IN THE SUPREME COURT OF IOWA

No. 18-1280

JOSHUA VENCKUS

Plaintiff-Appellee,

vs.

CITY OF IOWA CITY, ANDREW RICH, JOHNSON COUNTY, ANNE LAHEY, NAEDA ELLIOTT and DANA CHRISTIANSEN

Defendants-Appellants.

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

APPELLEE'S FINAL BRIEF

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ROUTING STATEMENT

This case presents the Court an opportunity to assess the wisdom of absolute immunity for prosecutors since its decisions in *Godfrey v State of Iowa* 898 N.W.2d 844 (Iowa 2017) and *Baldwin v. City of Estherville*, 915 N.W.2d 259 (Iowa 2018). For that reason, this appeal should be retained by the Supreme Court. *See* Iowa R. App. P. 6.1101(2). Since *Baldwin*, the additional issues raised by the City have become less important. Nevertheless, this Court should retain all issues in order to provide uniform application of *Godfrey* and *Baldwin* to cases involving wrongful law enforcement investigations and prosecutions that violate our Constitution.

STATEMENT OF THE CASE

NATURE OF THE CASE: This action comes before this Court on a denial of Motions to Dismiss filed by all Defendants. 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, and by the three prosecutors for Johnson County: Anne Lahey, Naeda Elliott, and Dana Christiansen. The wrongful prosecution was instigated or procured by Rich and carried out by the County Defendants. Venckus alleges that these defendants were made aware of evidence that

exonerated Venckus but continued the wrongful prosecution causing him financial and emotional harm that continues to this day.

Venckus asserts "claims against the City of Iowa City and Andrew Rich for defamation, abuse of process and malicious prosecution." (App. 41). Venckus further "asserts a claim of abuse of process against Johnson County, Iowa, and Ms. Lahey, Ms. Elliott and Mr. Christiansen." (App. 41)

In addition, Venckus "asserts a claim against all defendants for violation of his Iowa Constitutional rights as recently recognized by the Iowa Supreme Court in *Godfrey v. State of Iowa*. These constitutional rights include the right to freedom of movement and association as guaranteed by Article I, §1 of the Iowa Constitution; his right to liberty guaranteed by Article I, §1 of the Iowa Constitution; his right to due process, a fair trial, and equal protection guaranteed by Article I, §6 and §9 of the Iowa Constitution; and his right against unreasonable seizure guaranteed him by Article I, §8 of the Iowa Constitution." (App. 41)

In this Brief, other than as needed, Venckus will refer to the City of Iowa City and Andrew Rich collectively as "the City"; he will refer to the County and the individual prosecutors as "the County."

COURSE OF PROCEEDINGS: On March 15, 2018, Venckus filed suit against all defendants, save the individual prosecutors. (App. 4). The City and Rich filed a Motion to Dismiss on April 5, 2018 (App. 14). On April 11, 2018, the County filed its Motion to Dismiss. (County Motion to Dismiss). On April 13, 2018, the court granted Venckus' motion to Amend to add the individual prosecutors as parties. (App. 34). The County and prosecutors then refiled their Amended and Substituted Motion to Dismiss on May 3, 2018. (County's Amended and Substituted Motion to Dismiss).

On June 13, 2018, the court dismissed all claims except for the malicious prosecution claim against Rich. (App. 65). Venckus asked the court to reconsider on June 21, 2018. On July 4, 2018, Venckus alerted the court to the June 29, 2018 decision in *Baldwin*. (App. 76; App. 87).

On July 17, 2018, the district court reversed itself and reinstated all claims. (App. 102). Defendants then filed separate Applications for Interlocutory Appeal and this Court granted both Applications. (App. 110; County Application for Interlocutory Appeal).

STATEMENT OF FACTS[1]

In February 2013, Venckus lived at 516 S. Van Buren Street, Iowa City, a home he shared with roommates. (App. 35). Venckus left the State of Iowa for Illinois on February 15, 2013 and did not return to Iowa until February 17, 2013. (App. 35). Venckus did not have a driver's license or a vehicle during that weekend. On February 15 and 17, 2013, Michael Concannon served as Venckus' driver to and from Illinois. (App. 35).

On February 15, 2013, while Venckus was out of town at his parents' home in Chicago, Venckus' roommates hosted a party at the home in Iowa City. (App. 35). A young woman ("L.M.") whom Venckus had never met, attended that party. (App. 35). Ryan Lee Markley, an individual Venckus had never met before February 16, 2013, attended the same party. (App. 35). L.M. became intoxicated to the point of incapacity. Party-goers tended to L.M. and made her comfortable on a couch. L.M. was covered with pillows and a blanket. The blanket belonged to Venckus. Unbeknownst to all, the blanket covering L.M. was replete with Venckus' DNA. (App. 35).

After the party ended and all persons foreign to the residence left, Markley broke into the residence during the early morning hours of February

[1] As required by existing law, these facts are deemed true and found in the Amended Petition.

16, 2013, burglarized the residence, and perpetrated a sexual assault upon L.M. (App. 36). Police were summoned to the residence after L.M. escaped the on-going assault and sought help from a Samaritan in the alley by the back door of the residence. Andrew Rich was principally responsible for investigating these crimes. Rich was an employee of the City of Iowa City Police Department, employed as an Investigator. (App. 34, 37).

The Samaritan saw one assailant at the back door as L.M. ran out of the house. When interviewed, L.M. relayed hearing only one voice from one assailant. (App. 36). Police found Markley's wallet outside a window well on the south side of the residence; found Markley's handprint on the north window used for entry into the basement; and found a boot imprint belonging to Markley's boot on a chair inside the window where the unlawful entry was gained into the basement. Further, Markley stole a ceramic marijuana pipe from the basement, later recovered at his apartment. (App. 36).

The Police interviewed all Venckus' roommates and upon his return, interviewed Venckus. All of them explained that Venckus was in Chicago at the time of the crime. No one placed Venckus at the house during the entire party. (App. 36).

During their investigation, the Police focused solely on Markley until DNA testing returned two DNA male profiles: one for Markley and a second

for an unknown male profile. The DNA found upon the body of the sexual assault victim consisted of epithelial fraction of Markley and sperm fraction of Venckus. Defendants sought court orders for over twenty (20) males to submit to DNA procedures, including Venckus. The DNA belonging to Venckus that was found upon the victim consisted of only a sperm fraction with one single sperm found in the cervix. (App. 36-37).

On January 24, 2014, Venckus was arrested for Sexual Abuse in the Second Degree, Class "B" Felony, in violation of Iowa Code § 709.3. The arrest was made by Rich. (App. 37). Prior to Venckus' arrest, Venckus turned over to Rich his cell phone and bank card in an attempt to prove to Rich his alibi. Before his arrest, Venckus offered to Rich the names of people that could vouch to Rich that Venckus was in the Chicago area during the time the crime was committed in Iowa. (App. 37).

Rich made the arrest of Venckus in Iowa City, Johnson County, Iowa, alleging the following facts: *"On 2/16/12 (sic) several officers and detectives responded to the above address after a young woman was attacked and sexually assaulted. This investigation continued over the course of the last 11 months and through the collection and analysis of forensic evidence we have determined this Def participated in the attack and sexual assault of the victim. This Def stated during an interview that he was not even in IC when the attack*

occurred. However, DNA evidence developed in the course of this investigation proves the Def was not only present but participated in this attack and left the victim with multiple injuries requiring immediate medical attention." (App. 37).

After his arrest, Venckus was prosecuted for the crime of Sexual Abuse in the Second Degree along with Ryan Lee Markley, a man Venckus only knew due to being charged together. Venckus and Markley's criminal trials were severed. (App. 38).

The prosecution was conducted by the Johnson County Attorney's Office through the three employees: Lahey, Elliott, and Christiansen. (App. 38). Venckus pled an alibi defense. (App. 38). In order to derail the anticipated alibi defense, Rich interviewed Michael Concannon, one of Venckus' alibi witnesses, and in the course of the recorded interview, threatened him with charges if he did not change his testimony to implicate Venckus. (App. 38). This act constitutes tampering with a witness.

On August 20, 2015, and continuously until trial of Venckus in September 2016, Venckus' attorney created a Google Drive, a file storage and synchronization service developed by Google that allows users to store files on their servers, synchronize files across devices, and share files. On this Google Drive, the attorney placed all evidence that Venckus was relying upon

to prove to the Defendants that a) Venckus was not in the State of Iowa at the time of the crime; b) the DNA evidence relied upon by the Defendants was not reliable, particularly since Venckus was not physically present in Iowa at the time of the sexual assault; and (c) the DNA present was scientifically explainable given that Venckus lived in the home where L.M. was assaulted and had been covered with his blanket. This Google Drive was then shared with the Defendants upon its creation. Venckus' attorney would update the Google Drive with additional evidence and would notify Defendants when updated. The Google Drive was up to date until the time of trial. (App. 38-39).

Despite the overwhelming evidence that Venckus could not have been the perpetrator and the clear evidence that Markley was the sole perpetrator, the Defendants continued their reckless crusade to convict an innocent man of this awful crime. The Defendants either failed to review the information provided on the Google Drive, or recklessly and with malice ignored the information. The Defendants' pursuit of Venckus was so reckless that they even offered a more lenient plea to the actual rapist, Markley. In return, Markley was to testify against Venckus, a man he never implicated in several previous law enforcement interviews. At trial, Markley was not called as a witness because Markley did not have evidence that Venckus had been

involved in this terrible assault. As a result, Markley received a far more lenient sentence than he should have. (App. 39).

Defendants pressed onward against Venckus despite the overwhelming evidence that he was in Chicago at the time of the assault. Further, Venckus' lawyer provided the Defendants with expert witness reports to establish that the DNA evidence of one sperm found in the cervix represented evidence of a DNA transfer from the blanket covering the victim and could not represent the sole evidence of DNA left by a rapist. In response to the expert reports, the Defendants sought to find an expert that would testify that a transfer was not possible, and in doing so shopped for someone to testify at trial from the Iowa Division of Criminal Investigation. The Defendants were told by Michael Halverson, the DNA Technical leader at DCI, that it was possible that dry sperm, if rehydrated, could transfer from the blanket. Defendants then withdrew Halverson as an expert witness from the minutes. (App. 39-40).

Defendants then pressured DCI DNA criminalist Tara Scott, who was supervised by Mr. Halverson, to offer an opinion that a transfer was not possible, even though she testified that she had no training in transfer. They pressured her to offer such an opinion to salvage the malicious prosecution. This effort at expert shopping was done because Venckus' lawyer had provided a reasonable explanation for why only one sperm was

found in the body of the victim (rather than the many thousand which would be expected to be found during ejaculation) when the donor was 240 miles away. (App. 40).

During the pendency of the prosecution, the County filed an ethics complaint against Venckus' attorney (in an unrelated case) in order to distract his attorney from preparing for trial or to force the withdrawal of said attorney. The ethics complaint was based on information that was nearly 3 months old. The ethics complaint was eventually dismissed in July 2017. (App. 40).

Venckus was acquitted after a trial that began on September 7, 2016. (App. 40). The defendants knew that their effort to convict Venckus would likely fail but pressed forward because they knew they had made a mistake continuing to prosecute Venckus and they did not want to make such an admission. Venckus suffered damages from the continued criminal prosecution. This included incurring substantial attorney's fees, suffering significant emotional distress, expulsion from college, a lost career, and the continuous harm to his reputation to this day from the defamatory allegation. (App. 40-41).

APPEAL ARGUMENT ON THE CITY'S APPEAL

I. THE CITY FAILED TO PRESERVE ERROR ON ITS FIRST ISSUE. REGARDLESS, AT THIS STAGE, VENCKUS' MALICIOUS PROSECUTION CLAIM IS WELL-RECOGNIZED BY IOWA CASELAW.

Preservation of Error. In its Combined Certificate, the City failed to identify "the issues [they] intend to present on appeal." Iowa R. App. P. 6.804 and 6.1401, Form 2. In their Application for Interlocutory Review, they cite four potential arguments, including the viability of Venckus' malicious prosecution claim. However, when the City filed its Motion to Dismiss, it sought dismissal of the malicious prosecution claim solely on the statute of limitations defense. Nothing was said about Venckus failing to state a cause of action. (App. 23-24). The trial court indicated the basis on page 2 of its ruling and made no mention of this argument. (App. 66). Therefore, error has not been preserved.

Standard of Review. Assuming the Court proceeds to rule on this issue, Venckus agrees that the standard of review is for errors at law with the understanding that the standard for ruling on a motion to dismiss is set forth in *Hawkeye Foodservice Distrib. v. Iowa Educators Corp.*, 812 N.W.2d 600, 608-609 (Iowa 2012) as follows:

> Recently, we have described the standard for granting a motion to dismiss as follows:

> A court should grant a motion to dismiss if the petition fails to state a claim upon which any relief may be granted. In considering a motion to dismiss, the court considers all well-pleaded facts to be true. A court should grant a motion to dismiss only if the petition 'on its face shows no right of recovery under any state of facts.' **Nearly every case will survive a motion to dismiss under notice pleading.** Our rules of civil procedure do not require technical forms of pleadings. . . .
>
> A 'petition need not allege ultimate facts that support each element of the cause of action[;]' however, a petition 'must contain factual allegations that give the defendant "fair notice" of the claim asserted so the defendant can adequately respond to the petition.' The "fair notice" requirement is met if a petition informs the defendant of the incident giving rise to the claim and of the claim's general nature.
>
> (cite omitted) The only issue when considering a motion to dismiss is the 'petitioner's right of access to the district court, not the merits of his allegations.' The court cannot rely on evidence to support a motion to dismiss, nor can it rely on facts not alleged in the petition.

(Emphasis added).

Merits.

A. Applicable Law: In his Amended Petition, Venckus asserts a claim against Rich for malicious prosecution relating to his insistence on pursuing criminal charges against him after being provided with overwhelming exculpatory evidence. The elements of malicious prosecution are as follows: (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).

In *Johnson v. Miller*, 47 N.W. 903, 904 (Iowa 1891), this Court stated the following regarding the time frame relevant to a malicious prosecution claim:

> The contention is, whether the advice of counsel is a protection to one who commences a prosecution against another who is not guilty, and whom he does not believe to be guilty. 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 *Wilson v. Hayes*, 464 N.W.2d 250 (Iowa 1990), this Court was faced with a claim of malicious prosecution arising out of a civil case brought by an attorney. The Court stated the following:

> Malicious prosecution began as a remedy for unjustifiable criminal proceedings. Gradually the remedy was extended to the wrongful institution of civil suits. In fact, the Restatement refers to the civil side of the remedy as the "wrongful use of civil proceedings." So when applied to civil proceedings, malicious prosecution is actually a misnomer. *In our own cases we make no distinction*.

Wilson at 259 (Emphasis added).

Wrongful use of civil proceedings, found at §674 of the Restatement (Second) of Torts provides as follows:

> One who takes an active part *in the initiation, continuation or procurement of civil proceed*ings against another is subject to liability to the other for wrongful civil proceedings if
>
> (a) he acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and
>
> (b) except when they are ex parte, the proceedings have terminated in favor of the person against whom they are brought.

(Emphasis added).

The criminal proceedings counterpart to §674 is entitled "Wrongful Prosecution of Criminal Proceedings (Malicious Prosecution)" and is found at §653-671 of the Restatement (Second) of Torts. Specific to the issue raised by the City is §655, which 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 the following:

> The rule stated in this Section applies when the defendant *has himself initiated criminal proceedings against another or procured their institution, upon probable cause and for a proper purpose, and thereafter takes an active part in pressing the proceedings after he has discovered that there is no probable cause for them. It 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.*

(Emphasis added).

B. Application of Law to Amended Petition: The law cited above is clear ---you can be liable for instituting or procuring civil or criminal proceedings without probable cause, including in situations where you originally had probable cause and later learn probable cause no longer exists. Liability applies even if you are not the person bringing the charge if there is evidence that you sought to influence continued pursuit of charges. Venckus' claim fits comfortably within the existing law.

The City argues two things: 1) Iowa law does not recognize a claim for "continued prosecution" and limits itself to the initial charge; and 2) Venckus has failed to allege that Rich became aware that he no longer had probable cause.

The first argument is refuted by Iowa law. In *Johnson v. Miller*, the Court noted that a claim of malicious prosecution applied to both commencing and continuing a criminal prosecution. Further, the Court in *Wilson v. Hayes* recognized the application of malicious prosecution claims to the civil context where the court cited to Restatement §§674-675 with approval. The Restatement applies the same general concepts equally to a wrongful criminal or civil proceeding. In either, the continuation of the wrongful proceeding can result in liability. While the Restatement applies special rules to the differing claims, at this stage of the proceedings, where

the court must accept the factual and legal claims as true, Venckus' claim of malicious prosecution is supported by Iowa law.

The second argument is also without merit as the entire Amended Petition argues that Rich was provided with all the exculpatory evidence in the form of a Google Drive and "pressed forward against Venckus despite the overwhelming evidence that he was in the Chicago area at the time of the assault." (App. 39). Iowa is a notice pleading state and while the City seeks to nitpick over the language used by Venckus to argue that a particular word or phrase is not used, the Amended Petition tells a clear story ---Rich was provided with overwhelming evidence that Venckus was innocent and he continued to support and press for a prosecution that no longer had probable cause to support the charges.

At this stage of the litigation, where the allegations and reasonable inferences are accepted as true, the City's motion to dismiss must be denied. Venckus requests this Court affirm the District Court on this issue.

II. THE CITY MISCHARACTERIZES VENCKUS' CLAIMS IN ORDER TO ASSERT ABSOLUTE IMMUNITY. THE ALLEGATIONS IMPLICATE THE FAILURE TO PROPERLY INVESTIGATE. THE ONLY IMMUNITY AVAILABLE IS QUALIFIED IMMUNITY AS PROVIDED FOR IN *BALDWIN*.

Preservation of Error: The City has preserved error for review on this issue.

Standard of Review. Venckus agrees with the City that the standard of review is for errors at law with the understanding that the standard for ruling on a motion to dismiss is set out above in Section I.

Merits. Initially, it is necessary to point out that the City seeks to characterize Venckus' claim as an attack on Rich's trial testimony. This argument is made so that it can seek absolute immunity or otherwise avoid liability. Such a characterization is an incorrect representation of Venckus' claims. He contends that the City was obligated to properly investigate the allegations against him.

The Amended Petition at ¶s 36-42 (App. 38-39) outlines the crux of Venckus' complaint---that, after the charges were made and filed, the City was provided with wholly exculpatory evidence and that this information was either not reviewed or recklessly ignored. Either way, a reasonable officer should be expected to investigate any alibi defense, if for no other reason than

to disprove the alibi. This is a clear *Brady v. Maryland*, 373 U.S. 83 (1963) violation.

A claim of failure to investigate has been recognized in 42 USC §1983 litigation. *Wilson v. Lawrence County*, 260 F.3d 946 (8th Cir. 2001) recognized an obligation to properly investigate a crime. This concept was further explored in *White v. Smith*, 696 F.3d 740, 758 (8th Cir. 2012):

> We have also previously recognized that the following circumstances indicate conscience-shocking behavior in the context of a reckless or intentional failure to investigate claim: "(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, (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).

(Emphasis added).

In his Amended Petition, Venckus asserts that the defendants "purposefully ignored evidence suggesting [Mr. Venckus'] innocence" and claims that there is "evidence of systematic pressure to implicate the defendant in the face of contrary evidence." All of this occurred after the arrest and continued to trial, and in the process, the City continued to press for the prosecution of Venckus.

Yet, the City claims that "Venckus' claims all revolve around Rich's role as a witness, not his role as an investigator"; and none of the allegations made "relate to Rich's investigation or charge, but rather his role as a

witness." (City's Brief, p. 35 and 37)). This mischaracterization is made in order to assert absolute immunity for anything done after an arrest. But there is no such limitation; nor should there be. The duty to investigate a well-founded claim of innocence should be one of the key obligations of law enforcement because at no time does law enforcement have a governmental interest (or the jurisdiction) to purse a criminal charge against an innocent person. This was pointed out in *Wilson v. Lawrence County*:

> Law enforcement officers, like prosecutors, have a responsibility to criminal defendants to conduct their investigations *and prosecutions* fairly as illustrated by the *Brady* line of cases requiring the state to disclose exculpatory evidence to the defense. Although charged with investigating and prosecuting the accused with 'earnestness and vigor,' officers must be faithful to the overriding interest that 'justice shall be done.' They are 'the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.'

Id at 957 (emphasis added).

The City's duty to any citizen does not cease upon his arrest. If *Brady* requires a continuing duty to disclose exculpatory information after bringing a charge, then the City had a similar duty to review and investigate exculpatory information provided by Venckus. Granting absolute immunity for such reckless acts does nothing to serve the law's aims.

While much of the City's brief discusses the potential immunity of an "ordinary witness" or the role of "prosecutors", the City mischaracterizes the issue at this stage of the case. Venckus' claims are focused on the failure to

dismiss the charges when presented with overwhelming exculpatory evidence. Venckus contends that there should not have been a trial because the lack of probable cause was known to all defendants months before trial. Whatever probable cause may have existed at the outset, that probable cause evaporated when Venckus proved that he was 240 miles away at the time of the event. Coupled with evidence that only one perpetrator was identified by the victim and witness, that there was already strong evidence that Markley was the perpetrator, that the roommates all stated Venckus was in Chicago, and other exculpatory evidence provided by Venckus, a duty was triggered to re-evaluate probable cause and dismiss the charges.

The City contends that the decision to continue a prosecution was not theirs to make---that such a responsibility fell upon the County. However, it did have a duty to bring their concerns to the prosecutor and to do everything within their power to abort the prosecution. That included reviewing the information and further investigating. Rather than find the truth, the City dug in and sought to find ways to counter the exculpatory evidence. If the City can demonstrate that they acted with "all due care", then they will be entitled to plead and prove qualified immunity. *Baldwin v. City of Estherville*, 915 N.W.2d 259, 280 (Iowa 2018). But, at this stage, the City is not entitled to absolute immunity.

Finally, the City relies on *Minor v. State*, 819 N.W.2d 383 (Iowa 2012) for the proposition that this court should utilize the "functional approach" to assessing whether Rich was acting as an ordinary witness or a complaining witness. There are two problems with relying on *Minor*. First, *Minor* is a §1983 case. In §1983 litigation, the courts rely on the *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) analysis of immunities. That analysis was rejected by this Court in *Baldwin* at 279-280. Secondly, as noted earlier, the City's premise for seeking to distinguish between types of witnesses is a misplaced premise. This is not the issue raised by the Amended Petition and it appears to be an effort to distract the Court. It is possible that at a later stage of this case, the issue of what type of witness Rich was may be germane. But, for now, it is irrelevant to the issue before this Court on a Motion to Dismiss. In essence, the City seeks an advisory opinion or Summary Judgment before the completion of discovery. *Hartford-Carlisle Sav. Bank v. Shivers*, 566 N.W.2d 877, 884 (Iowa 1997) ("This court has repeatedly held that it neither has a duty nor the authority to render advisory opinions.")

Venckus requests this Court affirm the District Court on this issue.

III. VENCKUS' COMMON LAW CLAIMS ARE NOT TIME-BARRED. FURTHER, THE CONSTITUTIONAL CLAIMS SHOULD BE SUBJECT TO THE GENERAL PERSONAL INJURY STATUTE OF LIMITATIONS AND ARE TIMELY.

Preservation of Error: The City has preserved error for review on this issue.

Standard of Review. Venckus agrees with the City that the standard of review is for errors at law with the understanding that the standard for ruling on a motion to dismiss is set out above in Section I.

Merits.

A. Common Law Claims: Venckus has asserted three common law claims against the City: defamation, abuse of process and malicious prosecution. These claims are permitted under the Iowa Municipal Tort Claims Act, Iowa Code Chapter 670 (herein "IMTCA").

The applicable statute of limitations for the common law claims against the City defendants is Iowa Code §670.5 which begins to run when the wrongful loss or injury claimed occurs. The statute states in relevant part:

> …a person who claims damages from any municipality or officer…for or on account of any … loss, or injury within the scope of section 670.2 or section 670.8 or under common law shall commence an action therefor within two years after *the alleged wrongful …loss, or injury*.

(Emphasis added).

In this case, Venckus has alleged repeated and ongoing loss or injury and has specified the wrongful conduct that produced that loss or injury. The

City argues that the injury was the arrest, but that overlooks ¶s 36-59 (App. 38-41) which outline the loss and injury alleged and suffered by Venckus. That injury was repeated and continued throughout the time frame described in the Amended Petition and Venckus suffered both financial loss (e.g., defending against the wrongful charges and prosecution), repeated defamation in the press, and emotional injury due to the repeated refusal to dismiss the criminal charges against him. The arrest may have been reasonable based on the information that the City had at the time, but as more and more information was provided to the City as outlined in ¶s 36-59 (App. 38-41) it should have been clear that it had charged the wrong person and should have stopped causing harm to Venckus. The City chose to continue to press the charges despite repeated and ongoing requests that the charges be dismissed, and in doing so caused continuing harm to Venckus.

It is a question of fact for the jury to decide when the City knew or should have known it was prosecuting an innocent person and should have dismissed the charges. At that point, the injury suffered by Venckus is actionable due to the *wrongful* conduct of the City. If the conduct is not yet wrongful, then it is not a "wrongful…loss or injury". The City has delineated the arrest as the act that produces the injury, but it will also claim that it had probable cause. If the arrest was based on probable cause, then it was not

wrongful. The jury must determine when the conduct was wrongful and what loss or injury was incurred.

In *Hegg v. Hawkeye Tri-County REC*, 512 N.W.2d 558, 559 (Iowa 1994), while discussing the applicability of Iowa Code §614.1, the general tort statute, this court stated:

> We agree that where the wrongful act is continuous or repeated, so that separate and successive actions for damages arise, the statute of limitations runs as to these latter actions at the date of their accrual, not from the date of the first wrong in the series.

As applied to Iowa Code §670.5, the Iowa Court of Appeals in rejecting attacks on the statute, applied the same concept in finding that "C.B.'s injury occurred no later than 2005, when the last abuse allegedly occurred." *Buszka v. Iowa City Cmty. Sch. Dist.*, 2017 Iowa App. LEXIS 124 , *14 (Iowa App. 2007)

Moreover, 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); *Riniker v. Wilson*, 623 N.W.2d 220, 228-229 (Iowa App. 2000)[2] ("The trial court

[2] Even the City recognized the application of the last injury test, as they claimed in their Motion at page 6 (App. 19) that Plaintiff's injury "at the latest" was during his arrest. While this is factually incorrect, it is the proper method to use to establish an "injury."

correctly placed the burden of proving the statute of limitations defense upon Wilson.")

Here, the last major act that caused Venckus harm was when the defendants forced him to defend at trial, where he was acquitted. That trial ended in September 2016, well within the 2-year statute of limitations. Venckus still suffers in the court of public opinion, through lost education, and the stigma that follows him due to a sex abuse charge.

1. Malicious Prosecution: Malicious prosecution claims do not exist until the prosecution ends favorably to the claimant:

> The general rule is that a cause of action accrues when the aggrieved party has a right to institute and maintain a suit. In the case of malicious prosecution, this occurs only after termination of the prosecution by acquittal or discharge, because such a termination is one of six elements of a malicious prosecution claim that must be proven by the plaintiff.

Crouse v. Iowa Orthopaedic Ctr., 2005 Iowa App. LEXIS 437 (Iowa App. 2005).

If the claim does not exist until after the prosecution ends, then the injury is not established to have occurred until then. However, assuming that a malicious prosecution claim must be brought when the "wrongful injury" occurs, the last relevant injury occurs right before trial. In this case, suit was filed within two years of that date.

2. Abuse of Process: The same can be said for abuse of process, since the act of continuing the charges and bringing them to trial to avoid a potential lawsuit, as alleged in the Amended Petition, does not occur and therefore the injury from that does not occur until the element of the claim is established. *Mills County State Bank v. Roure*, 291 N.W.2d 1 (Iowa 1980) ("One who uses a legal process, whether criminal or civil, against another to accomplish a purpose for which it is not designed is liable to the other for the pecuniary loss caused thereby.") Again, a jury will have to determine the point at which the process was abused by the City.

3. Defamation: In *Kiner v. Reliance Ins. Co*., 463 N.W.2d 9, 14 (Iowa 1990), this Court said "every publication or repetition of defamatory matter constitutes a claim which is separate and independent from any claims arising out of the original publication." Venckus claims that the continual allegation that he was a rapist was defamatory and such a claim was continually made by the City up to the trial date. Once again, the City tries to limit the number of publications by claiming that its reading of the Amended Petition only applies to the arrest in 2014. But the allegations found throughout the Amended Petition relate to the continued claim that he was one of the rapists of the victim, a claim that was proven to be untrue. The criminal case went on for more than 2 ½ years with numerous additional defamatory statements

(whether oral or in writing), including court filings, court hearings, and a public trial (published within and outside the courthouse) all held because the defendants refused to dismiss or press for the dismissal of the charges. The jury will decide what was said, when it was said, and whether the statements were defamatory.

In summary, as to all the common law claims, the statute of limitations may be a defense that the defendants can use if they can establish its application, but it is not a basis for a motion to dismiss. *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.") *See also Earl v. Clark*, 219 N.W.2d at 491. The issue here cannot be resolved as a matter of law, and certainly not at this stage of the litigation.

B. Constitutional Claims: For the first time, the Iowa Supreme Court has recognized a "tort claim under the Iowa Constitution when the legislature has not provided an adequate remedy." *Godfrey v. State at* 880. *Godfrey* allowed such a claim for violations of article I, §§6 and 9. In *Baldwin*, this Court then implicitly found that *Godfrey* claims also applied to article, I, §§1

and 8, subject to an affirmative defense of qualified immunity for law enforcement.

What is the statute of limitations for such claims? The City contends that the most applicable statute is §670.5 because that is what the legislature has provided for when suing a municipality. The problem with this contention is what statute of limitations does one apply if the defendant is a state employee? Iowa Code §669.13 provides, in relevant part, as follows:

> a claim or suit otherwise permitted under this chapter shall be forever barred, unless within two years *after the claim accrued*, the claim is made in writing and filed with the director of the department of management under this chapter.

(emphasis added)

The Court will note that this statute differs dramatically from the municipality statute. §669.13 is an accrual statute and not the "statute of creation" pointed out by the City. If we accept the contention made by the City, we either end up with different statutes for different defendants, or less protection for suits against State employees than for Municipal employees. The position advanced by the City is untenable.

There needs to be one statute of limitations applicable to all governmental officials and the statute of limitations must reflect the importance of the claims made and the statements already made by this Court.

In *Godfrey*, this Court stated "When 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.* "[A] number of cases agree with the notion that constitutional rights are distinguishable from common law or statutory claims. Because the interests being vindicated are different, parallel claims are appropriate." *Id.*

That being the case, the statute of limitations needs to be flexible to accommodate the goal of protecting individual rights. A limitation on claims, such as found at §670.5, that is intended to provide greater protection to the government is inconsistent with the goal of vindicating individual rights.

The most appropriate statute is the statute of limitations applicable to all tort claims against private individuals in the State of Iowa. This guarantees governmental defendants are treated the same as private defendants. Iowa Code §614.1(2) provides as follows:

> Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:
>
> 2. Injuries to person or reputation — relative rights — statute penalty. Those founded on injuries to the person or reputation, including injuries

> to relative rights, whether based on contract or tort, or for a statute penalty, within two years.

This results in a 2-year accrual statute and the availability of a discovery rule.

This is consistent with *Callahan v. State*, 464 N.W.2d 268, 273 (Iowa 1990) where the court utilized Iowa Chapter 614 rather than the predecessor to Chapter 669 in a §1983 action against the State of Iowa:

> There is another issue upon which the plaintiff has appealed respecting the court's dismissal of her claim under 42 U.S.C. section 1983 for violation of her constitutional rights. Under *Wilson v. Garcia*, 471 U.S. 261, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985), section 1983 actions are subject to the appropriate state statutes of limitations governing actions "for an injury to the person or reputation of any person." The plaintiff's section 1983 action, therefore, is subject to the general limitation provisions of chapter 614, not section 25A.13 [now 669.13], and the discovery rule clearly applies….. Accordingly, the court's dismissal of the section 1983 action must also be reversed.

While *Godfrey* claims are distinct from §1983 claims as discussed in *Baldwin*, the use of the general statute of limitations against the State suggests that governmental officials are not entitled to special treatment when it comes to claims of constitutional violations.

It is noteworthy that when given the opportunity to utilize the state tort claims act to establish the standard to use in assessing available immunities, this Court, in *Baldwin*, refused to do so. *Baldwin* at 278-280. A reason not to do so is that such an approach leaves the Iowa Bill of Rights vulnerable to

legislative efforts to protect governmental interests at the expense of individual rights.

The City also noted that in *Baldwin* this Court looked to how other states handled state constitutional claims. While such a review may be valuable, it is noteworthy that the Court in *Baldwin* ultimately rejected the way most other states handled the issue of qualified immunity, opting for its own path. *Baldwin* at 280 ("We have decided not to follow any of these lines of authority exactly. 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 §874A.").

Venckus' claims all accrued at the time that trial began in September 2016. He therefore brought this action within the time limits provided for in Iowa Code §614.1(2).

Venckus requests the Court affirm the District Court on this issue.

IV. VENCKUS' CONSTITUTIONAL CLAIMS ARE RECOGNIZED BY *GODFREY* AND *BALDWIN* AND THE IMTCA DOES NOT PROVIDE AN OTHERWISE ADEQUATE REMEDY.

Preservation of Error: The City has preserved error for review on this issue.

Standard of Review. Venckus agrees with the City that the standard of review is for errors at law with the understanding that the standard for ruling on a motion to dismiss is set out above in Section I.

Merits.

Venckus' constitutional tort claims flow directly from *Godfrey* (article I, §§6 and 9) and *Baldwin* (article I, §§1 and 8). The City's final argument is that Venckus has been provided with adequate remedies under Chapter 670 (IMTCA) and therefore that statutory scheme preempts *Godfrey* constitutional tort claims. In support, the City claims that Iowa Code §670.12 allows punitive damages against municipal employees. [3]

However, the Court in *Baldwin* rejected the use of tort claims acts, such as Chapter 669, the Iowa Tort Claims Act (herein "ITCA") to define available immunities.[4] In doing so, the Court noted that "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* at 280. And therein lies the problem of substituting the system

[3] But, Iowa Code §670.4(1)(e) specifically excludes claims for punitive damages against a municipality. This was not noted by the City in its brief.
[4] Even though the Court in *Baldwin* discussed state tort claims acts in evaluating immunities, the actual defendants there were municipal officials. Therefore, when the court rejected the use of tort claims act it implicitly rejected the use of the IMTCA.

established under either the ITCA or IMTCA for *Godfrey* constitutional torts. If this Court were to use the IMTCA or ITCA to preempt constitutional tort claims, the legislature could create further roadblocks.

Justice Appel, in his dissent in *Baldwin*, commented on the problems created by allowing tort claims acts to limit claims. He stated:

> The Acts, however, have sweeping exceptions.
>
> The Iowa Tort Claims Act broadly exempts the state from liability for claims "arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." Further, the state is exempt from liability for any claims brought by an inmate. These provisions, if enforced with respect to constitutional claims, would dramatically undermine the scope of available remedies in a wide variety of actions.
>
> The Municipal Tort Claims Act also provides for liability of local government, subject to enumerated exceptions. The exceptions are different than under the Iowa Tort Claims Act. … Further, claims for punitive damages are not allowed. Depending on interpretation, application of these Code provisions to situations where government officials cause grievous harm could dramatically reduce any possible recovery.
>
> These statutory provisions are not of much value in determining whether there is qualified immunity for officers who commit constitutional torts. The very purpose of the Bill of Rights is to restrain the majoritarian branches of government. These provisions are distinctly antimajoritarian. It would be a fox-in-the-henhouse problem to permit the legislature to define the scope of protection available to citizens for violation of constitutional rights. As noted by Professor Amar, "When governments act ultra vires and transgress the boundaries of their charter, . . . their sovereign power to immunize themselves is strictly limited by the remedial imperative."

Baldwin at 292, (Appel, J. dissent) (citations omitted)

The City seeks to distinguish *Baldwin* by claiming that it did not concern adequacy of remedies. This is incorrect. What good are remedies if you are precluded by immunity from asserting a claim?

Venckus contends that the Iowa Bill of Rights can only be truly protected if the legislature is kept away from selecting winners and losers or placing the governmental thumb on the scales of justice. In order to have a true constitutional tort that emanates from the Iowa Bill of Rights, the Court must reject preemption. It is antithetical to the self-executing pronouncement in *Godfrey*. If the IMTCA or the ITCA can preempt constitutional tort claims, then there are no constitutional tort claims. The City's preemption defense must be rejected.

Venckus requests this Court affirm the District Court on this issue.

APPEAL ARGUMENT ON THE COUNTY'S APPEAL

I. PROSECUTORS ARE ONLY ENTITLED TO *BALDWIN* QUALIFIED IMMUNITY

Preservation of Error: The County has preserved error for review on this issue.

Standard of Review. Venckus agrees with the County that the standard of review is for errors at law.

Merits.

> The prosecutor has more control over life, liberty, and reputation than any other person in America. …While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.
>
> ***
>
> A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.

Robert H. Jackson, *The Federal Prosecutor*, 24 J. Am. Jud. Society 18, 20 (1940).[5]

In its brief, the County seeks absolute immunity for prosecutors contending it is necessary "to maintain the integrity of the judicial process." (County Brief, p. 8). But what integrity exists when the prosecutor acts negligently, recklessly or maliciously, focused only on "winning", abusing the

[5] At the time of this article, U.S. Supreme Court Justice Jackson was the Attorney General of the United States.

power entrusted to her? Is prosecutorial indifference to the harm caused by such conduct part of the integrity described by the County? Does that engender confidence in the judicial process? For too long, courts have countenanced such wrongful behavior by convincing themselves that shielding prosecutors from civil accountability is a key component to protecting the "integrity" of the judicial system.[6] This case provides the Court with an opportunity to test the legitimacy of that theory; to balance the prosecutorial independence needed with accountability when a prosecutor fails to seek truth and creates victims.

A. Justice Scalia Analysis of Prosecutorial Immunity.

Justice Scalia's dissent in *Burns v. Reed*, 500 U.S. 478 (1991) outlines the common-law immunities that existed before 1871. According to him, absolute immunity applied to "judicial immunity" or "defamation immunity" and not to "quasi-judicial immunity". As to the latter, he stated:

> I do not doubt that prosecutorial functions, had they existed in their modern form in 1871, would have been considered quasi-judicial. But that characterization does *not* support absolute immunity.

[6] *Van de Kamp v. Goldstein*, 129 S. Ct. 855, 860 (2009) (holding that prosecutors have absolute immunity for actions associated with the judicial phase of trial, stating it is better "to leave unredressed the wrongs done by a dishonest officer(s) than to subject those who try to do their duty to [the] constant dread of retaliation.").

Burns at 496. (citing *Wight* v. *Rindskopf*, 43 Wis. 344, 354 (1877) (prosecutor acts as a quasi-judicial officer in deciding whether to dismiss a pending case)).

Venckus' allegations relate to the failure to investigate wholly exculpatory evidence. This conduct is investigatory in nature and to Justice Scalia would merit qualified immunity only. Venckus argues for a similar though slightly different approach---"all due care" qualified immunity for all prosecutorial actions, regardless of function.

B. Wrongful Prosecutions and Convictions Exist in Ever Growing Numbers.

In a study entitled "*Estimating the Prevalence of Wrongful Convictions*", funded by the National Institute of Justice, Office of Justice Programs, U.S. Department of Justice, issued in 2017, the authors conclude the following:

> This study extends prior research on the prevalence of wrongful convictions. In particular, we rely on case processing and disposition data collected on 714 murder and sexual assault felony cases across 56 circuit courts to calculate an estimated rate of wrongful conviction. Based on forensic, case processing, and disposition data, we estimate, after weighting, that wrongful convictions in cases with a sexual assault component occurred at a rate of **11.6 percent**, which is different than prior estimates reported by the Urban Institute in 2012, due to both a more refined scope and additional context from case files.

www.ncjrs.gov/pdffiles1/nij/grants/251115.pdf (emphasis in original)

Wrongful convictions and exonerations have become so commonplace that there is a National Registry of Exonerations[7] maintained by two law schools and a University Center for Science and Society, and a Center on Wrongful Convictions at Northwestern University School of Law.[8] There is also the well-known Innocence Project.[9] According to the National Registry, there are a reported 2300 exonerations to date and counting. Each story of exoneration is heartbreaking ---the years and families lost to a failed process.

Iowa is not immune to wrongful convictions. *McGhee v. Pottawattamie County*, 547 F.3d 922, 933 (8th Cir. 2008), dismissed, 130 S. Ct. 1047 (2010) (concluding that "immunity does not extend to the actions of a County Attorney who violates a person's substantive due process rights by obtaining, manufacturing, coercing and fabricating evidence before filing formal charges, because this is not 'a distinctly prosecutorial function'").

This has led to scholarly articles about prosecutorial misconduct as a feature of wrongful prosecutions and convictions. A few examples are Catherine Ferguson-Gilbert, *It Is Not Whether You Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for*

[7] www.law.umich.edu/special/exoneration/Pages/about.aspx;
[8] www.law.northwestern.edu/legalclinic/wrongfulconvictions
[9] www.innocenceproject.org

Prosecutors?, 38 CAL. W. L. REV. 283, 304 (2001); Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 UDC L. REV. 275, 282 (2004); Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 57 (2005); Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 281 (2007); and Randall Grometstein, *Prosecutorial Misconduct and Noble-Cause Corruption*, 43 CRIM. L. BULL., No. 1, ART I (2007)

C. The Prosecutor's Role in Undermining the Integrity of the Judicial Process

The County tosses the word "integrity" around as though it is an undeniable truth that prosecutors are the heroes in this story. But, if innocent people are being convicted at the rate of 11%, made to spend many years in prison, and potentially put to death, there is something very wrong with the "integrity" of the judicial process. There is also little doubt that the solution to the problem is multi-factorial. Venckus contends that one of those factors is the lack of accountability for prosecutors. Professor Davis points out the severity of the problem of prosecutorial misconduct:

> Prosecutorial misconduct encompasses a wide range of behaviors, including courtroom misconduct (such as making inflammatory comments in the presence of the jury, mischaracterizing evidence, or making improper closing arguments), mishandling physical evidence (destroying evidence or case files), threatening witnesses, bringing a

> vindictive or selective prosecution, and withholding exculpatory evidence. Although there is no dispute that prosecutorial misconduct exists, there is considerable disagreement about whether it is a widespread problem in the criminal justice system. Some suggest that the phenomenon is an aberration, but there is considerable evidence to suggest that misconduct is a pervasive problem.
>
> ***
>
> In 2003, the Center for Public Integrity, a nonpartisan organization that conducts investigative research on public policy issues, conducted one of the most comprehensive studies of prosecutorial misconduct. A team of researchers and writers studied the problem for three years and examined 11,452 cases in which appellate court judges reviewed charges of prosecutorial misconduct. In the majority of cases, the alleged misconduct was ruled harmless error or not addressed by the appellate judges. The Center discovered that judges found prosecutorial misconduct in over 2000 cases in which they dismissed charges, reversed convictions, or reduced sentences. In hundreds of additional cases, judges believed that the prosecutorial behavior was inappropriate, but affirmed the convictions under the "harmless error" doctrine.

The Legal Profession's Failure to Discipline Unethical Prosecutors, 36 HOFSTRA L. REV. at 277-78

The study essentially found that in 17% of cases there was such misconduct that reversals and dismissals were warranted, and in many others here was misconduct deemed "harmless error." In short, there is a 1 in 5 chance that a criminal defendant will experience prosecutorial misconduct. If this is the "integrity" trumpeted by the County, then there is a significant disconnect.

Despite this level of misconduct, the legal profession is slow to intervene. "The Supreme Court has recommended that prosecutors be referred

to the relevant disciplinary authorities when they engage in misconduct. However, for reasons that remain unclear, referrals of prosecutors rarely occur. Even when referrals occur, state bar authorities seldom hold prosecutors accountable for misconduct. The Office of Professional Responsibility of the U.S. Justice Department, the counterpart for federal prosecutors, has a similar weak record." *Id* at 277.[10]

D. Prosecutors and Judges: A False Equivalency

The County, in citing to *Blanton v. Barrick*, 258 N.W.2d 306, 308 (Iowa 1977) argues that Judges and prosecutors are "generally cloaked with the same immunity." This is the biggest problem with the argument in favor of absolute immunity. The suggestion that Judges and prosecutors are equivalent because they are part of the "judicial process" is patently false. Judges are expected to be neutral; prosecutors are expected to be advocates. They have wholly different roles. They may all work for the same system, but they are not on the same team. Football teams and referees may be on the same field, but they are not on the same side. Judges, as arbiters of disputes, should be shielded with some type of absolute immunity, absent egregious conduct. But prosecutors cannot be provided with absolute immunity. Their job is to

[10] A call to the Iowa Office of Professional Regulation disclosed that there is currently no mechanism available to research complaints made or discipline of prosecuting attorneys.

zealously advocate for their perception of the evidence. Catherine Ferguson-Gilbert painted an unflattering picture of a prosecutor as follows:

> My job is to play a game. I have a rule book to guide me but its terms are vague. Scholars debate what the terms mean but are unable to come to a resolution. Thus, I define the terms myself in the same manner as other players who are in different positions on different teams. At the very least, the terms mean that I must win because no one would pay me to lose. I have played the game before and am undefeated, with an impressive record of 50-0. With such an impressive record, I can advance to more intense games - especially if my fans realize what a winner I am. I have enormous power behind me to help me win. I can choose or dismiss my opponents, buy the help of others, and use my virtually unchecked power against my opponents. Even if I do not play the game well, and I lie, cheat, and dishonor the game itself - I will face no consequences. When I play the game unfairly, and even hurt innocent people in the process, others will label my actions as "harmless." There is no recourse for my misconduct in my attempt to win the game. I thus continue my pursuit of wins, but I am supposed to be "just." I have a blindfold on, but if I take it off I can see the procedure I need to follow to be "just." Who am I? I am … a prosecutor.

It Is Not Whether You Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?, 38 CAL. W. L. REV. 283

While unflattering, there is support for this perception of the prosecutor. In fact, one can reasonably argue that such a perception can be placed on any attorney representing a client. Ms. Ferguson-Gilbert quotes Clarence Darrow to that effect. *Id* at 283. And therein lies the false equivalency. While we expect prosecutors to act as an officer of the court, we also demand that they zealously advocate for their client----the citizens of the county and the state of Iowa.

The law on absolute immunity for prosecutors has created this false equivalency and once that's done it is easy to convince yourself of the need for absolute immunity. But the continuing disclosure of wrongful prosecutions and convictions is beginning to drown out the false equivalency. While Judges may on rare occasion belie their oath to dispense justice, the judicial system does not encourage such behavior; the opposite is not true for prosecutors. They are encouraged to win at all costs by a system that demands partiality and advocacy.

E. A Call to End Absolute Immunity for Prosecutors

Iowa's State Motto is "our liberties we prize and our rights we will maintain." Absolute immunity for the violation of Iowans' constitutional rights is generally incompatible with that motto. One will not find any reference to immunity from suit in the text of the Iowa Constitution.

At the heart of the individual rights granted by the Iowa Constitution is the rejection of abusive governmental power. Whether this comes in the form of false arrests, wrongful prosecutions or interference with parent-child relationships, the abusive use of the heavy hand of the government is repugnant to the Iowa Constitution. To allow or grant absolute immunity to otherwise abusive governmental conduct is to undermine the very existence of the right granted to the individual by the Iowa Constitution. Joshua

Venckus was innocent, and the prosecutors knew he was innocent or recklessly disregarded his innocence. And now the County is pleading with this Court to ratify that conduct; to not allow the story to be told. Such a request undermines the state motto.

1. Precedential Value of Federal Constitutional Law:

This Court has on many occasions rejected the use of federal constitutional precedent; it has chosen to lead rather than follow. *See State v. Short*, 851 N.W.2d 474, 507 (Iowa 2014) (Cady, C.J., specially concurring). This was highlighted most recently in *Baldwin*, where Justice Mansfield writing for a majority of the Court rejected the *Harlow v. Fitzgerald* qualified immunity test in the context of a claim for wrongful arrest. The dissenters in that case would have gone further than the majority.

> Justice Appel in a separate case made the following pronouncement:
>
> > The mere fact that the United States Supreme Court has developed an approach does not bind us to follow it if we think there is a better, sounder approach under the Iowa Constitution. And, whenever we consider federal precedents involving individual rights, we must consider Justice Harlan's admonition that the protections afforded by individual liberties tend to be diluted by the lowest-common-denominator pressures of federalism, considerations wholly absent when we consider questions under the Iowa Constitution.

State v. Wickes, 910 N.W.2d 554, 575 (Iowa 2018) (Appel, J., specially concurring).

This is consistent with the expectation of the federal drafters, who considered it the responsibility of the states to preserve the rights of individuals. *State v. Baldon*, 829 N.W.2d 785, 808 (Iowa 2013) (citing I *Records of the Federal Convention of 1787* 356 (Max Farrand ed., 1937)).

And consistent with the comments of our Chief Justice that Iowa's Constitution "was designed to be the primary defense for individual rights, with the United States Constitution Bill of Rights serving only as a second layer of protection." Honorable Mark S. 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, 1145 (2012).

It is also consistent with this Court's comments in *Godfrey*:

> [T]he record of the 1857 Iowa Constitutional Convention reflects a desire of its members 'to put upon record every guarantee that could be legitimately placed [in the constitution] in order that Iowa not only might be the first State in the Union, unquestionably as she is in many respects, but that she might also have the best and most clearly defined Bill of Rights.'

Godfrey at 864.

This Court should reject the precedential value of U.S. Supreme Court or other federal caselaw in determining whether absolute immunity should be recognized and applied to limit the reach and importance of the Iowa Constitution.

2. Absolute Immunity is Incompatible with the Iowa Constitution:

The Iowa constitutional delegates met in Iowa City in 1857 to revise the Constitution. The president of the convention recognized the importance of what they were about to do:

> The constitution of a State may be regarded, to a certain extent, as a fixed and permanent instrument, a higher law, for the guidance, not only of individual members of the body politic, but also a law to which the various departments of the government, in their action, must conform. It is the foundation upon which the superstructure of the legislation and jurisprudence of the State rests. Upon its character and principles, the prosperity and happiness of the social compact may be said much to depend. It is looked upon as embodying the spirit and policy of a people. It is in a word, "positive law."

http://publications.iowa.gov/7313/1/The_Debates_of_the_Constitutional_Convention_Vol%231.pdf (last visited on 5/4/18) (containing The Debates of the Constitutional Convention of the State of Iowa, Vol. 1, January 20, 1857, P. 6-7).

In *Varnum v. Brien*, 763 N.W.2d 862, 875 (Iowa 2009), this Court made clear that "[t]he Iowa Constitution is the cornerstone of governing in Iowa. Like the United States Constitution, the Iowa Constitution creates a remarkable blueprint for government." The Court also stated that:

> Among other basic principles essential to our form of government, the constitution defines certain individual rights upon which the government may not infringe. *See* Iowa Const. art. I ("Bill of Rights")…. All these rights and principles are declared and undeniably accepted as the supreme law of this state, against which no contrary law can stand. *See* Iowa Const. art. XII, § 1 ("This constitution shall be the

> supreme law of the state, and any law inconsistent therewith, shall be void.").
>
> ***
>
> It is also well established that courts must, under all circumstances, protect the supremacy of the constitution as a means of protecting our republican form of government and our freedoms.

Varnum at 875.

This obligation of our courts includes refusing to grant absolute immunity to government officials who violate the rights of Iowans guaranteed by our state's Constitution.

In *State v. Short*, in a concurring opinion, Chief Justice Cady commented on the importance of remaining resolute in the face of efforts to erode the individual protections provided by the Iowa Constitution:

> As Iowans, we are deservingly proud of a long history of rejecting incursions upon the liberty of Iowans, particularly because we have so often arrived to the just result well ahead of the national curve. Yet, we cannot ignore that our history of robust protection of human rights owes in no small part to our authority within America's federalist system to independently interpret our constitution. Similarly, we must not forget that the virtue of federalism lies not in the means of permitting state experimentation but in the ends of expanded liberty, equality, and human dignity. A court that categorically ignores these distinctly human ends can only accomplish injustice. Thus, we have recognized that "[w]hen individuals invoke the Iowa Constitution's guarantees of freedom and equality, courts are bound to interpret those guarantees….
>
> It goes without saying our decisions have not always been without their detractors. As we pointed out in *State v. Lyle*, also decided today, "[o]ur court history has been one that stands up to preserve and protect individual rights regardless of the consequences."854 N.W.2d 378, 403 (Iowa 2014). Yet, history has repeatedly vindicated, and the people of Iowa have repeatedly embraced, the bold expansions of civil,

> constitutional, and human rights we have undertaken throughout the 175 years of our existence as a court. …
>
> Today's decision is another step in the steady march towards the highest liberty and equality that is the birthright of all Iowans; it will not be the last.

Short at 507.

In *Short*, the majority noted that over time U.S. Supreme Court decisions had diluted the substance of the rights conferred by the federal Bill of Rights, particularly regarding search and seizure law. It noted that concerns had been raised about the potential that the pronouncements of federal courts in applying the Bill of Rights to the states would result in the diminution of individual rights. *Short* at 485-86.

A similar discussion was held in *State v. Baldon*, where Justice Appel filed a concurring opinion in which he discussed the history of state constitutional interpretations in relationship to then existing federal caselaw as well as discussing the long line of cases in which the Court "jealously reserve[d] our right to construe our state constitution independently of decisions of the United States Supreme Court." *Id.* at 803

3. The Cost of Immunity

The doctrines of absolute and qualified immunity in federal civil rights litigation have eroded constitutional rights. The result is that few cases survive summary dismissal because of qualified or absolute immunity. For example,

Professor Diana Hassel, in her law review article *Living a Lie: The Cost of Qualified Immunity*, 64 Mo. L. Rev. 123 (1999) states:

> A determination of the scope of the immunity defense--which government officials should get it and how much--has provided the means to resolve, at least temporarily, difficult questions regarding the proper role of civil damage awards in protecting constitutional rights. The problem with this approach is that using the immunity defense as the language of the debate over the proper limits of civil rights remedies obscures choices that are being made on the fundamental and divisive issue of what constitutional wrongs should be compensated.

Id.

Later, in discussing 42 USC §1983, she notes:

> On its face, the statute provides for no immunities from liability. Nonetheless, in a series of decisions beginning in 1967 with *Pierson v. Ray* [386 U.S. 547 (1967)], the United States Supreme Court created immunity defenses. In a policy-driven analysis which was largely uninfluenced by any controlling law, the Court fashioned the qualified immunity defense. As it evolved, the stated purpose of the defense was to protect government officials who acted reasonably from frivolous law suits but also to provide damages for plaintiffs when a government official's conduct was particularly blameworthy. However, these stated rationales for the qualified immunity defense do not tell the whole story. The qualified immunity defense also provided a flexible mechanism for the resolution of civil rights actions that would leave the determination of the outcome almost entirely in the unfettered control of the courts.
>
> ***
>
> In the years that followed *Pierson*, the Court sorted through which government officials were entitled to absolute immunity and which were protected by good faith, or qualified immunity. … The decision to insulate certain government officials from liability was driven by the Court's determination that critical governmental functions must remain unfettered so as to provide better government for all. These decisions were to a large extent unabashedly based on the policy choices of the Court.

***

> These laudable goals notwithstanding, the judicial creation and modification of the qualified immunity defense gave the courts broad discretion to determine whether a particular civil rights claim would go forward. Whether certain types of claims would result in judgments for plaintiffs or summary judgments for defendants was now firmly in the control of the judiciary. This placement of control in the hands of the courts through the mechanism of qualified immunity has led to the development of a canon of civil rights law that is apparently driven by a focus on the reasonableness of the defendant. *This emphasis on the defendant removes the spotlight from the impact of civil rights law on the plaintiff and on broader societal concerns about the enforcement of civil rights.*

64 Mo. L. Rev at 125, 127-28, 133-34 (emphasis added).

Professor Hassel contends that:

> The problem with qualified immunity is not so much that the outcomes are sometimes unfair but the fact that qualified immunity blocks a clear view of the real limitations that exist in civil rights law. Civil rights law is, in effect, being designed in the dark. Distinctions are being made about the types of cases that will receive compensation and the types that will not.
>
> ***
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> *Using qualified immunity as a shield from the truth may buy us peace, but it keeps from us the tools required for reform*.

64 Mo. L. Rev at 152 and 156 (Emphasis added)

Perry M. Rosen, *The Bivens Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L Rev. 337 (1989) argues that the use of immunities, among other aspects of Bivens claims has undermined the purpose of these claims:

> As will be discussed below, *Bivens* plaintiffs have been deprived of a meaningful remedy because the courts have created innumerable obstacles to obtaining a recovery against wrongdoing federal officials. The courts have tipped the balance so far in favor of the concern for the

> proper functioning of government that the primary purpose of the *Bivens* action -- the right of an aggrieved citizen to obtain damages for a constitutional deprivation -- has become an empty and unfulfilled promise.

67 N.C. L Rev. at 344.

4. Availability of Immunity after *Baldwin*

In *Baldwin*, this Court cited with approval the law review article authored by Professor John Jeffries, *The Liability Rule for Constitutional Torts***,** 99 Va. L. Rev. 207 (2013). *Baldwin* at 280-81. He stated:

> There is no liability rule for constitutional torts. There are, rather, several different liability rules, ranging from absolute immunity at one extreme to absolute liability at the other…. The right being enforced is irrelevant to constitutional tort doctrine. What matters instead is the identity of the defendant or the act she performs….
>
> This fracturing of constitutional torts into disparate liability rules does not reflect any plausible conception of policy. Although the Court occasionally makes functional arguments about one or another corner of this landscape, it has never attempted to justify the overall structure in those terms. Nor could it. The proliferation of inconsistent policies and arbitrary distinctions renders constitutional tort law functionally unintelligible…. However sympathetic one may be to the disruptive effect of such fortuities or to the more general difficulty of devising a rational system through episodic pronouncements on constituent issues, the fact remains that constitutional tort doctrine is incoherent. It is so shot through with inconsistency and contradiction as to obscure almost beyond recognition the underlying stratum of good sense.

Id.

Professor Jeffries is right and unless this Court establishes a coherent doctrine going forward, it may well fall victim to the same disease found in the federal

system. This Court flirts with contracting that disease when it states at the end of the decision in *Baldwin*:

> We leave open a number of other issues. These include the possibility that constitutional claims other than unlawful search and seizure may have a higher mens rea requirement, such as intent, embedded within the constitutional provision itself. In other words, it may take more than negligence just to violate the Iowa Constitution. They also include the possibility that common law absolute immunities, such as judicial immunity or quasi-judicial immunity, could apply to state constitutional claims. And they include the potential applicability of provisions in chapters 669 and 670 other than *sections 669.14* and *670.4*. We do not address those issues today.

Baldwin at 281

This statement presages a quilt-like set of immunities that will devolve into each defendant demanding a custom-made immunity. This Court must protect the Iowa Constitution from the disease or else it will end up with the same problem described by Professor Jeffries.

The solution begins with the question whether qualified immunity as outlined in *Baldwin* is acceptable to all government officials.[11] If so, then that

[11] Venckus does not include Judges and jurors in the government official category because they are the gatekeepers of the Iowa Constitution and must be allowed to enforce and protect it without regard to interference. They should receive absolute immunity, absent evidence of corruption, such as an admission of guilt, criminal conviction or administrative finding of guilt. "Absolute immunity for judicial decisions is justified by the general availability of the alternative remedy of appeal. It follows that judicial decisions so far removed from that corrective process as to render it irrelevant should not be absolutely beyond the pale of constitutional tort actions." Jeffries, *The Liability Rule for Constitutional Torts* at 214.

type of immunity should be made available to all government officials, offering them the opportunity to prove and plead that they acted with all due care. Professor Jeffries says the following about all forms of immunity:

> This Article attempts a unified theory of constitutional torts. Less grandly, it offers a comprehensive normative guide to the award of damages for violation of constitutional rights. It seeks generally to align the damages remedy on one liability rule, a modified form of qualified immunity with limited deviations justified on functional grounds and constrained by the reach of those functional justifications....
>
> Critiques of existing doctrine provide the basis for proposed changes. *The analysis begins with absolute immunity, then proceeds to absolute liability, and concludes with extended consideration of qualified immunity. I call for curtailment of the first two categories and reform of the third.* Overall, these changes would shift the law toward greater damages liability for constitutional liability, but not across the board. Liberalization of recovery would be the net effect of reforms that cut in both directions. The overall goals are preservation of money damages as a means of enforcing constitutional rights; protection against the downside of unconstrained damages awards and their effect on the functioning of government and the development of constitutional law; and rationalization of the law through simplification of existing doctrine*....[t]he best balance of those conflicting goals lies in adopting some version of a fault-based standard as the general liability rule for constitutional torts and in adhering closely to that standard in almost all situations.*
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> On its face, absolute immunity seems nonsensical. To say that money damages are an appropriate remedy for constitutional violations but that the defendant is absolutely immune from having to pay them reduces constitutional tort to a nullity. Yet surprisingly large areas of current law embrace this contradiction.

Jeffries, *The Liability Rule for Constitutional Torts*, 99 Va. L. Rev. at 209 (emphasis added)

Specifically, as to prosecutorial immunity, Professor Jeffries states the following:

> The problems with legislative and judicial immunity pale in comparison to those of absolute prosecutorial immunity. Here there is no support from history. However ready one may be to assume that the Civil Rights Act of 1871 silently incorporated common-law immunities, absolute prosecutorial immunity cannot rest on that basis.
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> Obviously, absolute prosecutorial immunity should rest - as all immunities should rest - on a functional justification. That justification cannot be, as the Court once unwisely suggested, that prosecutors are somehow so vulnerable to unwarranted civil liability that they require greater solicitude and protection than, for example, the police. The true justification is that much of what prosecutors do occurs in court, where they may legitimately rely on monitoring by opposing counsel and supervision by a judge. For misconduct in that arena - including inflammatory remarks in summation, or improper comment on the defendant's silence, or introduction of hearsay evidence, or even eliciting false testimony- correction in the courtroom seems the obvious remedy. For such violations, the costs of providing an additional remedial opportunity to sue for money damages may very well outweigh the benefits.
>
> Prosecutors, however, perform many actions that are not subject to direct monitoring and supervision…The pressure to deny absolute immunity for investigative acts is especially great when police and prosecutors perform the same functions. In that circumstance, extending absolute immunity only to prosecutors would look too much like class-based adjudication, or, in Justice Rehnquist's gentler phrasing, an especially keen judicial sensitivity to the difficulties faced by lawyers and judges.

Jeffries, *The Liability Rule for Constitutional Torts*, 99 Va. L. Rev. at 222.

The professor argues that a better approach is to deny absolute immunity but to provide qualified immunity to most officials, including prosecutors:

> Qualified immunity as currently administered protects much error that is plainly unreasonable, simply because of the vagaries of prior adjudication. The consequence is to send exactly the wrong deterrent message: not only that officers should not be inhibited by the threat of liability for reasonable error, but that officers should not be inhibited at all, absent specific prior adjudication.
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> ***
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> Of course, no mere turn of phrase can avoid hard cases or ensure good decisions. Close calls are inevitable. But the first step toward getting the right answer is to ask the right question, and the inquiry into "clearly established" law has proved too technical, too fact-specific, and far too protective of official misconduct. Asking instead whether conduct was "clearly unconstitutional" would not resolve all difficulties at a stroke, but it would move in the right direction.
>
> ***
>
> There is no liability rule for constitutional torts, but there should be. Constitutional tort law needs a spine, an organizing principle reflecting a considered judgment of the costs and benefits of damages liability, a principle from which deviations are allowed only where, and to the extent that, they are justified. In my view, the correct default rule for constitutional torts is a modified form of qualified immunity. I would therefore eliminate the pocket of strict liability that exists in current law, *prune absolute immunity with an eye to the availability of alternative remedies, and reform the administration of qualified immunity to make immunity less robust and liability more routine*. …Only in thinking about constitutional tort law systematically and comprehensively is the full scope of that incoherence visible, and only in thinking about constitutional tort law systematically and comprehensively is there hope of a better alternative.

Jeffries, *The Liability Rule for Constitutional Torts*, 99 Va. L. Rev. at 261, 264 and 270 (emphasis added)

Professor Jeffries argues for qualified immunity for prosecutors:

> Indeed, the most serious objection to replacing absolute with qualified immunity is that it might not matter much. The difficulty of uncovering *Brady* violations and the lax standards by which such questions are judged suggest that, so long as the substantive dimensions of the right remain the same, constitutional tort actions could provide only a gentle constraint. Nevertheless, something is better than nothing. There is real value in providing redress for egregious *Brady* violations, of which there seems to be no shortage, even if more marginal violations go unremedied. And… even the remote prospect of civil liability would induce prosecutors to release more evidence than a strict interpretation of *Brady* might require, that is all to the good. The sense of absolute power engendered by absolute immunity is exactly the problem, and should be constrained wherever possible.

Jeffries, *The Liability Rule for Constitutional Torts*, 99 Va. L. Rev. at 230-31

5. Prosecutors Should be Allowed to Plead and Prove *Baldwin* Qualified Immunity

Venckus has a legitimate claim arising from the wrongful conduct of the County. The County seeks absolute immunity without even bothering to be concerned about the facts of this case,[12] the harm done to Venckus, and the harm done to the Iowa Constitution. It wants to avoid accountability. But, most of all, it wants the blessing of this Court to continue to act as it has and to be reassured that it will not be asked to answer for its behavior now or in

[12] The County's Statement of Allegations in its brief reflects a clear lack of understanding of the factual claims made by Venckus.

the future. And make no mistake--- the County wants absolution from accountability.

In this case, the claim made against the prosecutors is that they failed to adequately investigate the allegations against Venckus after being provided with overwhelming evidence of his innocence. Given the fact that these activities are not subject to "direct monitoring and supervision" by the court, these actions are not protected by absolute immunity but are entitled to *Baldwin* qualified immunity. This is consistent with Iowa Rule of Prof'l Conduct 32:3.8(a) which provides "the prosecutor in a criminal case shall (a) refrain from prosecuting a charge that the prosecutor knows or reasonably should know is not supported by probable cause." The demands of qualified immunity are no greater than that existing obligation.

The only way that prosecutorial misconduct will stop is if the Court refuses to countenance it. Venckus respectfully requests that this Court reject absolute immunity for prosecutorial violations of Iowa Constitutional rights and provide to all Iowans true protection from governmental overreach.

Venckus requests that the Court allow prosecutors the same qualified immunity provided for in *Baldwin,* the right to plead and prove that they acted with all due care.

CONCLUSION

On the City's appeal, this Court should affirm the District Court on all issues. On the County's appeal, this Court should affirm the district court on the denial of absolute immunity but allow the County to plead the affirmative defense of qualified immunity.

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____

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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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_____/s/ Martin A. Diaz__