No. 21-1319
Polk County No. 05771 FECR340733

IN THE
SUPREME COURT OF IOWA

STATE OF IOWA,
Plaintiff-Appellee,

v.

DAVID DWIGHT JACKSON,
Defendant-Appellant.

ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
HONORABLE SCOTT BEATTIE (Suppression Motion)
HONORABLE DAVID PORTER (Trial)

APPLICATION FOR FURTHER REVIEW
(COURT OF APPEALS DECISION AUGUST 30, 2023)

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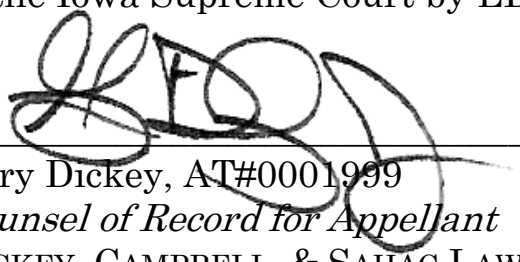
PROOF OF SERVICE & CERTIFICATE OF FILING

On September 19, 2023, I served this application on all other parties by EDMS to their respective counsel, and I mailed a copy of this brief to my client at Fort Dodge Correctional Facility.

I further certify that I did file this application with the Clerk of the Iowa Supreme Court by EDMS on September 19, 2023.



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QUESTIONS PRESENTED

Following a fatal accident, a jury convicted David Jackson of vehicular homicide by operating while intoxicated (OWI), reckless driving, leaving the scene of an accident resulting in death, and operating a motor vehicle without the owner's consent. Jackson argues that the district court should have suppressed a toxicology report obtained with warrant application that contained false statements. He also argues the district court erred in admitting hearsay medical records obtained by the State without a waiver of his physician-patient privilege. On these issues, this application presents the following questions for further review:

1. Does a law enforcement officer act in reckless disregard of the truth under *Franks v. Delaware* when he submits a search warrant application without first reading its contents?

2. Did the court of appeals violate the error preservation rule set forth in *State v. Ochoa* by deciding an issue on a theory expressly abandoned by the prosecutor in the district court?

3. May the State introduce Jackson's hospital discharge records without a waiver of the physician-patient privilege under Iowa Code section 622.10(1)?

4. Did the court of appeals violate the error preservation rule set forth in *Nahas v. Polk County* by deciding an evidentiary issue on grounds that were neither advanced at trial by the State nor decided by the district court?

5. Is testimony from the *Polk County Jail's custodian* of records that *hospital discharge records* are kept as a part of the *regular business of the jail* sufficient to establish the foundational elements of the business record exception for Jackson's *hospital records*?

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STATEMENT IN SUPPORT OF FURTHER REVIEW

At least five grounds exist to grant further review of David Jackson's convictions for homicide by vehicle by operating while under the influence, reckless driving, leaving the scene of an accident resulting in death, and operating a motor vehicle without owner's consent. First, the State obtained a blood sample from Jackson by way of a search warrant application that contained several false statements that resulted from the police officer's failure to read the application before its submission to the court. The court of appeals affirmed because Jackson did not establish that the officer "engaged in some kind of intentional act." *State v. Jackson*, Iowa App. LEXIS 647 at *9 (Iowa Ct. App. Aug. 30, 2023). But, a defendant need only show that the officer acted in reckless disregard for the truth to establish a *Franks* violation. *See State v. Brown*, 930 N.W.2d 840, 916 (Iowa 2019).

Second, the court of appeals held that Jackson waived his right to the physician-patient privilege over his hospital records under Iowa Code section 622.10(1) notwithstanding the fact that the prosecutor expressly abandoned the waiver argument in the

district court. The court's consideration of the unpreserved argument is directly contrary to this Court's decision in *State v. Ochoa*, 792 N.W.2d 260 (Iowa 2010).

Third, Jackson did not waive his physician-patient privilege by testifying on his own behalf at trial. This Court's decision in *Chung v. Legacy Corp.*, 548 N.W.2d 147 (Iowa 1996), makes clear that "the mere act of denying the existence of an element or factor of an adversary's claim" does not waive the physician-patient privilege under section 622.10. *Id.* at 150.

Fourth, the court of appeals held that Jackson's hospital records fell within the business record exception to the hearsay rule even though the State never advanced that theory of admissibility at trial, and the district court never considered it. The consideration of the unpreserved argument is directly contrary to this Court's recent decision in *Nahas v. Polk Cty.*, 991 N.W.2d 770 (Iowa 2023).

Lastly, the court of appeals allowed Jackson's hospital records to be admitted upon testimony from the Polk County Jail's custodian of records that they were kept in the regular course of

business. This testimony is insufficient to satisfy the foundational elements of the business record exception as set forth in *State v. Reynolds*, 746 N.W.2d 837 (Iowa 2008).

STATEMENT OF THE CASE

David Jackson appeals from his conviction, sentence, and judgment entered in the Iowa District Court for Polk County. On April 12, 2021, the jury returned a verdict finding Jackson guilty of homicide by vehicle by operating while under the influence, reckless driving, leaving the scene of an accident resulting in death, and operating a motor vehicle without owner's consent. (04/09/21 Trial Tr. Vol. V at 60:1-18, App. at 23). The district court ordered the counts to run concurrently and imposed a term of incarceration not to exceed twenty-five years. (App. at 34-35). Pursuant to Iowa Code sections 902.12(6) and 321.261(4), the court ordered that Jackson would not be eligible for parole until he serves at least seventy percent of his sentence. (App. at 34). The court also ordered Jackson to pay $150,000 in restitution pursuant to Iowa Code section 910.3B. (App. at 35).

Jackson timely filed a notice of appeal. (App. at 39). The court of appeals affirmed. *Jackson*, 2023 Iowa App. LEXIS 647. This application for further review follows.

STATEMENT OF FACTS

At approximately 8:30 p.m. on August 9, 2020, a Toyota Prius being driven by David Jackson collided with a Slingshot[1] on Martin Luther King Jr. Parkway ("MLK") just north of Prospect Road in Des Moines, Iowa. (04/06/21 Trial Tr. Vol. II at 33:19 to 37:7). The driver of the Slingshot, Bounleua Lovan, died from multiple blunt force injuries sustained in the accident. (04/06/21 Trial Tr. Vol. II at 29:18-21, 04/07/21 Trial Tr. Vol. III at 91:16-22, 93:6-8). Eyewitness Timothy Gilbert testified that Jackson turned south onto MLK from Euclid Avenue and drove normally for approximately three quarters of a mile. (04/06/21 Trial Tr. Vol. II at 40:3-22). As the Prius approached Prospect Road, it accelerated quickly, crossed over two lanes of traffic, and struck the Slingshot head on. (04/06/21 Trial Tr. Vol. II at 34:24 to 35:15). From the

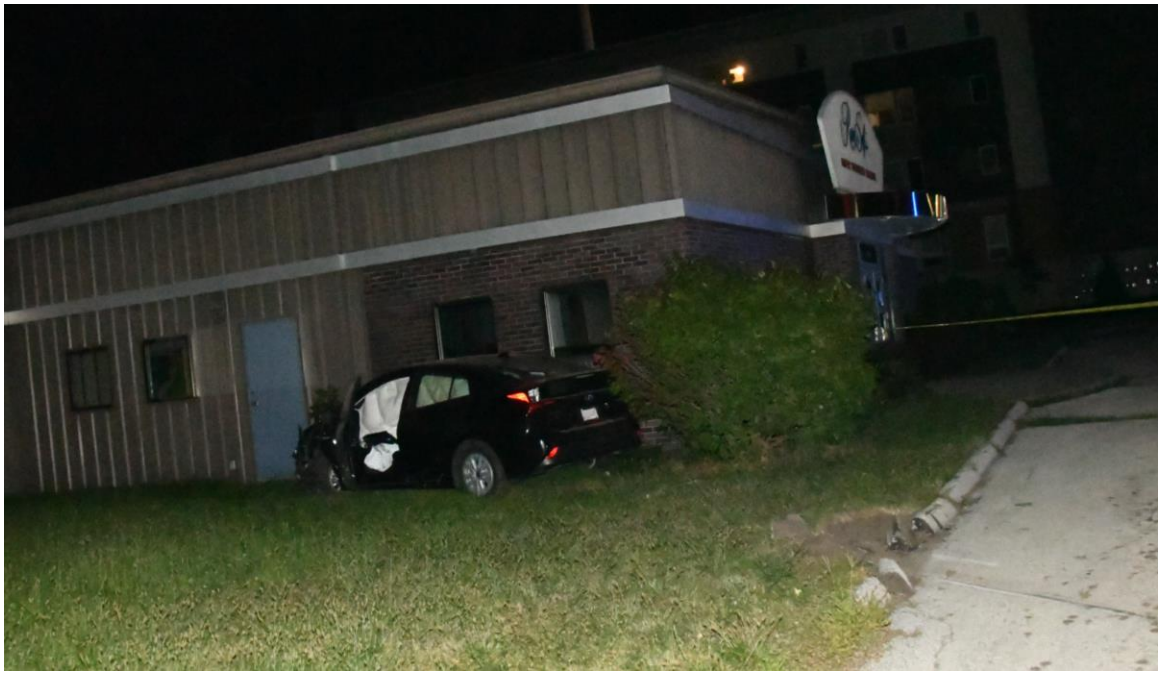
[1] A Slingshot is a "reverse trike" motorcycle with two wheels in the front and one in the back. (04/06/21 Trial Tr. Vol. II at 36:18-25)

way the Prius veered off course, Gilbert assumed the driver was experiencing a medical problem. (04/06/21 Trial Tr. Vol. II at 37:2-7).

The Des Moines Police Department's accident reconstructionist, Bryan Wickett, was able to retrieve information from the Prius's electronic data recorder and retrace the path of the vehicle:

(04/07/21 Trial Tr. Vol. III at 36:11 to 38:22; App. at 52). The information revealed that the Prius was traveling 57 mph one

second before collision. (04/07/21 Trial Tr. Vol. III at 53:4-12, 54:4-9). Officer Wickett determined that the Prius's steering wheel remained fixed at three degrees from center, which he concluded explained why it crossed the center line and struck the Slingshot. (04/07/21 Trial Tr. Vol. III at 82:12-18). He also discovered that Jackson did not apply his brakes prior to or after impact. (04/07/21 Trial Tr. Vol. III at 53:4-12, 54:4-9). Instead, the Prius continued over the curb and crashed into a building located 220 feet from the location of the slingshot:



(04/06/21 Trial Tr. Vol. II at 107:18-23, 04/07/21 Trial Tr. Vol. III at 71:11-16; App. at 51).

Prior to the accident, Jackson borrowed the Prius from his neighbor's girlfriend. (04/07/21 Trial Tr. Vol. III at 137:7-15). He had been quarantined for two weeks because of a COVID-19 exposure and was on his way to the Broadlawns Medical Center to get paperwork to give to his employer. (04/07/21 Trial Tr. Vol. III at 161:1 to 164:24). After pulling onto MLK, Jackson started to have tightness in his chest, his breathing became restricted, and he blacked out at the wheel. (04/07/21 Trial Tr. Vol. III at 141:16 to 142:6). His next memory was being in a confused state, getting out of his car, and encountering an African-American lady standing in front of him. (04/07/21 Trial Tr. Vol. III at 142:7 to 143:23). Thinking that he had crashed into a concrete wall, Jackson started walking towards the nearby assisted living facility. (04/07/21 Trial Tr. Vol. III at 143:24 to 144:22). He attempted to go into the lobby, but the inside door was locked. (04/07/21 Trial Tr. Vol. III at 146:10-20).

Des Moines Police Officer George Latcham encountered Jackson sitting at a picnic table outside the main entrance to the assisted living facility. (04/06/21 Trial Tr. Vol. II at 72:2-5).

Officer Latcham's body camera video shows that he ordered Jackson to the ground and threatened him with pepper spray mace if he did not comply. (State's Ex. 6). Jackson initially got down on all fours but then took off running. (State's Ex. 6). At that point, Officer Latcham sprayed Jackson with pepper mace. (04/06/21 Trial Tr. Vol. II at 72:22 to 73:10). Jackson then ran directly into a concrete pillar and was subdued shortly thereafter. (04/07/21 Trial Tr. Vol. III at 150:23 to 152:5). He was taken to the hospital where they gave him Ativan to calm him down. (04/06/21 Trial Tr. Vol. II at 178:6-15).

Des Moines Police Officer Nathan Nemmers applied for and obtained a search warrant to draw a blood sample from Jackson to test for drugs and alcohol. (04/06/21 Trial Tr. Vol. II at 170:5-14). Iowa Division of Criminal Investigation criminalist Justin Grodnitzky conducted a toxicology examination of Jackson's blood, which revealed the presence of amphetamines at 16 ng/mL, methamphetamines at 104 ng/mL, and Lorazepam (a/k/a Ativan) at less than 10 ng/ML. (04/07/21 Trial Tr. Vol. III at 21:14 to 22:8, 23:13-16). Grodnitzky testified that 20 to 50 ng/mL is the

therapeutic range for methamphetamines when it is prescribed to treat obesity, narcolepsy, and ADHD-type disorders. (04/07/21 Trial Tr. Vol. III at 25:20 to 26:1). He was unable to say, however, whether the level of methamphetamines in Jackson's blood sample rendered him intoxicated without knowing his tolerance to the drug. (04/07/21 Trial Tr. Vol. III at 26:17-25)

The State charged Jackson with homicide by vehicle while operating under the influence and other related charges as part of a five-count trial information. (App. at 6). After a five-day trial, the jury found Jackson guilty of homicide by vehicle by operating while under the influence, reckless driving, leaving the scene of an accident resulting in death, and operating a motor vehicle without owner's consent.[2] (04/09/21 Trial Tr. Vol. V at 60:1-18, App. at 23-26). The district court ordered the counts to run concurrently and imposed a term of incarceration not to exceed twenty-five years. (App. at 34-35). This appeal followed. (App. at 39).

[2] Prior to submission of the case to the jury, the State dismissed Count V, which charged Jackson with first-offense OWI. (04/09/21 Trial Tr. Vol. V at 5:19-25).

ARGUMENT

I. FURTHER REVIEW IS NECESSARY BECAUSE THE COURT OF APPEALS APPLIED THE WRONG STANDARD TO DETERMINE WHETHER OFFICER NEMMERS ACTED RECKLESSLY FOR PURPOSES OF *FRANKS V. DELAWARE*

On August 9, 2020, Officer Nemmers applied for a search warrant seeking a specimen of Jackson's "blood, urine, and/or breath specimen" (App. at 41). At the end of the application, Nemmers swore that the "facts establishing the grounds for issuance of a search warrant are as set forth in the attachments made a part of this application." (App. at 41). Polk County Attorney Jaki Livingston reviewed and approved the application. (App. at 41). In an attachment entitled "A-2 – OBSERVATIONS OF IMPARIMENT," Officer Nemmers indicated that he performed "Field Sobriety Tests" ("FSTs") on Jackson and set forth the following results:

Standardized Field Sobriety Tests (Please indicate score, refusal, or inability)

	Test	Score / Refusal / Inability
✓	Horizontal gaze nystagmus	Passed
✓	Walk and Turn	Failed - 7 of 8 clues
✓	One leg stand	Failed - 3 of 4 clues
✓	Preliminary breath test results	.000
	Admission to drinking	
✓	Other: Lack of Convergence - not present, Modified Romberg Balace Test - 18 seconds	

(App. at 43). In reality, Nemmers never performed any FSTs. (01/26/21 Motion to Suppress Hr'g Tr. at 11:10-15).

Jackson filed a motion to suppress evidence, including a toxicology report, that Nemmers obtained from the warrant. (App. at 11-17). At the suppression hearing, Nemmers testified that he used a previous application and did not remove the information concerning the FSTs:

> Q. So let's go back, if we can, to the field sobriety test part. Can you explain why you included that section with the check marks for six different items and scores for pass or fail? Can you explain why you included those things in the search warrant?
>
> A. Just an oversight on my part. As I went through the form, not realizing I didn't delete it out or realizing it was there or needed to be deleted from a previous application.

(01/26/21 Motion to Suppress Hr'g Tr. at 12:10-18). On cross-examination, he conceded that he did not read the application before submitting it to the judge for review. (01/26/21 Motion to Suppress Hr'g Tr. at 21:2 to 22:1).

A. Officer Nemmers acted recklessly when he submitted a sworn affidavit to the court containing false information without first reading it

In denying Jackson's motion to suppress, the district court described Officer Nemmer's misrepresentation as "a scrivener's error (albeit a significant one)." (App. at 20). Not surprisingly, the court of appeals rejected the suggestion that the false information pertaining to the FSTs was a mere scrivener's error. *Jackson*, 2023 Iowa App. LEXIS 647 at *9. Nevertheless, the court of appeals concluded that Jackson had not "established that the error was more than negligence or that Officer Nemmers engaged *in some kind of intentional act* when filling out the application." *Id.* (emphasis added).

In this way, the court applied the wrong legal standard. To constitute a violation under *Franks v. Delaware*, 438 U.S. 154 (1978), a defendant need prove that the falsehood was the product of an "intentional act" by the law enforcement officer. Instead, the case law is clear that an officer commits "a constitutional violation" under *Franks* if he or she "with *reckless disregard for the truth* falsely support[s] a warrant application." *State v.*

Brown, 930 N.W.2d 840, 916 (Iowa 2019)(emphasis added). The court of appeals' refusal to consider whether Nemmers acted recklessly warrants further review.

Reckless disregard is established by proof that the officer "had obvious reasons to doubt the accuracy of the information" contained in the warrant affidavit. *United States v. Reed*, 921 F.3d 751, 756 (8th Cir. 2019). In other areas of the law, "reckless disregard" covers the "ostrich type situation" where an individual has "buried his head in the sand" and failed to make simple inquires" which would alert him to the falsities. *United States v. Bourseau*, 531 F.3d 1159, 1168 (9th Cir. 2008); *see also Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 831 (Iowa 2007)(explaining that "purposeful avoidance" is sufficient to establish reckless disregard of the truth). Clearly, Officer Nemmers had obvious reason to doubt the accuracy of the contents of an affidavit that he did not bother to read.

The central principle of *Franks* is that the warrant requirement would be "reduced to a nullity" if a police officer is allowed to mislead the magistrate and "remain confident that the

ploy was worthwhile." *Franks*, 438 U.S. at 168. This principle will be forever frustrated if false statements avoid judicial review on account of the officer's failure to read warrant application prior to its submission. If allowed to stand, the decision below creates the perverse incentive to turn in warrant affidavits without first reading them thereby affording law enforcement officers complete immunity from *Franks* for false statements.

B. The remainder of the search warrant does not establish probable cause that Jackson operated his vehicle while under the influence

If the Court determines that Officer Nemmer's false statements were made recklessly, it must consider whether the remaining information in the warrant establishes probable cause. *State v. Niehaus*, 452 N.W.2d 184, 186-87 (Iowa 1990). The answer is plainly "no." The remnant remaining in the warrant consists mainly of conclusory statements and fact that are consistent with person involved in a serious head-on accident followed by being sprayed with pepper mace. But, "innocent-appearing activity cannot be used to bolster an otherwise inadequate warrant application." *State v. McManus*, 243 N.W.2d

575, 579 (Iowa 1976). Likewise, the occurrence of an accident alone does not suggest intoxication. *State v. Payne*, 2011 Iowa App. LEXIS 318 at *8 (Iowa Ct. App. May 11, 2011). The warrant, therefore, was invalid, and all evidence seized during the search, as well as all fruits from the search, must be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963).

II. FURTHER REVIEW IS WARRANTED BECAUSE THE COURT OF APPEALS INCORRECTLY HELD THAT JACKSON WAIVED HIS RIGHT TO PHYSICIAN-PATIENT PRIVILEGE UNDER IOWA CODE SECTION 622.28

At trial, Jackson testified that he "blacked out" on two separate occasions prior to August 9, 2020. (04/07/21 Trial Tr. Vol. III at 156:25 to 166:7). He also testified that his heart rate dropped to 34 upon admission to the Broadlawns intensive care unit following the accident. (04/07/21 Trial Tr. Vol. III at 153:19 to 154:7). To refute this testimony, the State called Polk County Jail health services administrator Dale Peterson in rebuttal to testify about information contained in the discharge records that Broadlawns Medical Center provided to the jail upon Jackson's admission. (04/08/21 Trial Tr. Vol. IV at 58:12 to 61:14).

Jackson's attorney objected to Peterson's testimony on the basis that the information in the records was privileged. (04/08/21 Trial Tr. Vol. IV at 55:7 to 56:9). The district court denied the objection. (04/08/21 Trial Tr. Vol. IV at 55:7 to 57:9). Peterson then testified on direct examination that Jackson's medical records indicated that he had normal vital signs and a normal pulse oximetry level. (04/08/21 Trial Tr. Vol. IV at 61:3 to 63:7). He also testified that nothing in Jackson's discharge records indicated he had difficulty breathing or a history of blacking out. (04/08/21 Trial Tr. Vol. IV at 55:7 to 57:9). Peterson further testified that the jail placed Jackson on "an alcohol and opioid detox program," which is designed for any "patient that states they have been using either opioids or alcohol or Benzos." (04/08/21 Trial Tr. Vol. IV at 63:18 to 64:15). On cross-examination, Peterson acknowledged that he had only reviewed Jackson's discharge records. (04/08/21 Trial Tr. Vol. IV at 66:9 to 67:9). Because he had not reviewed the treatment records, Peterson could not testify about Jackson's vital signs or heart rate on August 9th or 10th. (04/08/21 Trial Tr. Vol. IV at 67:5-21).

A. The court of appeals' consideration of whether Jackson "waived" his physician-patient privilege is directly contrary to this Court's error preservation rule set forth in *State v. Ochoa*

The issue before the district court was whether Jackson's hospital records were admissible under Iowa Code section 622.10(1) without a waiver. The prosecutor expressly acknowledged that Jackson had not waived his physician-patient privilege:

> THE COURT: I'll have you slide as close as you can to that microphone and lower the microphone a little bit, okay?
>
> Because that testimony would be HIPAA protected, a couple things -- one of a couple things can happen: One, Mr. Jackson would need to waive that protection. As you sit here today, have you or anyone in the Polk County Sheriff's Office received a waiver from Mr. Jackson allowing you to provide testimony regarding medical treatment?
>
> THE WITNESS: No, I have not.
>
> * * *
>
> MS. LIVINGSTON: Well, part of the problem, Judge, is that because the defendant put his health into the record, *but has not waived any of his rights and has not given us access to any information*, Mr. Peterson can't tell me exactly what's in the records, so I don't know, but the defendant has made his health that day his primary -- his sole defense without any evidence whatsoever. I should have an opportunity to rebut that.

(04/08/21 Trial Tr. Vol. IV at 67:5-21, 54:15-22) (emphasis added). Recognizing that the State conceded that waiver had occurred, the trial court admitted the evidence because Jackson "opened the door" through his trial testimony. (04/08/21 Trial Tr. Vol. IV at 55:22 to 56:4). But, the "fight fire with fire" theory of admissibility does not apply in this circumstance. *State v. Huser*, 894 N.W.2d 472, 506 (Iowa 2017) (explaining the doctrine of curative admissibility). Jackson's direct examination testimony did not contain inadmissible evidence. More importantly, the prosecutor did not object. Accordingly, Jackson's testimony did not "open the door" to anything.

Implicitly recognizing the problem with the trial court's theory of admissibility, the State changed horses midstream and argued — for the first time on appeal — that Jackson did waive his privilege under section 622.10(1). (State's Br. at 52-58). Taking the bait, the court of appeals framed the question on appeal as follows:

> So, did Jackson waive his privilege to keep his medical information private and is the district court correct

> that Jackson 'opened the door' with his testimony about his health?

Jackson, 2023 Iowa App. LEXIS 647 at *14-15. That is not how error preservation works. The State cannot expressly disclaim a legal theory in district court and then turn around and pursue it on appeal.

On this point, the decision in *State v. Ochoa*, 792 N.W.2d 260 (Iowa 2010), controls. One of the questions presented in *Ochoa* was whether the defendant consented to a warrantless search of his motel room. *Id.* at 291-92. In the district court, the State "conceded that the parole agreement did not waive constitutional rights in any blanket fashion." *Id.* at 291. On appeal, however, the State sought to "resurrect the claim abandoned in the trial court, namely, that Ochoa consented to the search by virtue of his execution of the parole agreement." *Id.* On further review, this Court held that an issue abandoned by the State at the trial court level cannot be revived on appeal. *Id.* at 292 ("An argument not made on an issue before the district court is ordinarily waived").

What was true in *Ochoa* is also true in this case. Here, the State expressly abandoned any claim that Jackson waived his physician-patient privilege over his hospital records at trial. Under *Ochoa*, it may not resurrect the claim on appeal. For this reason, further review is necessary.

B. Jackson did not waive confidentiality of his Broadlawns hospital records

Setting aside the problem with error preservation, the court of appeals' decision is contrary to this Court's decision in *Chung v. Legacy Corp.*, 548 N.W.2d 147, 150 (Iowa 1996), as well as the court of appeals decision in *State v. Roling*, 2001 Iowa App. LEXIS 101 (Iowa Ct. App. Feb. 7, 2001).[3] In *Chung*, an injured plaintiff sought the medical records from the driver of the vehicle that struck him to show the driver's "condition and particularly his state of intoxication." *Chung*, 548 N.W.2d at 148. This Court rejected the claim for access to the records, holding that "the mere act of denying the existence of an element or factor of an

[3] To its credit, the State recognized these decisions in its merits brief as contrary legal authority. (State Br. at 54-57).

adversary's claim does not fall within the statutory language." *Id.* at 150.

In *Roling*, the State sought to admit the defendant's hospital records, which showed his blood alcohol content, "to impeach his testimony that he only had six or eight beers," and the district court admitted the records. *Roling*, 2001 Iowa App. LEXIS 101 at *6. Noting that the "statute has been interpreted liberally to accomplish its goal of fostering candid communications between doctor and patient," the court of appeals reversed. *Id.* at *8. In particular, the court rejected the State's argument that "the privilege should be waived whenever a defendant puts his medical condition in issue as a defense to a charged crime." *Id.* at *9. From *Chung* and *Roling*, it follows a fortiori that Jackson did not waive his physician-patient privilege under section 622.10.

The court of appeals' decision also runs headlong into the text of section 622.10. For starters, the Iowa General Assembly amended section 622.10 in 2011 to make clear that "the confidentiality privilege under this section *shall be absolute with regard to a criminal action*." 2011 Iowa Acts ch. 8, § 2 (emphasis

added). The legislature provided criminal defendants with the right to access medical records by either "a voluntary waiver" or a showing that they likely "contain exculpatory information not available from any other source." *Id.* Notably, the legislative amendments do not provide a pathway for the prosecution to obtain a criminal defendant's medical records under any circumstances. *Id.*

III. THE COURT OF APPEALS' HOLDING THAT A POLK COUNTY JAIL CUSTODIAN OF RECORDS CAN PROVIDE FOUNDATION FOR ADMISSION OF JACKSON'S BROADLAWNS HOSPITAL RECORDS CANNOT BE SQUARED WITH THIS COURT'S DECISION IN *STATE V. REYNOLDS*

A. The court of appeals' consideration of whether Jackson's hospital records fell within the hearsay exception for business records is directly contrary to this Court's error preservation rule set forth in *Nahas v. Polk County*

Jackson also objected to the admission of Peterson's testimony about information contained in his Broadlawns medical as hearsay. *See Madison v. Colby*, 348 N.W.2d 202, 203-204 (Iowa 1984) (recognizing that testimony about the contents of a medical records by someone other than the treating physician is hearsay). To get around the hearsay problem, the district court ruled that

Peterson's testimony was not offered for the truth of the matter asserted but instead to "show the subsequent course of conduct that the jail did as far as their treatment of Mr. Jackson once he arrived there." (04/08/21 Trial Tr. Vol. IV at 56:22-25).

The State did not even attempt to defend the district court's clearly erroneous analysis on appeal. Instead, the State pivoted to an entirely new theory of admissibility: "the hearsay exception for business records." (State's Br. at 62)(citing Iowa R. Evid. 5.803(6)). The court of appeals affirmed on the basis of this newfound theory of admissibility notwithstanding the fact that the State did not advance it at trial, and the district court never considered it.

This approach to error preservation is directly "in conflict with a decision from this [C]ourt." Iowa R. App. 6.1103(1)(b)(1). Just this term, in *Nahas v. Polk Cty.*, 991 N.W.2d 770 (Iowa 2023), this Court reiterated its error preservation rules:

> Finally, Nahas disputes section 670.4A's constitutionality. We decline to consider this argument because error was not preserved for our review. The district court never ruled on the statute's constitutionality. 'It is a fundamental doctrine of appellate review that issues must ordinarily be both

> raised and decided by the district court before we will decide them on appeal.'

Id. at 784. The State's hearsay argument in this appeal is even less-preserved than the constitutional argument in *Nahas*. At no point at trial did the State suggest that the business record exception applies to Jackson's medical records. Moreover, the district court never considered the business record exception as a potential theory for admissibility. Consequently, the court of appeals' decision cannot stand.

B. A jail custodian of records cannot establish the foundation to admit hospital records under the business record exception merely by testifying that the jail keeps the records as part of its regularly activity

The court of appeals application of the business record exception is manifestly incorrect. Iowa's case law is clear that medical records are admissible under Rule 5.803(6) only upon proper foundation. *State v. Buelow*, 951 N.W.2d 879, 885 (Iowa 2020) (citing *In re Estate of Poulos*, 229 N.W.2d 721, 727 (Iowa 1975)). And, the foundation must be "shown by the testimony of the custodian or another qualified witness." Iowa R. Evid. 5.803(6)(D). At Jackson's trial, the State "did not offer testimony

from the doctor or other party involved in creating or keeping the record, a certification from a custodian of the proffered record, or a stipulation to the document's admission." *State v. Fiems*, 2020 Iowa App. LEXIS 358 at *10 (Iowa Ct. App. Apr. 15, 2020). "Without the required foundation, the [testimony] did not qualify for the business-records exception." *Id.*

The best the State could muster came from Peterson who testified that the Polk County Jail received Jackson's records from Broadlawns and maintained them in the regular course of its business. (04/08/21 Trial Tr. Vol. IV at 65:5-14). The court of appeals found this testimony to provide sufficient foundation under Rule 5.803(6)(D). But, in *State v. Reynolds*, 746 N.W.2d 837 (Iowa 2008), this Court explained:

> Although the specific person who created the record in the course of business need not testify to lay the foundation for the business record exception, the party offering the evidence must demonstrate the evidence was made in the course of the [business], at or reasonably near the time, using standard procedures that reasonably indicate the trustworthiness of the information.

Id. at 843 (citations omitted). That evidence is lacking from this record. Noticeably absent was any testimony from a person with

knowledge of how Broadlawns generates and maintains its records.

The same result is required for the testimony concerning Jackson's placement alcohol and opioid detox protocol. While that information came from Jackson's records at the Polk County Jail, Peterson did little more than lay foundation that the records were "kept in the regular course of business." (04/08/21 Trial Tr. Vol. IV at 65:5-14). He established none of the other perquisites for Rule 5.803(6) such as (1) the record was made at or near the time of the act; (2) the information was transmitted by a person with knowledge; or (3) that it was regular practice of the Polk County Jail to make such a record. *Compare Reynolds*, 746 N.W.2d at 843 (identifying five "foundational elements" to admit a record containing hearsay under Rule 5.803(6)).

Left uncured, the decision below threatens to allow the business record exception to swallow the hearsay rule. Under court of appeals' analysis, an enterprising prosecutor literally may launder any hearsay statement through the business record exception by transferring it to the Polk County Jail's custodian of

records to keep "in the regular course of business." That cannot be squared with this Court's explanation of the foundational elements of the business record exception in the *Reynolds* decision.

C. The admission of Peterson's testimony prejudiced Jackson's defense

Prejudice is presumed if hearsay is admitted unless the State affirmatively establishes to the contrary. *Hawkins v. Grinnell Reg'l Med. Ctr.*, 929 N.W.2d 261, 266 (Iowa 2019); *In re Det. of Stenzel*, 827 N.W.2d 690, 708 (Iowa 2013); *State v. Elliott*, 806 N.W.2d 660, 669 (Iowa 2011); *State v. Nims*, 357 N.W.2d 608, 609 (Iowa 1984). Even without the presumption of prejudice, Peterson's testimony was undeniably damaging. Jackson's theory of defense was that he blacked out from a medical condition, which caused the accident. There was plenty of evidence introduced at trial to support this defense. The State's own eyewitness testified that he assumed the driver of the Prius was experiencing a medical emergency. On top of that, information from the vehicle's event record established that Jackson suddenly accelerated and did not apply the brakes before or after the

collision—which is also consistent with a medical event. Lastly, Jackson testified that he blacked as he approached Prospect Road. Recognizing that, if believed, this evidence would create reasonable doubt as to the causation element of the homicide by vehicle charge, the State used Peterson's testimony to undermine Jackson's defense. Consequently, Jackson is entitled to a new trial.

CONCLUSION

The reasons set forth above, David Jackson asks this Court to grant further review, reverse his conviction, and remand with instructions.

REQUEST FOR ORAL ARGUMENT

Jackson requests to be heard in oral argument.

COST CERTIFICATE

I hereby certify that the costs of printing this application was $ 13.50, and that that amount has been paid in full by me.

CERTIFICATE OF COMPLIANCE

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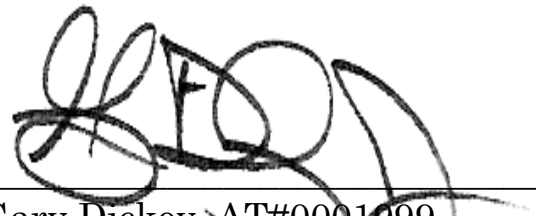

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