the meaning of the Iowa Constitution. " *Wright* at 402.

The new statute directly contradicts this Court's holding in *Baldwin* I and that is the point of the statute. The proponents of the new legislation specifically argued that it was intended to overturn *Baldwin I*. Sen. Dawson, referring to the *Baldwin I* case, claimed "I would submit to the body here that the Supreme Court got it wrong on that particular case, and what we are trying to do is put this genie back in the bottle." S.F. 476, Iowa Senate Floor Debate at 7:21.

The "all due care" requirement is the standard when applying the Iowa Constitution. *Baldwin I* at 280. This Court specifically rejected the

Harlow standard for Iowa Constitutional claims. *Id.* at 279. The legislature may not amend the Iowa Constitution in a single session, or without the express consent of the people of Iowa. See Iowa Const. art. X.

In *Wagner*, this Court held that damage claims filed against state officials can only be regulated by the Iowa legislature if they do not deny Iowans an adequate remedy. *Id* at 847. In the present case, disregarding the Supreme Court's "all due care standard" may prevent Venckus—and individuals like him--- from obtaining any remedy at all. The legislature's attempt to overrule *Baldwin I* must fail as an unconstitutional intrusion into this Court's role of the final arbiter of the Iowa Constitution.[10]

IX. THERE IS A GENUINE ISSUE OF MATERIAL FACT ON THE QUALIFIED IMMUNITY DEFENSE.

Preservation of Error.

See Section I. Venckus preserved error for review.

Standard of Review.

See Section II.

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[10] The gap between what the Iowa Constitution aspires to and what the legislature can devise to undermine it is a theme explored in Cady, *A Pioneer's Constitution: How Iowa's Constitutional History Uniquely Shapes Our Pioneering Tradition in Recognizing Civil Rights and Civil Liberties*, 60 Drake L. Rev. 1133 (2012).

Merits.

Rich bears the burden of proof that he acted with all due care. *Baldwin I* at 280-81. The evidence described throughout this brief and in the Statement of Facts precludes the grant of summary judgment on this affirmative defense.

Venckus has brought forth substantial evidence that would permit a jury to conclude that Rich's conduct in this case rises to the level of a reckless investigation or an intentional disregard for Venckus' constitutional rights as outlined above. There being a genuine issue of material fact as to whether Rich acted recklessly or with an intentional disregard for Venckus' constitutional rights, it was error for the District Court to grant summary judgment. It is a jury question.

X. VENCKUS' CLAIMS WERE BROUGHT WITHIN THE STATUTE OF LIMITATIONS.

Preservation of Error.

See Section I. Venckus preserved error for review.

Standard of Review.

Review of a ruling on a statute-of-limitations defense is for correction of errors of law. As it applies to constitutional claims, the review is *de novo*. *Harrington v. State*, 659 N.W.2d 509, 519-20 (Iowa 2003).

Merits.

The applicable statute of limitations for all of Venckus' claims is Iowa Code §670.5 which begins to run when the injury *claimed* occurs. *Venckus* at 807-08.

A. Malicious Prosecution claim:

When did Rich first recognize that he no longer had probable cause? Rich testified, on April 1, 2016, that Venckus had never left Iowa City. But at trial, he conceded that Venckus had left Iowa City on Friday. He then learns, on or around July 6, 2016, that the DNA evidence did not support his theory. The evidence supports the conclusion that sometime between April 1, 2016 and September 2016, Rich no longer had probable cause. It is at that point that Venckus suffers his wrongful injury. The wrongful injury is repeated each day that he is subject to prosecution thereafter. During this period, Venckus suffers both economic loss (e.g., defending the charge against him, including any financial loss due to the existence of the charge) and emotional injury due to the refusal to dismiss the criminal charges and continued prosecution against him.

Until a wrongful act has been committed, a plaintiff has not suffered an injury. After all, the statute of limitations under Chapter 670 requires that a plaintiff experience a "***wrongful*** …loss, or injury." An individual may sustain

an injury as a result of criminal charges or prosecution, but if those charges are righteous, there is no wrongful injury. A jury's job will be to determine when there was substantial information available to Rich to have been aware that Venckus was innocent and taken steps to dismiss the charges. At that point, Venckus begins to suffer injury due to the wrongful conduct. *Buszka v. Iowa City Cmty. Sch. Dist.*, 898 N.W.2d 292 (Iowa App. 2017) ("C.B.'s injury occurred no later than 2005, when the last abuse allegedly occurred."). In a continuing tort, the burden of segregating damages arising before and after the commencement of the limitation period falls on the defendant. *Earl v. Clark*, 219 N.W.2d 487, 491 (Iowa 1974).

The statute of limitations is an affirmative defense and the burden rests on the defendants to establish that defense. As a result, it is a fact question for a jury to resolve. *Shams v. Hassan*, 905 N.W.2d 158, 163 (Iowa 2017) ("We agree with the court of appeals that whether a claim in a civil case is barred by the statute of limitations should be determined by the factfinder, unless the issue is so clear it can be resolved as a matter of law.").

Venckus brought suit on March 15, 2018. He is entitled to damages for any wrongful act that occurred after March 15, 2016. Since Detective Rich gained sufficient knowledge on or after April 1, 2016, the claim for malicious prosecution was brought within the two-year statute of limitations for any

injury arising out of that malicious prosecution. Summary judgment is not appropriate on this record.

This interpretation is also supported by the tort of malicious prosecution which by caselaw is not established until the prosecution ends favorably to the claimant. *Mills County State Bank v. Roure*, 291 N.W.2d 1, 3 (Iowa 1980). Any other interpretation would result in *de facto* immunity. It would often require a criminal defendant subject to prosecution to bring an action before the prosecution ends, at a time when no cause of action exists since the prosecution has not ended. Venckus contends that the application of Iowa Code §670.5 does not apply until the *wrongful act* causing a *wrongful injury* occurred.

B. Iowa Constitutional claims: Since Iowa Constitution claims are tort claims, the same analysis applies. At what point did Rich violate Venckus' constitutional rights? The point at which his actions crossed over from legitimate law enforcement (probable cause) to unconstitutional conduct (lack of probable cause).

Rich contends that it needs to be when Venckus was arrested or when the prosecution began, presumably in 2014. However, if that were the point at which all cases relating to unconstitutional law enforcement conduct existed, there would never be a claim arising out of *Brady v. Maryland, 373 U.S. 83*

(1963) violations, or unjustifiable continuation of prosecutions. The obligation to meet the Constitution does not end when an individual is arrested or charges are filed. The obligation to meet the Constitution exists throughout the law enforcement continuum, especially in a case like this where Rich was heavily involved in all aspects of the case and its management.

Iowa Code §670.5 requires that there be an act that causes a wrongful injury. One cannot be deemed to have suffered a wrongful injury if the conduct is neither a common-law tort, nor a constitutional tort. In this case, it occurred between April 1, 2016 and September 2016. Since that timeline fell within the two-year statute of limitations, summary judgment is not appropriate.

CONCLUSION

Venckus has put forth substantial evidence to establish his common law claim for malicious prosecution and his Iowa Constitutional tort claims. Judicial process immunity does not apply to claims involving wrongful investigations. Chapter 670 immunities do not apply to any of Venckus' claims. Rich has not established Qualified Immunity as a matter of law. Finally, Venckus' claims were brought within the applicable Statute of Limitations.

Venckus requests that the Court reverse the grant of summary judgment and remand for trial.

REQUEST FOR ORAL SUBMISSION

Venckus requests oral argument on any issue considered by the Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND FILING

The undersigned certifies a copy of this Final Brief was filed and served through the Electronic Document Management System on all counsel of record and the Clerk of Supreme Court.

_____/s/ Martin A. Diaz____

CERTIFICATE OF COST

I further certify that because of use of EDMS, there was no cost associated with the printing and reproduction of this Final Brief.

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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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