IN THE SUPREME COURT FOR THE STATE OF IOWA
NO. 18–1534

IN RE 2018 GRAND JURY OF DALLAS COUNTY

JOHN DOE,
Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR DALLAS COUNTY,
HONORABLE DUSTRIA RELPH

APPELLANT'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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Routing Statement

The supreme court has had few opportunities to address the proper initiation and administration of grand jury proceedings. This case should therefore be retained because it presents several substantial questions of broad public importance which also serve as issues of first impression. Iowa R. App. P. 6.1101(2)(c), (d). First, this Court must determine whether the State may lawfully subpoena an expert, retained by an accused for the purpose of a criminal investigation, to testify before a grand jury as to the expert's opinions. Second, the Court must address the propriety of a state prosecutor contacting that expert *ex parte*. Third, this Court must decide whether a district court has general supervisory authority over a grand jury proceeding to the extent it may quash the proceeding when the proceeding's true purpose is subverted.

Statement of the Case

On September 5, 2018, the State convened a grand jury to determine whether an indictment should be filed against the Appellant, John Doe.[1] (GJT 2:10–11). Before the grand jury was selected and sworn, Doe filed two motions requesting that the proceeding be continued, that the proceeding be

[1]The pseudonym "John Doe" is used throughout this brief to refer to the accused because grand jury proceedings are secret in nature. Iowa R. Crim. P. 2.3(4); *see* Iowa Ct. R. 21.25.

quashed in its entirety, or at a minimum that one subpoena—issued to Doe's retained expert—be quashed. (App. 30; App. 37). The district court entered an order denying the motions and a grand jury was selected and sworn. (9/5/2018 Order; GJT 77:25–78:2). Doe filed an Application for Interlocutory Review. (App. 43). Both parties were given an opportunity to brief the issues raised in the Application. (App. 43). Interlocutory review was then granted, and the grand jury proceeding was stayed. (App. 63).

Statement of the Facts

I. Case Initiation and Plea Discussions.

John Doe, an African-American male, is the adoptive father of S.C., a minor child. In November 2017, law enforcement received information from the Department of Human Services that S.C. had possibly been physically abused. (App. 5). A detective reported to S.C.'s daycare center and observed what he perceived to be multiple bruises on S.C.'s back, which were photographed. (App. 5). The detective interviewed Doe about the bruises. (App. 5). Following that interview, a criminal complaint was filed against Doe alleging Child Endangerment Causing Bodily Injury—a class "D" felony. (App. 5).

Shortly after the complaint was filed, a county prosecutor was specially assigned to the case. (App. 8). Doe retained legal counsel and pled not guilty.

(App. 7). Doe waived his right to speedy indictment under Iowa Rule of Criminal Procedure 2.33(2)(a). (App. 20). Doe also filed a motion to produce discovery. (App. 10). The district court granted the discovery motion and ordered reciprocal discovery. (App. 16).

The parties began discussions to resolve the case and Doe's counsel met with the special prosecutor on at least four occasions. (GJT 30:10–13; App. 61). The attorneys reviewed the photographs of S.C.'s back as part of settlement discussions. (GJT 30:11–14). One of the fighting issues was whether the State could prove its case of physical abuse based on the photographs taken of S.C. The attorneys adamantly disputed whether the photographs indicated bruising (consistent with physical abuse) or merely depicted a skin condition. (GJT 30:13–17).

In late December, the parties reached a tentative resolution of the case. (App. 18). However, no agreement was formalized, and the State's investigation continued. In January 2018, the special prosecutor applied for a subpoena *duces tecum* for S.C.'s medical records. (App. 21). In his Application, the prosecutor agreed to forward all documents he received pursuant to the subpoena to defense counsel. (App. 21).

Six more months passed, and the special prosecutor requested the assistance of Assistant Attorney General Denise Timmins. (App. 25).

Defense counsel continued to meet with prosecutors. In the course of those settlement discussions, Doe's attorney disclosed he had consulted with two doctors about the case. (App. 61). Defense counsel eventually disclosed that one of those doctors, Dr. Linda Railsback, had been retained in connection with the investigation and for the purpose of assisting in Doe's defense. (GJT 29:17–20; 38:11–20). Defense counsel had asked Dr. Railsback to review several documents but had not provided Railsback the full case file. (App. 61). Dr. Railsback had not completed a report or rendered an official opinion to be used in Doe's defense. (GJT 29:22–25).

II. Lead-Up to the Grand Jury Proceeding.

By August 2018—nine months after the State began its investigation and the parties began discussing possible resolution—no trial information had been filed by the prosecutors. On August 29, 2018, prosecutor Ms. Timmins called defense counsel, Alfredo Parrish, who was traveling out of state at the time. (GJT 10:4–14). Ms. Timmins informed Mr. Parrish that the State had decided to convene a grand jury. (GJT 10:15–16). Mr. Parrish asked who the State would be subpoenaing for the proceeding. (GJT 10:16–17). Ms. Timmins would not give that information, on the basis the State was not legally required to tell Doe about the proceeding at all. (GJT 10:18; 20:17–19).

That same day, Ms. Timmins contacted defense expert Dr. Linda Railsback by telephone without any advance notice to, or permission from, defense counsel. (App. 28; GJT 25:12–14). Timmins asked Dr. Railsback if she was working on a case involving Mr. Parrish and John Doe. (App. 28; GJT 11:13–14). Railsback responded she was not able to discuss that matter with Timmins and there was an awkward silence. (App. 28; GJT 11:15–16). Timmins then confronted Dr. Railsback about what Timmins believed to be the doctor's ultimate opinion as to S.C.'s injuries, which Timmins supposedly had learned through the settlement discussions. (App. 28; GJT 11:16–18). Again, Railsback responded she was not able to discuss the matter with Timmins. (App. 28; GJT 11:18–20). According to Dr. Railsback, Timmins then said "she would have me subpoenaed if I would not answer her questions." (App. 28). Two days later, Dr. Railsback was served with a subpoena. (App. 28).

Despite months of constructive settlement discussions, Doe was unable to confirm who else received a subpoena because of the State's new stonewall approach. Nonetheless it appeared at least one of Doe's coworkers, a sibling, and Doe's wife would be subpoenaed. (GJT 14:9–18). By no coincidence, these individuals were named on John Doe's witness list in a related Child-In-Need-of-Assistance case. (*Id.*).

On September 4, Doe filed a motion to quash the subpoena of Dr. Railsback, reasoning that the only conceivable testimony Railsback could offer to the grand jury is privileged. (App. 30). The following morning, Doe filed a second motion requesting the grand jury proceeding be quashed in its entirety given the State's tactics or, at a minimum, continued to allow for a challenge of the demographic makeup of the grand jury panel. (App. 37); *see State v. Plain*, 898 N.W.2d 801 (Iowa 2017). Doe also requested that Ms. Timmins be disqualified from the case due to her *ex parte* contact with Dr. Railsback. (App. 30).

III. Grand Jury Proceeding.

The district court heard Doe's motions in chambers before the grand jury was selected and sworn. (GJT 2:10–17).

Much of the hearing focused on the State's motive in convening a grand jury. The prosecutors claimed they opted to call a grand jury due to their indecisiveness whether to indict via trial information. (GJT 18:12–13; 26:17–21). The purpose of subpoenaing the defendant's expert—and all conceivable defense witnesses—was therefore to give John Doe "a fair shake." (GJT 27:8). Doe disagreed:

> The State seemingly is arguing that they want to present all evidence before the grand jury. The State doesn't know what the defendant's evidence is. The State's delving into the defendant's discovery. There would really be no other reason for the State to

> bring in witnesses that the defendant has listed either via CINA proceeding or in advising in settlement discussions that they talked to Dr. Railsback and subpoenaing her for trial. They don't know that it would -- how that would advance the cause. That is their attempt to delve into the defendant's investigation and ability to defend himself.
>
> . . . .
>
> Their reason for calling them in is not to advance the cause and the knowledge of the grand jury, judge. It is our position that the State needs to bring to the grand jury the evidence that the State has that they believe may or may not help to indict, but to bring in the defendant -- people that they have discovered that the defendant has talked to, when in order for the State to find out what the -- what they're going to say via the tool of the grand jury proceeding, you know, strikes as adverse to the -- subterfuge to the discovery process and to the grand jury proceeding.

(GJT 13:6–16; 14:19–15:4). Doe also pointed out the so-called "fair shake" approach was inconsistent with the State's (1) refusal to inform Doe who would be called, and (2) blanket subpoenaing of defense witnesses without any prior notice or input from defense counsel. (GJT 28:18–29:9)

As to Dr. Railsback, Ms. Timmins confirmed she had contacted the defense expert *ex parte* the previous week. (GJT 17:11–12). Ms. Timmins also confirmed she attempted to elicit Dr. Railsback's opinion about the case:

> When I called her, I did ask her, "You know, it is my understanding that this is what I've been told your opinion is . . . Is that correct?"
>
> And her response was correctly said, an awkward silence. She said she wasn't comfortable talking about that.

(GJT 17:17–22). In other words, "I asked a question. She didn't answer. I informed her factually that she would still be receiving a subpoena." (GJT 18:4–6).

Prosecutors maintained the sole reason to subpoena Dr. Railsback was because the State perceived Railsback possessed "exculpatory evidence." (GJT 20:5; 27:17–19). Defense counsel again disagreed with that characterization:

> The State does not know what Dr. Railsback is going to testify to. . . . .
>
> If the State's purpose was benevolent to present exculpatory evidence that the defendant had, presumably the State would have advised the defense that they were going to call Dr. Railsback and possibly the defense would like to -- or "Would the defense like to call Dr. Railsback?"
>
> The State wouldn't tell us that they were calling her. The State called her without letting us know that they were going to call her. And then the State subpoenaed her. That doesn't ring true with, "We think she's got exculpatory evidence, so we're going to present it before the jury." To me, that rings more of, "We want to know what discovery she might have."

(GJT 28:18–29:9). Importantly, Dr. Railsback had only been retained for purposes of assisting in a defense—not to testify at trial. (GJT 38:15–24). Defense counsel argued that up until Doe decided to call Dr. Railsback to testify, under no other circumstances would the State be entitled to compel testimony from Railsback as a defense expert. (GJT 9:1–11). Allowing the

subpoena to stand would therefore subvert the discovery process and allow access to traditionally privileged information. (GJT 8:11–17).

Following argument, the district court denied Doe's request to quash the entire grand jury proceeding. The court concluded it lacked the legal authority to do so because grand jury proceedings are designed to protect the interests of the accused. (GJT 42:6–14; App. 44).

Doe had also requested the grand jury proceedings be continued in order to access demographic data about the grand jury pool in Dallas County. The request was rooted in Doe's constitutional right to a grand jury panel comprised of a fair cross-section of the community, to which the State agreed Doe was entitled. (GJT 6:16–7:22; 49:5–7); *see* Iowa Const. art. I, §§ 10–11. However, the district court ruled that such a challenge to the panel could be raised after the grand jury was sworn, and if an indictment was returned. (GJT 43:5–7; App. 44).

The district court took the Dr. Railsback issue under advisement and later denied the motion to quash in a written ruling. The court concluded:

> While documents or tangible items prepared in anticipation of litigation between an attorney and expert are immune from disclosure (Iowa R. Civ. P. 1.503(3)), the party claiming that privilege must describe the nature of the documents, communications or things claimed to be privileged so that the applicability of the privilege can be assessed. (Iowa R. Civ. P. 1.503(5)(a)). The State has not requested any documents or tangible items from Dr. Railsback. In this case, as

> related to Dr. Railsback, the Defendant only claims the Defendant's "trial strategy" is privileged work product. To the extent Dr. Railsback is aware of Defendant's "trial strategy" (there is nothing in the record to show that she is), that information would be privileged and should not be sought. However, the exculpatory evidence Defendant's counsel told the State Dr. Railsback would testify regarding is not privileged and the State should be allowed to inquire about it. It makes no sense to this court why Defendant's counsel would repeatedly inform prosecutors that Dr. Railsback would provide evidence favorable to and tending to exonerate the Defendant if this matter were to proceed to trial, but then resist her providing that same exculpatory testimony to a grand jury.

(App. 44). Given this ruling, the court also concluded there was no basis to disqualify Ms. Timmins from the case. (App. 45; GJT 52:6–10).

Following the in-chambers hearing, a grand jury was selected and sworn for the remainder of 2018. (GJT 77:25–78:2). On September 11, 2018, this Court granted Doe's Application for Interlocutory Appeal and stayed the grand jury proceedings. (App. 63).

Argument

I. A prosecutor who contacts an accused's expert *ex parte* must be disqualified from a criminal case.

A. *Error Preservation*.

Doe filed a motion to disqualify prosecutor Denise Timmins, which was resisted by the State and denied by the district court following argument. (App. 37; GJT 24:17–25; App. 43). Error is preserved. *State v. Coleman*, 890 N.W.2d 284, 286–87 (Iowa 2017).

B. *Standard of Review.*

This Court typically reviews a district court's decision regarding the disqualification of an attorney for an abuse of discretion. *State v. Thompson*, 597 N.W.2d 779, 782 (Iowa 1999). However, because the issue arises in a criminal case and implicates constitutional protections such as the right to due process and the right to a fair grand jury and jury trial, review is de novo. *Id.*

C. *Ms. Timmins violated the "no-contact rule" and must therefore be removed from the case.*

Disqualification of a prosecutor is appropriate "based on a determination that they have a conflict of interest which might prejudice them against the accused *or otherwise cause them to seek results that are unjust or adverse to the public interest*." *State v. Iowa Dist. Ct.*, 870 N.W.2d 849, 853 (Iowa 2015) (emphasis added) (internal quotation marks omitted). It is unethical for a lawyer to contact an opponent's expert witness *ex parte* as Ms. Timmins did. Hence, Doe submits that disqualification of Ms. Timmins is warranted under these circumstances because of her irretrievable breach of trust to both Doe *and* the general public. *See State v. Graves*, 668 N.W.2d 860, 870 (Iowa 2003) ("[A] prosecutor owes a duty to the defendant as well as to the public.") (citing *ABA Standards for Criminal Justice* 3–1.2(b), (c) (3d ed. 1993) ("[T]he duty of the prosecutor is to seek justice, not merely to convict.")).

As will be discussed in another section, Ms. Timmins disregarded the ABA Standards for Criminal Justice by subpoenaing Dr. Railsback to testify before the grand jury. *See ABA Standards for Criminal Justice: Prosecution Function* 3-4.6(i) (4th ed. 2015), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/ [hereinafter *ABA Standards*]. Worse yet, Ms. Timmins—by her own admission—attempted to circumvent these standards by contacting Dr. Railsback *ex parte* and eliciting Railsback's opinion on the case. *See Blanton v. Barrick*, 258 N.W.2d 306, 311 (Iowa 1977) (relying on ABA Standards in determining whether disqualification of prosecutor was warranted). Only because Dr. Railsback was vigilant as to her duty of confidentiality to John Doe and defense counsel did Ms. Timmins not obtain privileged information.

Dr. Railsback was retained by defense counsel to investigate the case and assist in John Doe's defense—Dr. Railsback was *not* retained to testify as a witness at trial. (GJT 38:13–24). Of course at the time Dr. Railsback was contacted, the State had not yet indicted John Doe. Nonetheless, Iowa Rule of Civil Procedure 1.508(2) is instructive. *See* Iowa R. Civ. P. 1.101 (stating the rules of civil procedure "govern the practice and procedure in all courts" unless otherwise indicated). That rule provides:

> *Expert who is not expected to be called as a witness*. The disclosure of the same information concerning an expert used for

> consultation and who is not expected to be called as a witness at trial is required if the expert's work product forms a basis, either in whole or in part, of the opinions of an expert who is expected to be called as a witness. Otherwise, a party may discover the identity of and facts known, or mental impressions and opinions held, by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, *only as provided in rule 1.516 or upon a showing of exceptional circumstances* under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Iowa R. Civ. P. 1.508(2) (second emphasis added). Notably, Rule 1.508 does not contain a loophole for the State to subpoena an expert. *Cf. State v. Halverson*, 857 N.W.2d 632, 637 (Iowa 2015) (recognizing that any doubt on the proper construction of a statute must be resolved in favor of the accused).

The careful framework of Rule 1.508(2) is meaningless if attorneys can contact an adversary's expert witness directly. Many courts have therefore enforced a so-called "no-contact rule" and proscribed this kind of *ex parte* communication. *See* George M. Cohen, *Beyond the No-Contact Rule: Ex Parte Contact by Lawyers with Nonclients*, 87 Tul. L. Rev. 1197, 1210 (2013) (citing and discussing numerous authorities) [hereinafter Cohen].

The best justification for the no-contact rule is obvious: *ex parte* communication blatantly circumvents mandatory discovery rules such as Iowa Rule of Civil Procedure 1.508(2). *Id.* "[T]he careful scheduling of experts' disclosures and discovery by the district court would be for naught if

the parties could back door these provisions with informal contacts of an adversary's experts." *Carlson v. Monaco Coach Corp.*, No. CIV. S–05–181 LKK/GGH, 2006 WL 1716400, at *4 (E. D. Cal. 2006) (unpublished). The rule also protects against the "inadvertent disclosure of confidential or privileged information or information protected by the work product doctrine." Cohen, 87 Tul. L. Rev. at 1210–1211; *see Carlson*, 2006 WL 1716400 at *4 ("[F]or at least part of the litigation, the parties' contacts with experts would be guarded by work product immunity and attorney–client privilege; premature contacts might well invade these privileges.").

Violation of the no-contact rule also permits one party a window into the trial strategy of his or her opposition at the earliest stages of litigation. In a criminal case involving a prosecutor, this is fundamentally problematic. *See, e.g.*, *State v. Dahl*, 874 N.W.2d 348, 353 (Iowa 2016) (adopting a protocol that protects defense strategy and work product). *Any* contact with a defense expert, *ex parte*, has a ripple-effect of consequences:

> It is true that experts already have a store of information that represents their expertise, but applying that expertise to a particular case often takes a large amount of analytical effort. Lawyers who retain experts of course shape that effort in a variety of ways. The lawyer's ability to shape an expert's testimony is the source of much of the criticism about such testimony, but there is a more generous interpretation of the practice. An advocate has the right to present the evidence to fit her story of the case, as long as the evidence is not itself false or fraudulent. Guiding an expert is part of that effort. If the

> opponent's counsel could contact the expert, the contacting lawyer would not be limited to asking questions about what the expert was doing and the bases for the expert's opinion. The lawyer could subtly convey that lawyer's own story of the case and thus cause the expert some concern. Having heard this alternative version, the expert might feel the need to do alternative analyses under different assumptions or with different emphases, resulting in additional time and expense for the retaining lawyer and the client. At the extreme, the resulting doubts could lead the expert to drop out of the case, necessitating the retention of a new expert, again resulting in increased time and expense. It is not obvious why a lawyer should be able to impose these costs on the opposing side. Opposing lawyers have ample opportunities to develop their own stories through their own experts and through cross-examination of the other side's expert.

Cohen, 87 Tul. L. Rev. at 1212.

Considering these important justifications for the rule, the United States Court of Appeals for the Ninth Circuit has explained the ethical consequences of such a blatant violation:

> A leading legal ethics treatise discusses the ethical implications of communications with an adversary's expert witness. 2 Geoffrey C. Hazard & W. William Hodes, *The Law of Lawyering* § 3.4:402 (2d ed. Supp.1994). The treatise advises that: "Since existing rules of civil procedure carefully provide for limited and controlled discovery of an opposing party's expert witnesses, all other forms of contact are impliedly prohibited." *Id.* Therefore, an attorney who engages in prohibited communications violates the attorney's ethical duty to obey the obligations of the tribunal. Moreover, since the procedure for the discovery of experts is well established, an attorney may also be in violation of the rule prohibiting conduct prejudicial to the administration of justice. *Id.*

Erickson v. Newmar Corp., 87 F.3d 298, 301–02 (9th Cir. 1996). The Ninth Circuit remanded that case with instruction "to impose appropriate sanctions and disciplinary action" against the offending attorney. *Id.* at 304.

The Ninth Circuit panel cited to an American Bar Association formal opinion, which was released twenty-five years ago and is still relied upon today. *Id.* at 302; Cohen, 87 Tul. L. Rev. at 1210. The opinion is applicable in jurisdictions with a discovery rule similar to that of Iowa Rule 1.508:

> Although the Model Rules do not explicitly prohibit ex parte contacts with an opposing party's expert witness, a lawyer who engages in such contacts may violate Model Rule 3.4(c) if the matter is pending in federal court or in a jurisdiction that has adopted an expert-discovery rule patterned after Federal Rule of Civil Procedure 26(b)(4)(A).
>
> The Committee has been asked for its opinion on whether a lawyer representing a client in a civil matter may initiate ex parte contact with an expert witness retained to testify for the opposing party without first obtaining permission from the opposing counsel.
>
> Although the question presented is not directly addressed by any Model Rule of Professional Conduct, it does implicate Model Rules 3.4(b), 3.4(c), 3.4(f), 4.1(a), 4.2 and 4.3.

ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93–378 (1993); *see* Iowa Rs. Prof'l Conduct 32:3.4; 4.1; 4.2; 4.3. The Committee concluded,

> Rule 3.4(c) requires a lawyer to conform to the rules of a tribunal before which a particular matter is pending, and it is under this Rule that the matter of expert witnesses comes into particular focus. The rules of procedure of many tribunals contain specific and exclusive procedures for obtaining the opinions, and the

> bases therefor, of the experts who may testify for the opposing party. The leading rule in this regard is Fed.R.Civ.P.Rule 26(b)(4)(A), which sets forth a two-step process that must be followed in order to obtain discovery of facts and opinions held by an adversary's expert who is expected to testify at trial: first, written interrogatories are to be served; second, if additional discovery is desired, leave of court must be obtained.
>
> . . . .
>
> The Committee therefore concludes that, although the Model Rules do not specifically prohibit a lawyer in a civil matter from making ex parte contact with the opposing party's expert witness, such contacts would probably constitute a violation of Rule 3.4(c) if the matter is pending in federal court or in a jurisdiction that has adopted an expert-discovery rule patterned after Federal Rule 26(b)(4)(A). Conversely, if the matter is not pending in such a jurisdiction, there would be no violation.

Id.

Ms. Timmins did not comply with the specific and exclusive procedures for obtaining Dr. Railsback's opinion and therefore violated the no-contact rule. Her disregard of Rule 1.508(2) risked the inadvertent disclosure of privileged information and allowed her unauthorized access to Doe's defense strategy. Her conduct was unethical and deserves reprimand.

At hearing, the State claimed it was "entitled" to contact Dr. Railsback *ex parte*, at which point the expert could decline to divulge her opinion. (GJT 24:25–25:2). This position neither furthers the prosecutor's obligation to seek justice, nor does it ensure the safeguards of the no-contact rule. Suppose Dr. Railsback was caught off-guard and inadvertently disclosed confidential or

privileged information. Not only would that disclosure radically reshape Doe's defense to the criminal charge, it would waive privilege that Dr. Railsback (as the expert) is not permitted to waive. *In re Green Grand Jury Proceedings*, 492 F.3d 976, 980 (8th Cir. 2007) ("Because the work product privilege protects not just the attorney–client relationship but the interests of attorneys to their own work product, both the attorney and the client hold the privilege" (internal quotations omitted)). The far more prudent rule is bright-line: do not contact a criminal defendant's expert *ex parte*.

As the accused in a criminal case, Doe is entitled to due process of law and fairness at every stage of the proceeding—including during the grand jury phase. Any attempts by the State to gain backdoor access to the opinions of Doe's expert witness in this manner surely infringe upon Doe's ability to defend himself and violate his constitutional rights to due process and a fair and impartial trial. And as Iowa courts recognize,

> "[P]rosecutorial misconduct" describes conduct by the government that violates a defendant's rights whether or not that conduct was or should have been known by the prosecutor to be improper and whether or not the prosecutor intended to violate the Constitution or any other legal or ethical requirement.

State v. Coleman, 907 N.W.2d 124, 138–39 (Iowa 2018) (internal quotation marks omitted).

Ms. Timmins' disregard of the rules of discovery and Doe's constitutional rights are grounds for disqualification. *Blanton*, 258 N.W.2d at 311 ("Undeniably there are clearly circumstances in which the participation of a county attorney in a criminal trial as prosecutor would be improper."). "[E]ven though prosecutor should keep in mind their obligation to the accused *at every stage of the proceeding*, too often, they do not." *Graves*, 668 N.W.2d at 870 (emphasis added). Here, the breach of the public trust is especially problematic because it involves an invasion of Doe's trial strategy. Our supreme court illustrated the problem long ago in another prosecutorial-disqualification case:

> The attorney becomes familiar with all facts connected with his client's cause; he learns from his client the weak points of the case, as well as the strong ones. Such knowledge carried by the recalcitrant attorney to the other side would be the sure means of defeat and injustice to the client.

State v. Halstead, 35 N.W. 457, 459 (Iowa 1887). "The good of the profession, as well as the safety of clients, demand the recognition and enforcement of the rules we have stated." *Id.* Based on this reasoning, the *Halstead* Court disqualified the State's prosecutor. *Id.* If this matter proceeds following appeal, Ms. Timmins likewise must be disqualified.

II. The State cannot lawfully subpoena a criminal defense expert, retained in anticipation of litigation, to testify at a grand jury proceeding.

A. *Error Preservation*.

Doe filed a motion to quash the subpoena of Dr. Railsback, which was resisted by the State and denied by the district court following argument. (App. 30; App. 34; App. 43). Error is preserved. *Coleman*, 890 N.W.2d at 286–87.

B. *Standard of Review*.

This Court typically reviews the denial of a motion to quash a county attorney subpoena for correction of errors at law. *State v. Sanders*, 623 N.W.2d 858, 859 (Iowa 2001). Because this Court's review involves constitutional claims, such as the right to due process and a fair grand jury proceeding, review is de novo. *State v. Kukowski*, 704 N.W.2d 687, 690 (Iowa 2005); *see* Iowa Const. art. I, §§ 9, 11.

C. *The subpoena issued to Dr. Railsback must be quashed*.

If a subpoena demands the presence and testimony of a witness who will provide only privileged testimony, that subpoena must be quashed. *See In re A.M.*, 856 N.W.2d 365, 379–80 (Iowa 2014). In particular, an expert cannot be forced to testify as to facts or opinions developed in anticipation of litigation or for trial. *Hansen v. Central Iowa Hosp. Corp.*, 686 N.W.2d 476, 482–83 (Iowa 2004) (relying on *Morris-Rosdall v. Schechinger*, 576 N.W.2d

609 (Iowa Ct. App. 1998)). Especially when litigation has not yet been initiated, such testimony is privileged and shielded by the attorney work–product doctrine. *See In re Grand Jury Proceedings*, 473 F.2d 840, 846–47 (8th Cir. 1973) ("[I]n relevant criminal cases (admittedly few), the courts have *consistently* held statements by witnesses . . . to be the 'work product' of an attorney."); *see also Molyneaux v. Willcockson*, 137 N.W. 1016, 1017 (Iowa 1912) (statutory protections for privileged testimony in open court serve the same purpose during grand jury testimony).

As applied to this case, the only conceivable testimony Dr. Railsback could provide to the grand jury is privileged, and therefore, the district court erred in enforcing the subpoena. After prosecutors unsuccessfully elicited Dr. Railsback's opinion regarding Doe's case by telephone, Dr. Railsback was subpoenaed to testify before the grand jury. (GJT 17:17–18:1). At the time Dr. Railsback was subpoenaed, the State knew Dr. Railsback: (1) had been retained by Doe and defense counsel as an expert witness in anticipation of litigation; (2) had provided Doe and defense counsel a preliminary opinion; (3) had not issued any formal opinion or report; and (4) had not been designated as an expert expected to testify at trial. (GJT 17:12–14; 27:17–22; 33:20–25). The decision to issue a subpoena for the purpose of a grand jury investigation—in this manner and under these circumstances—is unheard of.

Enforcing the subpoena of Dr. Railsback also wholly circumvents the specific rules of discovery for disclosure of Dr. Railsback's opinion. Iowa Rule of Civil Procedure 1.508 makes a distinction for discovery purposes between experts expected to testify at trial and experts not expected to testify. *See* 11 Barry A. Lindahl, *Iowa Practice Series™: Civil & Appellate Procedure* § 25:6 (West, Westlaw updated May 2018). Discovery of the opinions of experts not expected to testify, and specially retained in anticipation of litigation, may only be disclosed "upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." Iowa R. Civ. P. 1.508(2). This rule is worthless if the State can obtain the same information by wielding its power to issue investigative subpoenas.

The exceptional-circumstances requirement is likely why the ABA Standards for Criminal Justice proscribe such an invasive tactic. This Court has relied on the ABA Standards in past cases to measure the conduct of Iowa prosecutors. *DeSimone v. State*, 803 N.W.2d 97, 104 (Iowa 2011); *see also State v. Martinez*, 896 N.W.2d 737, 761 (Iowa 2017) (Wiggins, J., concurring specially) ("The county attorney is an administrator of justice, an advocate, and an officer of the court." (citing *ABA Standards* 3-1.2(b))).

Part IV of those ABA standards address grand jury proceedings. *See ABA Standards* Pt. IV. A prosecutor "should not use illegal or unethical means to obtain evidence or information." *Id.* 3-4.1(b). Further, the prosecutor should not "abuse the processes of the grand jury." *Id.* 3-4.5(a). Fortunately, the ABA Standards also specifically address the scope of evidence before a grand jury:

> (i) The prosecutor should not issue a grand jury subpoena to a criminal defense attorney or defense team member, *or other witness whose testimony reasonably might be protected by a recognized privilege*, without considering the applicable law and rules of professional responsibility in the jurisdiction.

Id. 3-4.6(i) (emphasis added).

As noted, Ms. Timmins' attempt to elicit Dr. Railsback's opinion of the case through *ex parte* communication was unethical. Yet the decision to then subpoena Dr. Railsback, knowing she was retained by Doe in anticipation of litigation, stands in stark contrast to the ABA Standards governing all prosecutors.

The decision to subpoena Dr. Railsback without first informing the district court or opposing counsel also contradicted the Iowa Rules of Evidence. "Nothing in the [Rules of Evidence] modifies or supersedes existing law governing a claim of privilege." Iowa R. Evid. 5.501. In

particular, Rule 5.1101 makes abundantly clear claims of privilege are applicable in grand jury proceedings:

> *b*. *Rules on privilege*. The rules on privilege apply to all stages of a case or proceeding.
>
> *c*. *Exceptions*. The Iowa Rules of Evidence—except for those on privilege—do not apply to the following:
>
> . . . .
>
> (2) Grand-jury proceedings.

Iowa R. Evid. 5.1101(*b*)–(*c*). Finally, Rule 5.104 provides:

> Subject to rule 5.104(*b*), the court ***must*** decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

Iowa R. Evid. 5.104(*a*) (emphasis added). The word "must" is unambiguous and connotes mandatory action. *Patch v. Bds. of Sup'rs*, 159 N.W. 694, 696 (Iowa 1916) (rejecting an interpretation that "the use of the word 'must' in the statute is discretionary").

Taken together, the State was required to alert the district court in advance it intended to call Dr. Railsback. It failed to do so. At least one court has adopted this approach and persuasively rejected the State's apparent position that questions of privilege are exempt from the grand jury process. *State v. Wong*, 40 P.3d 914, 922 (Haw. 2002) ("The State opines it was not required to seek judicial review before it presented Frunzi's testimony to the

grand jury. We disagree."). The State's noncompliance with the rules of evidence are yet another reason to quash the subpoena for Dr. Railsback.

The undersigned is unaware of any Iowa precedent addressing this particular issue. However, in *In re Grand Jury Proceedings*, the United States Court of Appeals for the Eighth Circuit faced a similar situation and concluded an attorney should not be required to testify before a grand jury with respect to recollections and opinions covered by work–product privilege. 473 F.2d at 849. At the outset, the Court recognized the work–product doctrine and privilege apply to grand jury proceedings. *Id.* at 842. "On the one hand, there is the heavy weight of history and public need commanding that the grand jury's investigations be as unfettered as possible." *Id.* (quoting *In re Terkeltoub*, 256 F. Supp. 683, 684 (S.D.N.Y. 1966)). "On the other hand, the disclosures now demanded touch a vital center in the administration of criminal justice, the lawyer's work in investigating and preparing the defense of a criminal charge." *Id.* (quoting *Terkeltoub*, 256 F. Supp. at 684).

Ultimately, the Eighth Circuit sided with the accused to a criminal charge, holding that such a privilege applies to grand jury proceedings. *Id.* at 843.

> Although the above-noted policies supporting protection of an attorney's work product were stated with reference to civil litigation, they are even more strongly applicable in criminal proceedings. There is "an especially strong tendency toward the

> protection of materials as the 'work product' of an attorney in criminal cases. Thus, in relevant criminal cases (admittedly few), the courts have *consistently* held statements by witnesses . . . to be the 'work product' of an attorney." Annot., 35 A.L.R.3d 424 (1971) (footnotes omitted) (emphasis added).

Id. at 846. The Court further clarified, "The test of whether the work product doctrine applies is not whether litigation has begun but whether documents were prepared or obtained in anticipation of litigation.' *Id.* at 847.

Here, Dr. Railsback's opinions and recollections were surely prepared in anticipation of litigation. Dr. Railsback was retained by Doe and defense counsel before any indictment was filed, and for the purpose of assisting the defense understand the case. (GJT 38:6–24). At the time Dr. Railsback was subpoenaed, she had reviewed some (but not all) of the relevant documents in the case. (App. 61). Based on that review, Dr. Railsback had likely formed an opinion on the case but certainly had not issued a formal report or been designated as an expert. (GJT 38:22–24). Consistent with *In re Grand Jury Proceedings*, Dr. Railsback's statements and opinions are privileged.

Even more troubling, the State learned of Dr. Railsback's identity through confidential plea discussions. All lawyers have a duty to *not* disclose those type of communications. Iowa R. Prof'l Conduct 32:1.6; *Lawyer Disciplinary Bd. v. Farber*, 488 S.E.2d 460, 466 (W. Va. 1997). Statements made during plea discussions are also inadmissible. Iowa R. Crim. P. 2.10(5);

Iowa R. Evid. 5.410(a)(4). This Court should recognize the State is not entitled to capitalize on such confidential plea discussions by subpoenaing a witness only as a result of those discussions. At a minimum, the State's tactic will have a chilling effect on plea or settlement discussions in criminal cases. Iowa courts have long encouraged plea bargaining and recognized the essential role it plays in our justice system. *State v. Bearse*, 748 N.W.2d 211, 215 (Iowa 2008).

The State's position is clear: the only reason it subpoenaed Dr. Railsback to testify before the grand jury was because of her opinions as to the criminal charge. (GJT 33:20–25). That preliminary opinion was developed in anticipation of litigation and after Dr. Railsback had been retained by the accused. Basic fairness, common-law privilege, the Iowa Court Rules, and a public policy favoring the full and free resolving of criminal charges pre-indictment all dictate the subpoena issued to Dr. Linda Railsback should be quashed.

III. A district court has the authority to quash a grand jury proceeding and must do so to uphold the constitutional rights of an accused.

A. *Error Preservation*.

Doe filed a motion to quash the grand jury proceeding, which was resisted by the State and denied by the district court following argument.

(App. 37; GJT 19:12–18; App. 43). Error is preserved. *Coleman*, 890 N.W.2d at 286–87.

B. *Standard of Review.*

The district court determined it lacked authority to quash the grand jury proceeding. "Questions of jurisdiction, authority, and venue of the district court are legal issues to be reviewed for correction of errors at law." *State v. Clark*, 608 N.W.2d 5, 7 (Iowa 2000). Because this Court's review involves constitutional claims, such as the right to due process and a fair grand jury proceeding, review is de novo. *Kukowski*, 704 N.W.2d at 690; *see* Iowa Const. art. I, §§ 9, 11.

C. *The district court has authority to oversee grand jury proceedings and uphold individual rights.*

Doe requested that the district court quash the entire grand jury proceeding as a violation of his rights under the Iowa Constitution to a fair and impartial grand jury, due process, and ultimately, a fair jury trial. (App. 39). As a threshold matter, the district court concluded it had no legal authority to quash the proceeding. (App. 44). This issue invokes fundamental questions related to separation of powers.

Article III, section 1 of the Iowa Constitution provides,

> The powers of the government of Iowa shall be divided into three separate departments-the Legislative, the Executive, and the Judicial: and no person charged with the exercise of powers

> properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted.

Iowa Const. art. III, § 1. As related to the judicial powers of state government, our framers provided,

> The Judicial power shall be vested in a Supreme Court, District Courts, and such other Courts, inferior to the Supreme Court, as the General Assembly may, from time to time, establish.

Iowa Const. art. V, § 1. Finally, with respect to the authority of the district courts,

> The District Court shall be a court of law and equity, which shall be distinct and separate jurisdictions, and have jurisdiction in civil and criminal matters arising in their respective districts, in such manner as shall be prescribed by law.

Iowa Const. art. V, § 6.

"For the judiciary to play an undiminished role as an independent and equal coordinate branch of government nothing must impede the immediate, necessary, efficient and basic functioning of the courts." *Webster Cnty. Bd. v. Flattery*, 268 N.W.2d 869, 873 (Iowa 1978). One of the most basic functions of a court is to recognize and uphold individual rights afforded by our state and federal constitutions. *See, e.g.*, *Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."). "[I]t necessarily follows the judiciary is vested with inherent power

to do whatever is essential to the performance of its constitutional functions." *Webster Cnty.*, 268 N.W.2d at 874.

A grayer area of this Court's separation-of-powers precedent is the role of the courts in overseeing the prosecutor during grand jury proceedings. "A grand jury is not an adjunct of either the court or the prosecutor." *State v. Iowa Dist. Ct.*, 568 N.W.2d 505, 508 (Iowa 1997).

> In fact the whole theory of [the grand jury's] function is that it belongs to no branch of the institutional government, serving as a kind of buffer or referee between the government and the people. Although the grand jury normally operates, of course, in the courthouse and under judicial auspices, its institutional relationship with the judicial branch has traditionally been, so to speak, at arm's length. Judges' direct involvement in the functioning of the grand jury has generally been confined to the constitutive one of calling the grand jurors together and administering their oaths of office.

Id. (quoting *United States v. Williams*, 504 U.S. 36, 47 (1992)).

The Iowa Code requires prosecutors to "[a]ttend the grand jury when necessary for the purpose of examining witnesses before it or giving it legal advice." Iowa Code § 331.756(8); *see* Iowa R. Crim. P. 2.3(4)(d). The prosecutor assists the grand jury in securing witnesses to appear by subpoena. Iowa Code § 331.756(8); Iowa R. Crim. P. 2.3(4)(e); *id.* r. 2.3(4)(g). However, the district court specifies by order when the grand jury should be impaneled. Iowa R. Crim. P. 2.3(1). The court oversees the selection and swearing of the grand jury. *Id.* r. 2.3(4)(c). If a witness refuses to testify, the

court decides whether such testimony must be given. *Id.* r. 2.3(4)(h). The district court also rules on any challenge whether the grand jury was "composed or drawn as prescribed by law." *Id.* r. 2.3(2)(a). "Challenges to the panel or to an individual grand juror shall be decided by the court." *Id.* r. 2.3(2)(c).

The Iowa Supreme Court has held that a district court may not use the grand jury proceeding as a *sword*—i.e., by coaxing a prosecutor into bringing a criminal prosecution the prosecutor would not otherwise have pursued. In *State v. Iowa District Court for Johnson County*, a county attorney announced he would not file criminal charges following the death of an unarmed civilian at the hands of law enforcement. 568 N.W.2d 505, 507 (Iowa 1997). Thereafter, at the prodding of an individual grand juror, a district court judge entered an order requiring the Johnston County grand jury to investigate the matter, *id.* at 507, and a separate order appointing a special prosecutor to handle the case. *Id.* The court cited its "inherent power" to do so. *Id.*

On certiorari, the Court ruled the district court acted inappropriately by overtaking the duties of a prosecutor. *Id.* at 508 ("The decision whether to bring charges is at the heart of the prosecutorial function."). "Whether there was a probable cause to prosecute [the officer] was a matter for assessment by

the prosecutor, not the court. The decision not to go forward, right or wrong, was not appropriate for judicial oversight." *Id.* at 508. The Court warned,

> We sustain the writ because, as we have said, the orders amounted to a direct affront to a prosecutorial decision in which a court should take no part. And it scarcely needs to be said that a judge should be society's last person to respond to public clamor. In *State v. Glanton*, 231 N.W.2d 31, 35 (Iowa 1975), we noted that the first requirement for the administration of justice is a court which acts with what Edmund Burke called "the cold neutrality of an impartial judge." The orders entered here were partial to one side of the hotly disputed prosecutorial judgment call.

Id. at 509.

However, in a case predating *Johnson County*, the Iowa Supreme Court took no issue with a district court using its authority of overseeing a grand jury proceeding as a *shield* against prosecutorial misconduct. In *State v. Paulsen*, a grand jury was convened following an investigation into the "mileage expense collection and payment practices" of a county office. 286 N.W.2d 157, 158 (Iowa 1979). The defendants claimed they were denied due process under the Iowa and United States Constitutions during the grand jury proceedings because a prosecutor "improperly influenced the grand jury" and "subtly dominated the final decision to indict." *Id.* at 158, 159. The district court agreed and dismissed the indictments. *Id.* at 158.

Although the Court reversed the district court on appeal and reinstated the case, the Court evaluated the defendants' constitutional due-process claim

as any other constitutional challenge. *Id.* at 160. The Court recognized several protections afforded to an accused during a grand jury proceeding, including the right to be free from prosecutorial misconduct and a prohibition on prosecutorial influence over the grand jury. *Id.* "Prosecutorial misconduct infringes due process when a reasonable likelihood exists that it may induce action other than that which the grand jurors in their uninfluenced judgment would take." *Id.* (citing *State v. Joao*, 491 P.2d 1089, 1091 (Haw. 1971)). Based on those principles, the Court concluded the defendants had not met their burden for dismissal. *Id.* at 161.

Paulsen therefore recognizes that a district court may uphold the constitutional rights of an accused in connection with grand jury proceedings. The same result in *State v. Hall*, 235 N.W.2d 702 (Iowa 1975), another case in which the defendant raised constitutional violations to due process and equal protection during the grand jury proceeding. The *Hall* Court considered those issues "because of the grave crime involved and the serious charges made." *Id.* at 711; *see also State v. Olson*, 86 N.W.2d 214, 221 (Iowa 1957) (reserving the question of whether the district court has inherent authority to set aside an indictment "in order to prevent oppression or violation of constitutional rights").

The district court had inherent authority to rule upon Doe's constitutional claims and do whatever is essential to the performance of that task, including but not limited to quashing the grand jury proceeding in its entirety. *See Webster Cnty.*, 268 N.W.2d at 874. This function is wholly within the province of a district court, as in *Paulsen* and *Hall*, and does not overstep the court's authority, as in *Johnson County*.

D. *The prosecutors violated Doe's constitutional rights by converting the grand jury proceeding into a pre-indictment discovery tool.*

After months of constructive plea discussions, the State decided to not indict Doe by trial information, *see* Iowa Rule of Criminal Procedure 2.5, but instead decided to convene a grand jury, *see id.* r. 2.3. However, the State did not use its subpoena power to only call State witnesses. (GJT 32:4–11). The State used its subpoena power to call Doe, Doe's family members, Doe's coworkers, and Doe's retained expert. (GJT 14:9–18). This prosecutorial tactic subverts the purpose of the grand jury proceeding, converts the proceeding into an oppressive pre-indictment discovery tool, and will influence the grand jury to take action it may otherwise not have taken. The proceeding must therefore be quashed, and the case dismissed.

The purpose of a grand jury is to determine whether there is adequate basis for bringing a charge. *United States v. Williams*, 504 U.S. at 51. Any Iowa grand jury foreperson is therefore authorized to issue subpoenas to

determine whether the State's case is supported by probable cause. Iowa R. Crim. P. 2.3(4)(e). Although Iowa Code generally indicates a prosecuting attorney may also "procure" subpoenas for grand jury witnesses, Rule 2.3 specifically provides,

> The prosecuting attorney shall be allowed to appear before the grand jury on his or her own request for the purpose of giving information or for the purpose of examining witnesses, and the grand jury may at all reasonable times ask the advice of the prosecuting attorney or the court.

Id. r. 2.3(4)(d).

Despite the grand jury's authority to investigate via its subpoena power, that authority has limitations: "Grand juries are not licensed to engage in arbitrary fishing expeditions, nor may they select targets of investigation out of malice or an intent to harass." *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 299 (1991); *see Hobson v. Dist. Ct.*, 177 N.W. 40, 41 (Iowa 1920) ("The informalities observed in the rules of evidence by grand juries and the wide latitude allowed them in the exercise of their inquisitorial powers should never be permitted to become the instrument of oppression . . . ."). It naturally follows that a court must closely examine an instance when the *prosecutors*—and not the grand jury itself—attempt to subpoena every witness favorable to the accused. "Judicial supervision is properly exercised in such cases to

prevent the wrong before it occurs." *United States v. Calandra*, 414 U.S. 338, 346 (1974).

This Court must reject the State's position that it is attempting to give a "complete picture" of the case to the grand jury by subpoenaing the defendant, his retained experts, and list of fact and character witnesses. The prosecutor's ability to examine any of those individuals—outside the presence of the court, the defendant, and defense counsel—will fundamentally infringe upon Doe's ability to defend himself if the grand jury returns an indictment. The State will have sworn statements from each of Doe's favorable witnesses and a thorough understanding of Doe's defense via his expert witness, Dr. Railsback.

In other words, the State's "complete picture" tactic amounts to a violation of Doe's rights to a fair and impartial grand jury proceeding pursuant to article I, section 11 of the Iowa Constitution, a violation of his right to due process under article I, section 9, and ultimately a violation of his right to a fair jury trial pursuant to article I, section 10 of the Iowa Constitution. The district court therefore should have intervened and quashed the proceeding entirely.

The Hawai'i Supreme Court's opinion in *State v. Wong*, 40 P.3d 914 (Haw. 2002), is instructive. In *Wong*, the Court affirmed findings of

misconduct when prosecutors subpoenaed witnesses for grand jury that would likely provide privileged testimony but did not seek a court ruling regarding the extent to which those witnesses could testify. *Id.* at 515, 516. The Court pointed out the relevant rules of evidence, which "with stunning clarity" provided that common-law privileges apply in grand jury proceedings and must be preliminarily decided by a court. *Id.* at 520. On that basis alone, the Hawai'i Supreme Court determined dismissal was an appropriate remedy based on the prosecutor's misconduct. *Id.* at 521.

In doing so, the Court cited its well-reasoned precedent establishing that

> prosecutorial conduct that undermines the fundamental fairness and integrity of the grand jury process by invading the province of the grand jury or tending to induce action other than that which the jurors in their uninfluenced judgment deem warranted on the evidence *fairly* presented before them, is presumptively prejudicial.

40 P.3d 914, 919–20 (Haw. 2002) (internal alterations, citations, and quotations omitted). "The function of a grand jury to protect against unwarranted prosecution *does not* entail a duty to weigh the prosecution's case against that of the defense, or even to determine that the prosecution's case is supported by competent evidence." *Id.* (quoting *State v. Chong*, 949 P.2d 122, 129 (Haw. 1997)) (emphasis added).

As applied to the facts of that case, the *Wong* Court continued,

> The State's actions in this regard overreached and usurped the grand jury's function of determining probable cause as to whether a crime was committed, were an egregious disregard of Stone's right to an impartial grand jury, and tainted the grand jury process to such an extent that we cannot say the circuit court abused its discretion when it also dismissed the indictment against the Wong defendants. Having presented Frunzi's testimony without a judicial determination of privilege and having bolstered Frunzi's testimony by characterizing it to the grand jury as privileged testimony subject to the crime-fraud exception to the privilege, the State is in no position to now argue that Stone failed to meet his burden with regard to the existence of the attorney-client privilege.

Id. at 522.

As the Iowa Supreme Court has recognized for nearly forty years, "Prosecutorial misconduct infringes due process when a reasonable likelihood exists that it may induce action other than that which the grand jurors in their uninfluenced judgment would take." *Paulsen*, 286 N.W.2d at 160. This Court should build upon *Paulsen* and adopt a framework similar to *Wong*.

At hearing, the State argued it has the authority to subpoena anyone it wants while providing notice to no one. (GJT 19:19–20; 20:14–20). Not only does this position show that the prosecutors have become the driving force behind Doe's grand jury proceeding, it is not consistent with well-settled precedent. The purpose of the proceeding is to determine whether the evidence within the State's possession, if unexplained, would warrant a conviction at trial. Iowa R. Crim. P. 2.4(3). The purpose is *not* to "engage in

arbitrary fishing expeditions," whether at the hand of the foreperson or the prosecutor. *R. Enterprises, Inc.*, 498 U.S. at 299. The purpose is *not* to present the accused's version of the case (through defense witnesses), especially when the accused is not allowed to participate. It is this very reason federal courts commonly proclaim that a grand jury proceeding is not an adversary proceeding. *United States v. Civella*, 666 F.2d 1122, 1127 (8th Cir. 1981). "A grand jury hearing is not a mini-trial." *Id.*

The State is in a unique position of authority to unilaterally determine who and when any witness must report to the grand jury and testify under oath. Here, the prosecutors parlayed Doe's cooperation during confidential plea discussions, along with his witness list in a collateral CINA proceeding, into a full-fledged discovery technique called a "complete picture" grand jury proceeding. This is an abuse of power that cannot be remedied. The moment prosecutors subpoenaed all defense witnesses with information known by the accused, the well was poisoned and the grand jury proceeding necessarily improper. Doe's constitutional rights to a fair and impartial grand jury proceeding, his right to due process, and his right to a fair jury trial have been violated.

The proper remedy for such violations is dismissal of the proceeding with prejudice. *Wong*, 40 P.3d at 929. "Where a defendant's substantial

constitutional right to a fair and impartial grand jury proceeding is prejudiced, a quashing of the indictment emanating therefrom is an appropriate remedy." *Id.* at 928 (quoting *Joao*, 491 P.2d at 1092). Notably, in *State v. Paulsen*, Justices Rees and Reynoldson would have likewise followed the *Joao* Court and quashed the indictments in that case. *Paulsen*, 286 N.W.2d at 162–63 (Rees, J., dissenting).

As explained by the Hawai'i Supreme Court,

> [W]e are cognizant of the deference to be accorded the prosecuting attorney with regard to criminal proceedings, but such deference is not without bounds. As stated elsewhere:
>
> > Society has a strong interest in punishing criminal conduct. But society also has an interest in protecting the integrity of the judicial process and in ensuring fairness to defendants in judicial proceedings. Where those fundamental interests are threatened, the "discretion" of the prosecutor must be subject to the power and responsibility of the court.

Wong, 40 P.3d at 929 (quoting *State v. Moriwake*, 647 P.2d 705, 712 (Haw. 1982)). In the words of Justice John Paul Stevens,

> It is . . . clear that the prosecutor has the same duty to refrain from improper methods calculated to produce a wrongful indictment. Indeed, the prosecutor's duty to protect the fundamental fairness of judicial proceedings assumes special importance when he is presenting evidence to a grand jury. As the Court of Appeals for the Third Circuit recognized, "the costs of continued unchecked prosecutorial misconduct" before the grand jury are particularly substantial because there

> "the prosecutor operates without the check of a judge or a trained legal adversary, and virtually immune from public scrutiny. The prosecutor's abuse of his special relationship to the grand jury poses an enormous risk to defendants as well. For while in theory a trial provides the defendant with a full opportunity to contest and disprove the charges against him, in practice, the handing up of an indictment will often have a devastating personal and professional impact that a later dismissal or acquittal can never undo. Where the potential for abuse is so great, and the consequences of a mistaken indictment so serious, the ethical responsibilities of the prosecutor, and the obligation of the judiciary to protect against even the appearance of unfairness, are correspondingly heightened."

Williams, 504 U.S. at 62–63 (Stevens, J., dissenting).

For the foregoing reasons, Doe requests this Court quash the grand jury proceeding as initiated by the State with instructions to dismiss the case with prejudice.

IV. Rule 2.3(2)(a) requires any challenge to the grand jury panel be raised and ruled upon "before the grand jury is sworn."

A. *Error Preservation*.

Doe filed a motion to continue the grand jury proceeding to adequately challenge the makeup of the panel. (App. 39). This request was resisted by the State and denied by the district court following argument. (GJT 21:17–24; App. 43). Error is preserved. *Coleman*, 890 N.W.2d at 286–87.

B. *Standard of Review*.

A claim involving the interpretation of court rules, here Rule of Criminal Procedure 2.3, is typically reviewed for correction of errors at law.

Estate of Cox by Cox v. Dunakey & Klatt, P.C., 893 N.W.2d 295, 302 (Iowa 2017). Because this Court's review involves constitutional claims, such as the right to due process and a fair and impartial grand jury proceeding, review is de novo. *Kukowski*, 704 N.W.2d at 690; *see* Iowa Const. art. I, §§ 9, 11.

C. *The grand jury proceeding should have been continued for Doe to raise a prima facie* Plain *challenge*.

Before the grand jury convened, Doe raised a challenge to the makeup of the panel drawn by Dallas County pursuant to Iowa Rule of Criminal Procedure 2.3(2). (App. 37). Doe, an African-American male, asserted the right to a fair and impartial grand jury drawn from a fair cross-section of the community pursuant to article I, section 11 of the Iowa Constitution, which provides in part, "[N]o person shall be held to answer for any higher criminal offence, unless on presentment or indictment by a grand jury." (*Id.*).

The State agreed Doe has a constitutional right to a fair cross-section of the community on the grand jury panel. (GJT 49:5–7). However, the State resisted Doe's request to continue the proceeding to allow Doe the opportunity to access the necessary information to enforce his constitutional right. *See State v. Plain*, 898 N.W.2d 801, 828 (Iowa 2017). Ultimately the district court denied Doe's request and preserved the issue "for later consideration if raised by the Defendant." (App. 43).

"[I]t is possible to conceive of a circumstance when a continuance might be constitutionally required." *State v. Clark*, 814 N.W.2d 551, 562 (Iowa 2012). Considering the plain language of Rule 2.3(2), Doe's undisputed right to an impartial grand jury under article I, section 11, and the unique timing of the Rule 2.3(2) challenge, this case presents such a circumstance.

Rule 2.3(2)(a) provides in full,

> *Challenge to array.* A defendant held to answer for a public offense may, before the grand jury is sworn, challenge the panel or the grand jury, only for the reason that it was not composed or drawn as prescribed by law. If the challenge be sustained, the court shall thereupon proceed to take remedial action to compose a proper grand jury panel or grand jury.

"Challenges to the panel or to an individual grand juror shall be decided by the court." Iowa R. Crim. P. 2.3(2)(c).

Several terms and phrases of Rule 2.3(2) bear emphasis. First, the term "challenge" must be construed to mean the opportunity raise a meaningful prima facie claim disputing the constitutionality of the grand jury panel array. Because the term is not defined by statute or rule, its ordinary meaning applies. *State v. Crone*, 545 N.W.2d 267, 271 (Iowa 1996). "Challenge" is defined as "[a]n act or instance of formally questioning the legality or legal qualifications of a person, action, or thing." *Challenge*, *Black's Law Dictionary* 105 (4th Pocket ed. 1996). "Challenge to the array" is defined as

> A legal challenge to the manner in which the entire jury panel was selected, usu. for a failure to follow prescribed procedures designed to produce impartial juries drawn from a fair cross-section of the community.

Id. at 106.

Just recently, the Iowa Supreme Court affirmed that the accused has a constitutional right under the Sixth Amendment to a petit jury drawn from a fair cross-section of the community. *Plain*, 898 N.W.2d at 821. In order to establish a prima facie violation of the fair cross-section requirement, an accused must show

> (1) that the group alleged to be excluded is a ''distinctive'' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Id. at 822 (quoting *Duren v. Missouri*, 439 U.S. 357, 364 (1979)). Importantly, the *Plain* Court ruled that the defendant was required to offer specific records and lists concerning the selection of jurors before he could meet his prima facie case on the third prong. *Id.* 827–28.

Although *Plain* did not address the drawing of a grand jury, there is no doubt that a similar claim under article I, section 11 requires similar factual development by an accused as to the third *Duren* prong. As in *Plain*, the information requested by Doe on the morning of the grand jury proceeding

was not immediately available to him. (GJT 50:1–6). Doe therefore requested a continuance. And just as in *Plain*, John Doe is constitutionally entitled to that information so that he may raise a prima facie challenge to the panel. *Id.* at 829.

Without the information or prescribed procedures regarding the drawing of the Dallas County grand jury, Doe was denied the right to raise a meaningful, prima facie "challenge" to the panel. Merely *preserving* the challenge, as the district court ruled, is insufficient.

Second, the phrase "before the grand jury is sworn" is unambiguous and must be enforced as written. *Rhoades v. State*, 880 N.W.2d 431, 446 (Iowa 2016). Doe's challenge was denied for the sole reason that it could be ruled upon in a later motion to dismiss—i.e., *after* the grand jury was sworn. This is an unreasonable reading of the rule, especially once the entirety of Rule 2.3(2)(a) is examined. *Iowa Ins. Institute v. Core Grp. Of Iowa Ass'n for Justice*, 867 N.W.2d 58, 72 (Iowa 2015) ("[W]e read statutes as a whole rather than looking at words and phrases in isolation."). The second sentence of Rule 2.3(2)(a) contemplates a ruling on the merits of the challenge: "If the challenge be sustained, the court shall thereupon proceed to take remedial action . . . ." Iowa R. Crim. P. 2.3(a).

This temporal requirement is clear and cannot be read out of the rule. *State v. Pickett*, 671 N.W.2d 866, 870 (Iowa 2003) (recognizing statutes must be interpreted "to avoid rendering any part of the enactment superfluous"). The requirement is especially important when an accused's challenge relates to a violation of his or her constitutional rights. If the district court sustains the challenge, it may simply take remedial action and correct the error. Iowa R. Crim. P. 2.3(2)(a). However, if the district court does not rule on the challenge, preserves it for later review, and the violation proves successful, no more remedial action may occur. As the United States Supreme Court has recognized under similar circumstances,

> Just as a conviction is void under the Equal Protection Clause if the prosecutor deliberately charged the defendant on account of his race, a conviction cannot be understood to cure the taint attributable to a charging body selected on the basis of race. Once having found discrimination in the selection of a grand jury, we simply cannot know that the need to indict would have been assessed in the same way by a grand jury properly constituted. The overriding imperative to eliminate this systemic flaw in the charging process, as well as the difficulty of assessing its effect on any given defendant, requires our continued adherence to a rule of mandatory reversal.

Vasquez v. Hillery, 474 U.S. 254, 264 (1986) (citation omitted).

Doe had limited notice of the grand jury proceeding. It is irrelevant whether the State was prepared to proceed with the grand jury. The State's remedy for Doe—to raise the same issue in a motion to dismiss post-

indictment—is insufficient because it requires Doe to endure the grand jury process and bear the possible embarrassment and risk of a grand jury indictment. 4A B. John Burns, *Iowa Practice Series™: Criminal Procedure* § 5:3 (West, Westlaw updated April 2018) (recognizing in Iowa "grand jury indictments are generally reserved for politically sensitive cases" and "are often among the most controversial"). For these reasons, Doe's constitutional challenge to the grand jury panel was required to be raised and ruled upon "before the grand jury [was] sworn."[2]

Any challenge must be *decided* by the district court before the grand jury is sworn—not merely *preserved* by the district court for a later decision. *See* Iowa R. Crim. P. 2.3(2)(c); *see also State v. Hesford*, 242 N.W.2d 256, 257–58 (Iowa 1976) ("We must look to what the legislature said, rather than what it should or might have said."). For that reason, a brief continuance was required. *See Clark*, 814 N.W.2d at 561–62. Doe raised the issue as soon as possible, i.e., once it became clear the State intended to convene a grand jury. The reason advanced for the continuance was clear and certain: to raise a valid prima facie claim under article I, section 11 of the Iowa Constitution. The information obtained would have allowed the district court to decide the

[2]At hearing, the State argued, "There's no reason to delay and to waste the grand jurors who are here times. We can go forward today." (GJT 49:13–14).

challenge to the panel or, if sustained, take "remedial action" to compose a proper grand jury panel. *See* Iowa R. Crim. P. 2.3(2)(a). Instead, the district court carried on with a potentially unrepresentative grand jury panel.

The principles articulated in *Plain*, and applicable here, are meaningless if not enforced. Rule 2.3(2)(a) provides an opportunity to meaningfully challenge the jury panel before it is sworn, not preserve the issue for later litigation.[3] Doe's constitutional rights are more important than a short delay in a grand jury proceeding.

Conclusion

For the reasons set forth above, John Doe requests the district court's September 5, 2018 Order be reversed and the case remanded with instructions to dismiss with prejudice. Alternatively, if dismissal is not ordered, the subpoena of Dr. Linda Railsback must be quashed and Ms. Timmins must be disqualified as a State prosecutor for the remainder of the case.

[3]Mr. Doe remains suspicious that a *Plain* challenge is in fact adequately preserved if he is deprived of the opportunity to establish a factual basis for that issue. "Preservation of error also contemplates the construction of an appropriate and sufficiently detailed record upon which the reviewing court can base its decision." *Peterson v. First Nat. Bank of Iowa*, 392 N.W.2d 158, 164 (Iowa Ct. App. 1986) (quoting Allbee & Kincaid, *Error Preservation in Civil Litigation: A Primer for the Iowa Practitioner*, 35 Drake L. Rev. 1, 3 (1985–86)).

Oral Argument Notice

Counsel requests oral argument.

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This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because it contains 11,598 words (less than 14,000 words), excluding the parts of the brief exempted by Rule 6.903(1)(g)(1), which are the table of contents, table of authorities, statement of the issues, and certificates.

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/s/ Adam Witosky
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Dated: March 6, 2019

Certificates of Filing and Service

I hereby certify that I e-filed the Appellant's Final Brief with the Electronic Document Management System with the Iowa Judicial Branch on March 6, 2019. The following counsel will be served by Electronic Document Management System:

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