IN THE IOWA SUPREME COURT

No. 18-0733

STATE OF IOWA,

Appellee/Plaintiff,

v.

FONTAE C. BUELOW,

Appellant/Defendant.

APPEAL FROM THE DISTRICT COURT
FOR DUBUQUE COUNTY
HON. MONICA ZRINYI WITTIG

APPELLANT'S BRIEF AND REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

This is "a murder case that is dividing Dubuque."[1] Mr. Fontae Buelow was convicted of Murder in the Second Degree for the death of Ms. Samantha Link. Mr. Buelow says she stabbed herself. The State says Mr. Buelow stabbed her. Ms. Link had a long history of suicide attempts and severe mental illness that the jury was not allowed to know about because the trial judge ruled that Ms. Link's medical records and other first-hand accounts of her behavior were barred by the hearsay rule and the character evidence rule. Whether evidence of suicidal behavior is evidence of character is a question of first impression in this Court. *See* Iowa R. App. P. 6.1101(2)(c) & (f).

Mr. Buelow is black. Ms. Link is white. Mr. Buelow was convicted by an all-white jury *after* a holdout juror was removed during deliberations. Iowa law does not provide a procedure for removing a juror during deliberations. This case, therefore, presents an issue of broad public importance requiring guidance from this Court. *See* Iowa R. App. P. 6.1101(2)(d).

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[1] KCRG-TV9, *Family on both sides of a Dubuque murder case speak about possibility for a new trial*, available at http://www.kcrg.com/content/news/Family-on-both-sides-of-a-Dubuque-murder-case-speak-about-possibility-for-a-new-trial-478097793.html, March 27, 2018 (last retrieved August 26, 2018).

STATEMENT OF THE CASE

The State filed a Trial Information on April 6, 2017, charging Mr. Buelow with two offenses: Murder in the First Degree in violation of Iowa Code § 707.2(1)(a) and Possession of a Controlled Substance, to wit, Cocaine, in violation of Iowa Code § 124.401(5). Mr. Buelow pleaded not guilty to all charges. From the beginning, Mr. Buelow has explained that he is innocent because the decedent, Ms. Samantha Link, stabbed herself.

Judge Monica Ackley (now, and by the time of trial, Judge Monica Zrinyi Wittig) of Dubuque County was assigned to the case. Judge Zrinyi Wittig presided over every aspect of this case up to and including the trial. She held a pretrial conference on January 5, 2018. Trial was set for January 8, 2018. After two continuances, Mr. Buelow's speedy trial deadline was January 9, 2018. 01/05/2018 Tr. 29:5–6. At the pretrial conference, the trial judge made two decisions that are the subject of this appeal.

First, the judge prohibited the introduction of any evidence related to Ms. Link's mental health or suicidal disposition on the grounds that the medical records describing Ms. Link's mental disorders were hearsay and that such evidence is "a character assault." 01/05/2018 Tr. 46:14–15.

Second, the judge told Mr. Buelow and his counsel that "you've got to give me an answer" as to whether or not he was going to waive either his

right to a speedy trial or his objection to the racial cross-section of the jury venire because the speedy trial date was quickly approaching. 01/05/2018 Tr. 28:14–15.

On January 8, 2018, the case proceeded to a jury trial.[2] At the close of the State's evidence, Mr. Buelow moved for a judgment of acquittal on all counts, and the judge denied the motion. 01/16/2018 Tr. 139:19–20. After presenting his defense, Mr. Buelow renewed his motion for acquittal. 01/18/2018 Tr. 116:20–24.

After the case was submitted, the judge received a note from the jury room indicating that the jurors could not come to agreement. The judge stated that the jurors were arguing so loudly that she could hear them from outside the jury room. Late in the afternoon another note came from the jury room accusing an unnamed juror of not deliberating. In response, the judge admonished the entire jury (threatening contempt) and sent the jurors home for the weekend. Concerned that a mistrial might happen, the judge later explained on the record that she placed telephone calls to the alternate jurors.

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[2] None of the trial exhibits were entered on EDMS. Trial exhibits were only uploaded after the appeal was filed and upon the motion of appellate counsel. App. v. IV, p. 33–37. The trial judge did not explain why electronic filing requirements were disregarded.

Counsel was not present for the judge's *ex parte* communication with the alternate jurors and the phone calls were not reported.

The juror accused of not deliberating went home and wrote a letter to the judge explaining his commitment to the deliberative process. When court reconvened on January 22, 2018, the letter from the holdout juror was brought to the judge. The judge says that she did not read the letter and, instead, shredded the letter.[3] The holdout juror was dismissed without any investigation, an alternate juror joined deliberations, and Mr. Buelow was convicted shortly thereafter of the lesser included charge of Murder in the Second Degree and Possession of Cocaine. 01/22/2018 Tr. 12–20.

On March 8, 2018, Mr. Buelow filed a motion for a new trial and arrest of judgment, renewing the arguments from the previously argued motions for judgment of acquittal and renewing his objections on numerous issues. The judge denied the new trial motion in its entirety on April 4, 2018.

On April 26, 2018, Mr. Buelow was sentenced to a prison term of fifty years. Mr. Buelow filed a notice of appeal on the same day.

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[3] The letter is only available now because the holdout juror kept a copy. A copy was provided to Mr. Buelow's lawyers and preserved for the record through a motion for a new trial.

STATEMENT OF FACTS

I. Background.

Mr. Buelow and Ms. Link had a romantic relationship. On March 30, 2017, the couple was together throughout the evening. They were both drinking and using recreational drugs. Ms. Link was drinking especially heavily and using a variety of behavior altering drugs. App. v. I, p. 139. Ms. Link ingested cocaine, benzodiazepine (i.e. muscle relaxant), marijuana, and the antidepressant drugs Xanax and Prozac. *Id.* Her blood alcohol level measured for her autopsy was .221 g/100 mL, which is nearly three times the legal limit for driving. *Id.*

It is unclear exactly when or exactly why, but during the course of the evening Ms. Link's behavior became aggressive and erratic. Mr. Buelow and other witnesses described her actions at a bar called Easy Street. 1/18/2018 Tr. 19:3–7. She occasionally left the bar without Mr. Buelow. 1/18/2018 Tr. 22:25–23:6. When she would come back to the bar she would appear even more intoxicated than before. *Id.* Ms. Link attacked another young woman at the bar, who later testified that Ms. Link accused her of making advances toward Mr. Buelow. 01/16/2018 Tr. 42–46.

Ms. Link's ire eventually turned to Mr. Buelow. They argued about their relationship. She was upset about his prior relationships. 01/18/2018

Tr. 19:20–22:11. He was upset that she was prying. *Id.* When she was away from the bar, he would send her text messages but get no response. 01/18/2018 Tr. 28:17–25; App. v. I, p. 155–56. There is nothing threatening about the text messages but they bear out that the couple was having a spat. There is no testimony or evidence that they had any sort of physical altercation in public. After 2:00 a.m. on March 31, 2017, Mr. Buelow and Ms. Link went back to the house that he rented and where they frequently stayed together.

Taking the stand in his own defense, Mr. Buelow testified about the events leading to Ms. Link's death. 01/18/2018 Tr. 42–45.[4] She was still upset about his prior girlfriends. He still wanted her to drop it. They were the only people in the house.

As the argument continues, Mr. Buelow asks her to leave. He tells her that their relationship is over. She attacks him.[5] She began to punch him in the face while he tried to restrain her by her wrists. She was biting him. His

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[4] The description that follows is from Mr. Buelow's testimony. Although the appellate posture of this case requires this Court to view the evidence in the light most favorable to the verdict, Mr. Buelow's testimony was the only testimony about what happened in the last few minutes of Ms. Link's life. Exhibit 12 is a cell phone video taken by Mr. Buelow. The video shows Ms. Link attacking Mr. Buelow. The scene described by Mr. Buelow begins at page 42 of the transcript from January 18, 2018.

[5] As the tattoo on Ms. Link's forearm says: "Love is all or nothing."

face had the marks to prove it. App. v. I, p. 25. While she was biting him, he stuck his finger in her eye.

They become untangled and then she begins to go upstairs. Mr. Buelow says that she stumbled on her way up the stairs. He followed her; nudging her upstairs so that she would leave. But she does not head toward the front door. She goes to the kitchen.

In the kitchen she grabs a knife. At first Mr. Buelow thinks she is going to come after him. He retreats by taking a couple of steps back. She does not attack him. With two hands on the knife she stabs herself.

He runs to her. He checks her pulse but does not feel anything. He runs downstairs to find his cell phone. First he calls his friend but his friend doesn't answer. Immediately after that he calls 911. In the five minutes between the time that he calls 911 and when first responders arrive, he continues to call 911 begging for help. From the moment that first responders arrive to today, Mr. Buelow explains that Ms. Link committed suicide.

Mr. Buelow's recollection of that night is not perfect. He told the police and he testified at trial that he only saw her stab herself once in the stomach. In fact there were two penetrating stab wounds and one superficial stab wound on Ms. Link's abdomen and upper torso. App. v. I, p. 133, 153.

The two penetrating stab wounds, which were fatal, were to her chest. App. v. I, p. 133.

There is no forensic evidence—none at all—to show that Mr. Buelow ever touched the knife. Mr. Buelow's fingerprints are not on the knife. App. v. I, p. 154. He has only a speck of blood on his right hand (although he is left-handed) and on his shirt. At trial, the State's Medical Examiner admitted that Ms. Link's wounds could have been self-inflicted. 01/16/2018 Tr. 120. The State's blood spatter expert, likewise, admitted that the very small amount of blood on Mr. Buelow's shirt could have been deposited even if he was standing 10 feet from Ms. Link. 01/12/2018 Tr. 211:25–212:4.

At trial, Dr. Bradley Randall, a forensic pathologist that has performed over 2,000 autopsies, testified on Mr. Buelow's behalf. 01/17/2018 Tr. 13. Dr. Randall's opinion was that the evidence was more consistent with a suicide than a homicide because lacerations on Ms. Link's right hand were consistent with the knife slipping in her hand as it penetrated her chest. 01/17/2018 Tr. 37–39; App. v. I, p. 153 (showing lacerations on Ms. Link's pinky and index finger only).

II. The trial judge excluded all evidence of Ms. Link's mental illnesses and suicidal behavior.

Mr. Buelow consistently sought to introduce evidence of Ms. Link's mental health.[6] Ms. Link had a long history of suicidal behavior. Mr. Buelow's attorneys sought to introduce this evidence through medical records, through a psychiatrist who would render an expert opinion as to Ms. Link's risk of suicide, and through lay testimony. At each turn, the trial judge refused to admit any evidence of Ms. Link's mental health.

Evidence of Ms. Link's long history of suicidal behavior and significant risk factors for suicide is overwhelming, near in time to her death, and includes information that corroborates Mr. Buelow's account of her death.

The contents of Ms. Link's medical records are not here reproduced, quoted, or paraphrased due to Mr. Buelow's compliance with the Order of this Court dated November 29, 2018. The Court is specifically directed to the Confidential Appendix where the medical records may be found.[7]

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[6] The trial judge went to great lengths to protect Ms. Link's medical records. Any time that the records were discussed, the entire courtroom was cleared. Motions with any reference to her mental health were ordered sealed at security level 9, which does not even permit access to counsel of record.

[7] Mr. Buelow moved for review of the Order dated November 29, 2018. *See* Motion dated December 7, 2018. Requiring Mr. Buelow to forgo

The medical records demonstrate that Ms. Link (a) had attempted suicide on multiple occasions, (b) threatened suicide in a manner consistent with how Mr. Buelow says she actually committed suicide, and (c) had been diagnosed with mental disorders that increased her risk of completing suicide.

Mr. Buelow also sought to have Dr. David Bean, a board certified psychiatrist, testify in his defense. Dr. Bean's opinion was based on his review of Ms. Link's medical records, the autopsy, and Mr. Buelow's description of events. If permitted to testify to his medical opinion, he would have explained that Ms. Link's mental instability, her intoxication at the time of her death, and her feelings of rejection following her argument with Mr. Buelow "could precipitate an increase in her depressive symptomology even to the potential of suicidal activity." App. v. IV, p. 11–20.

Dr. Bean explained during a deposition that "the more symptoms you have the greater the amount of suicidal thoughts that are possible and the amount of suicidal – suicidal behavior." App. v. I, p. 78–101. The trial judge limited the expert testimony on the same grounds that it excluded the medical records. Dr. Bean was only permitted to testify that Ms. Link was

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extensive reproduction, quotation, or paraphrasing of Ms. Link's medical records violates Mr. Buelow's Sixth Amendment right to a complete and public defense. *Infra* Section IV.

taking medication typically prescribed for depression and anxiety. 01/17/2018 Tr. 84–92. He was prohibited from discussing Ms. Link's history of mental health problems, the mental disorder under which she suffered, the circumstances of her previous suicide attempts, and even the fact of her prior suicide attempts.[8] 01/17/2018 Tr. 84:2–15.

Finally, Mr. Buelow sought to introduce lay witness testimony that corroborated his description of events. Ms. Link's former boyfriend, Mr. Michael Harkey, testified at a deposition that during an altercation he had with Ms. Link she angrily grabbed a knife. App. v. I, p. 73. Mr. Harkey took the knife from her "[b]ecause, like a said, I mean, I'm not – obviously, I got punched and stuff like that. So, either – I'm not letting – No. 1, I ain't going to let her kill herself. And, No. 2, I ain't going to let anything happen to myself as well." *Id.*; 01/18/2018 Tr. 106–07.

The judge's initial ruling on all matters related to Ms. Link's mental health appeared to be based solely on the character evidence rule: "I cannot permit the character assault without the issue of self-defense being raised … this is not a trial as to the nature of the victim's alleged mental health."

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[8] The judge actually did not even permit Dr. Bean to see all of Ms. Link's medical records. She limited his review to the previous year's medical records. This appeal, of course, finds error in the judge's failure to admit all of Ms. Link's medical records regardless of time and of the scope of expert review.

01/05/2018 Tr. 46:14–20. At the request of the parties, the judge reluctantly clarified her ruling in writing:

> The Court had indicated that the record would suffice for a written record. The parties however asked that the Court issue a written ruling and include the case law relied upon by the Court…. The Defendant intended to call two physicians as to the mental health records of Ms. Link. The Court had previously entered a ruling on these matters and the extent to which an expert could testify. The Court ruled on a motion for further clarification that reiterated that the court would not permit hearsay evidence to be permitted and to the extent any of the reports offered by the Defendant's witnesses attempted to testify to the specifics contained within the records, they [sic] testimony would not be permitted. Furthermore, the Court intended to follow the holding of *State v. Jacoby* and its progeny, which barred the admission of evidence of the victim's mental health and propensities without the defense of self-defense is raised.

App. v. IV, p. 21–23.

The judge separately ruled that Mr. Harkey's experience with Ms. Link wielding a knife was impermissible character evidence and not relevant. App. v. IV, p. 22–23.

III. An alternate juror was substituted for an allegedly non-deliberating juror without an investigation and despite evidence that the juror was actually a holdout.

When closing arguments concluded on Thursday, January 18, 2018, the court attendant randomly selected the names of three jurors to be

dismissed as alternate jurors.[9] The judge did not tell the alternate jurors before they were dismissed that they were not to discuss the case or post about it on social media until a verdict had been returned. 01/18/2018 Tr. 192:9–193:1. The following day, the jury began deliberating at 9:00 a.m. 01/19/2018 Tr. 3:18.

At 1:45 p.m., the judge received a jury question and notified counsel to report to chambers to hear the question. The judge decided that it was not necessary to transport Mr. Buelow to the courthouse. 01/19/2018 Tr. 3:5–6. The question stated, "Count I: We the jurors of the Fontae C. Buelow case are not able to come to an agreeance on the 1st count of the murder charge, nor any lesser charges. Count 2: We are in agreeance of finding the defendant guilty of Count II, possession of cocaine." App. v. IV, p. 27 (incorrectly labeled on EDMS as Jury Question #2 & Response). The judge, with counsel's approval, responded in a note back to the jury: "You as judges of facts have the duty and obligation to deliberate over the facts. The time for proper consideration of the facts as analyzed with the law has not passed. Please continue with your efforts." *Id.*

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[9] The names of the alternate jurors in the order the court attendant read them: J.D., K.S., and B.W. 01/18/2018 Tr. 192:7–8.

Less than an hour later, at 2:35 p.m., the judge received a second jury question and notified counsel to report to chambers. Again, Mr. Buelow was not transported to the courthouse for the question. The question stated, "Please give us the legal definition of self defense." App. v. IV, p. 26 (incorrectly labeled on EDMS as Jury Question #1 & Response)). With the State's approval and the defense taking no position, the judge responded in a note back to the jury, "Self-defense is not a legal theory for your consideration in this case." *Id.*

An hour later, at 3:38 p.m., the judge received a third jury question and notified counsel to report to the courtroom. For this question, the judge deemed it necessary to transport Mr. Buelow to the courthouse "in light of the problem that [the jury question] seems to present." 01/19/2018 Tr. 5:21–22. Mr. Buelow was present in the courtroom with counsel when the district court read the question. The question, written in all capital letters, stated, "WE BELIEVE THIS MAY CONSTITUTE A MISTRIAL BECAUSE ONE OF THE JURORS FAILED TO LIVE UP TO HIS LEGAL OBLIGATION BY REFUSING AT THE OUTSET TO PARTICIPATE IN DELIBERATIONS." App. v. IV, p. 28. Notably, the third jury question, unlike the prior two questions, was not written on the proper jury question

form and was not signed by foreperson as required.[10] After consulting with the parties, the judge gave the following oral response to the jury in court outside the presence of counsel and Mr. Buelow:

> As the Court has indicated to you, you are the judges of the facts in this proceeding. You took two oaths. The first oath you took occurred before voir dire. You all indicated you would tell the truth during that process of selection. Your second oath occurred once you were identified as the jury panel for this trial. That oath requires you to deliberate in the final stage of the trial process. This is not only your oath, this is your court-ordered obligation. As you were told, a failure to comply with this court-ordered obligation may subject you to sanctions for contempt. I'm releasing you today, Friday, January 19th, for the weekend. You are ordered to appear Monday morning on January 22nd, 2018 at 9:00 a.m., to fully participate in the deliberation process.

01/19/2018 Tr. 13:6–21.

Minutes later, without first consulting with counsel, the judge contacted the three previously-dismissed alternate jurors. 01/19/2018 Tr. 14–15. The judge's *ex parte* communications with the alternate jurors were not transcribed. After the conversations, the judge described her conversations

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[10] The jury question was not signed when it was delivered to the judge. The judge later stated on the record that the question did "not have the foreperson's signature on it, so [she] intended to get her signature on that…." 01/22/2018 Tr. 9:19–21. The judge eventually obtained the foreperson's signature on the third jury question, *see infra*. The first time defense counsel had an opportunity to see this jury question was when it was filed on January 25, 2018, after the judge had instructed the foreperson to sign the question and to write in the name of the non-deliberating juror. 01/22/2018 Tr. 13.

with the alternate jurors saying that she called the alternate jurors and spoke with J.D. and K.S. and left a voice message for B.W. The judge "asked them to please maintain their oath as previously instructed" and "told [them] now that in the event that there are continuing issues with deliberation, they might be called upon under a new rule that Judge Linda Fangman informed the Court about . . . ." 01/19/2018 Tr. 14:8–22.

On Sunday evening, the judge emailed and texted counsel informing them that she had researched "the issue of removing a juror after deliberations commence." App. v. IV, p. 55-61. Counsel and Mr. Buelow met in chambers at 8:30 a.m. on Monday, January 22, 2018. *Id.* There the judge indicated that she had discussed the jury issue with Judge Linda Fangman and had researched the issue, particularly under Federal Rule of Criminal Procedure 24(c) because she believed Iowa law was in flux. 01/22/2018 Tr. 3:20–4:15; 5:21–7:11. She concluded that she was authorized to remove a juror for misconduct and to replace the juror with one of the previously-dismissed alternate jurors. Mr. Buelow was given an opportunity to discuss the situation with his attorneys and to decide what he wanted to do in response to the jury issue.

Before Mr. Buelow and his attorneys left to discuss the issue, the judge informed both parties that she had received a communication "from

the one juror, who seems to be the ousted juror." 01/22/2018 Tr. 8:20–21. The judge stated that she had not read the communication and asked Mr. Buelow to decide whether she should read the communication before making a decision on the jury issue. The judge did not explain how, without reading the note, she knew it was from "the ousted juror," whether the note was sealed, or how it got the judge. A short recess was taken for Mr. Buelow to meet with his attorneys. Shortly thereafter, Mr. Buelow's counsel reported back to the judge that Mr. Buelow had decided that he wanted to replace the non-deliberating juror with the first alternate juror. 01/22/2018 Tr. 9:5–9. Mr. Buelow's counsel also informed the judge that she did not believe they should read the juror communication. The State concurred. Upon the State's suggestion, the judge shredded the note. 01/22/2018 Tr. 12:5–13:6.[11]

After counsel left chambers, the judge put the third jury question on the proper form and sent it to the jury to obtain the foreperson's signature. 01/22/2018 Tr. 15:7–10. Along with the third jury question, the judge sent a

[11] Destroying a document causes this Court's review to be evaded and the practice should be strongly discouraged. It is especially troubling because it comes on the heels of the judge having unrecorded *ex parte* communications with the alternate jurors. In a separate case, the Iowa Court of Appeals specifically admonished this judge for failing to make a record of a settlement conference she conducted in a case that she ultimately presided over at trial. *See, e.g.*, *In re Konzen*, 819 N.W.2d 426 (Table), 2012 WL 1859931 at *3 (Iowa Ct. App. 2012) ("None of the discussions were reported; we have no way of knowing what occurred.").

note to the foreperson stating: "[Foreperson], Please sign the note you sent regarding mistrial, then please submit this form with the name of the person who is the subject of the note. Please sign & submit to Ellen Schwartz, the jury attendant."[12] 01/22/2018 Tr. 15:11–15. The judge received these documents back signed by the foreperson who also revealed for the first time the name of the non-deliberating juror, A.W. 01/22/2018 Tr. 15:17–19. The judge immediately dismissed A.W. and called J.D. to serve on the jury. 01/22/2018 Tr. 15:19–24. The judge had the law clerk inform the remaining eleven jurors that they were not to deliberate any further until J.D. arrived. 01/22/2018 Tr. 16:1–5.

When J.D. arrived at the courthouse, the judge went on the record at 9:53 a.m. and informed the remaining eleven jurors that J.D. would be substituted onto the panel. The judge stated that J.D. "indicated . . . that he has not had any communication with anyone, and he was following his rules strictly." 01/22/2018 Tr. 16:9–11. The jury was given new verdict forms and instructed to start deliberations anew. The judge instructed J.D. directly, stating: "[J.D.], you're now substituted in, and you're under the same rules that you were when you started." 01/22/2018 Tr. 16:22–24.

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[12] All that defense counsel was informed of and consented to was the district court "ask[ing] the foreperson to simply provide a note as to the name of [the non-deliberating juror] . . ." 01/22/2018 Tr. 12:1–2.

At 1:30 p.m., just a few hours after the juror substitution, counsel was notified that the jury had reached a verdict. All parties assembled in the courtroom and the judge read the verdict aloud. On Count I, the jury did not find Mr. Buelow guilty of First Degree Murder, as charged, but found him guilty of Second Degree Murder. On Count II, the jury found Mr. Buelow guilty of Possession of Cocaine.

After the trial concluded, it was discovered that J.D., the alternate juror, had posted about the trial on Facebook on January 19, 2018. Numerous individuals "liked" and commented on the post. App. v. IV, p. 62. Also after the trial concluded, two jurors came forward with affidavits about their jury service.

A.W., the allegedly non-deliberating juror, signed an affidavit on February 5, 2018 stating that he was accused of failing to deliberate due to his belief that Mr. Buelow was innocent as to Count I and that the death was a suicide. App. v. IV, p. 63. A.W. further stated that two jurors were bullying and harassing him and others to adopt a guilty verdict. App. v. IV, p. 63. A.W. believed that the two jurors misrepresented his actions to the foreman, who in turn misrepresented to the court that he was not deliberating. App. v. IV, p. 63. He feared that the two male jurors would

bully and harass the other jurors into rendering a guilty verdict after he was dismissed. App. v. IV, p. 63.

A.W. kept a copy of the note shredded by the judge, as it appears that the note was typed on a home computer. After the trial, he brought the note to Mr. Buelow's trial counsel. The holdout juror wrote:

> Dear Judge,
>
> > On Friday Jan. 19, 2018 I was accused by the other jurors of not fulfilling my oath as a juror.… I take my oath as a juror very serious and I have paid meticulous attention to the evidence and testimony presented in your courtroom. Some of the other jurors are very angry with me and resent me for not agreeing with them on the verdict…. I owe it to the defendant, the court, and our justice system to base my decision solely on the evidence and testimony presented in your court, not with the other jurors believe I should do. I have been ridiculed, criticized, insulted, and verbally attacked by other jurors just because of my stance in this case….
>
> App. v. IV, p. 65.

On February 12, 2018, a second juror, C.C., signed an affidavit regarding her jury service. C.C. stated that A.W. was in fact participating in the deliberations and that he explained the evidence as he saw it and gave his reasons for believing the State failed to meet its burden of proof. C.C. stated that A.W. "refused to give in to the bullying and harassment by the two other male jurors that wanted a guilty verdict on Count I." App. v. IV, p. 66. Like A.W., she did not believe the State had met its burden of proof on

Count I but she was intimidated by the judge's admonition on Friday afternoon to "deliberate or face a contempt charge." App. v. IV, p. 63. C.C. feared she would be dismissed like A.W. or held in contempt if she persisted in her not guilty verdict. Ultimately, she felt that the two male jurors who had bullied and harassed A.W. did the same to her and others until they all ultimately adopted a guilty verdict. She further stated that when the jury was polled, she was in fear that she would be removed like A.W. if she did not say that the verdict was her verdict.

IV. Mr. Buelow was required to waive either his demand for a speedy trial or his objection to the racial composition of the jury venire.

The pretrial conference was held on Friday, January 5, 2018. The speedy trial deadline was Tuesday, January 9, 2018. 01/05/2018 Tr. 29. The parties had just received the demographic information of the potential jurors. Mr. Buelow raised an objection to the racial composition of the jury venire because there were proportionately fewer African-American potential jurors than live in Dubuque County. Mr. Buelow's counsel raised the objection under both the United States and Iowa Constitutions, and proceeded to discuss each prong of the analysis required by this Court in *State v. Plain*, 898 N.W.2d 801 (Iowa 2017). The relevant parts of the colloquy between the judge and counsel are below.

Defense Counsel: In this case, and similar to the Defendant in Plain, Fontae Buelow is African American. So we believe he does meet the first prong of the law as set forth in Plain.

The Judge: Is he 100 percent African American?

Defense Counsel: Yes.

The Judge: Go ahead.

Defense Counsel: With regard to the second prong, the Defendant must establish the proportion of group members in in the jury pool is under-representative of the proportion of group members in the community. …

The Judge: I don't think you needed to do that. *The Court can simply acknowledge that it's zero.*

Defense Counsel: And then under the third prong, I believe we would have to present additional testimony to the Court, which we believe we have the right to do, by the time of the trial in the Plain case. I believe the third, under the third prong, you have to prove the systemic exclusion, and I would have to be able to get and compile some data on how juries were comprised in Dubuque, and additional records to be able to do that, to see whether or not there is a fair cross-section to be able to make the argument for the third prong in the case, and we reserve the right to do that at the time that the trial starts.

The Judge: *Are you taking the position that you do not want to go forward with this trial based on the zero percent of proportionate members of African Americans in this community?*

Defense Counsel: *No, Your Honor. I and my client would like his right to speedy trial to be afforded and go forward with trial*.

The State: The State is unclear as to the wishes of the Defendant. … The Defendant is proposing superficially now

that this is an improper panel to be hearing this matter, yet at the same time, Defendant is not waiving his right to speedy trial. Which is it?

***

Defense Counsel: Your Honor, the reason we're proceeding is to make a record with this Court that we do not believe that it is a fair cross-section, and we will make an objection pursuant to Plain, but we would proceed with trial.

The Judge: You understand that the Court has acknowledged that there is a zero percent cross-section. I don't know how much more clear that could be. So I think the State's question is valid, as to whether or not you are waiving the fact that this Court cannot bring in a better cross-section or whether or not we don't go forward, because the Court can't bring in that cross-section?

The State: The Defendant is suggesting that we proceed with a deficient jury panel. Now we either waive it and bring in, either more representatives, which I'm amenable to, or we have a change of venue, and we have a jury which is more of the Defendant's situation, which again, I'm amenable to, but to say that we're going to proceed with a deficient panel, how is that justice? How is that even good for the Defendant?

The Judge: How is it good for the system? That's my question. So I need the answer. *You've got to answer*.

Defense Counsel: Your Honor, I would like to take a break to discuss with my client, before I make that representation on that. If you want to go off the record right now and take a quick recess, we can confer with our client, or we can leave this issue for the record open.

The Judge: I think we need to know that now, because if I'm calling the jury panel, I need to know so that I can let the Clerk know to let the jury know that it needs to be here on Monday, if he is going to waive the deficiency. If he will not waive the deficiency, then I will not call the jury panel, and then you will have to discuss with him waiver of his right to speedy trial. I

> will not go forward in violation of that, since the speedy trial deadline has been established as January 9th. So fifteen minutes.
>
> (Whereupon, a recess was taken at 2:15 p.m., and the proceedings were resumed at 2:35 p.m.)
>
> **The Judge**: Thank you. Have a seat. [Defense counsel], has the Defendant reached a conclusion as to the disparity issue under Plain?
>
> **Defense Counsel**: Yes, Your Honor. He's waiving his right to make an objection to Plain at this time.
>
> **The Judge**: So we will go forward, then, next week as scheduled. Correct?
>
> **Defense Counsel**: Correct.
>
> 01/05/2018 Tr. 23–29 (emphasis added).

Once trial began, an all-white jury was seated. Following trial, Mr. Buelow sought a new trial on the basis of having been forced to choose between his right to a speedy trial and his right to a jury venire comprised of a fair cross-section of the community. 03/08/2018 Br. Supp. New Trial Mot., at 4. The judge denied the new trial motion on the basis that Mr. Buelow's objection was withdrawn during the pretrial conference.

V. This Court struck extensive quotations to Ms. Link's medical records in Mr. Buelow's proof brief.

Mr. Buelow filed his brief on August 27, 2018. The State moved to strike portions of Mr. Buelow's proof brief on October 15, 2018. The Court

granted the contested motion to strike on November 29, 2018. Mr. Buelow timely moved for review by the other Justices on December 7, 2018. A panel of three Justices subsequently affirmed the November 29, 2018 Order.

This revised proof brief omits quotations to Ms. Link's medical records that are exculpatory. Due to this Court's Order dated November 29, 2018, no Iowa court has permitted Mr. Buelow to publicly and plainly explain his most powerful exculpatory evidence.

ARGUMENT

I. The district court erred by refusing to admit evidence of Ms. Link's suicidal disposition.

Standard of Review. "The standard of review with respect to the admission of hearsay evidence is for correction of errors at law." *State v. Huser*, 894 N.W.2d 472, 495 (Iowa 2017). Application of the character evidence rule is reviewed for an abuse of discretion. *State v. Krogmann*, 804 N.W.2d 518, 523 (Iowa 2011). An abuse of discretion occurs when evidence is excluded based upon an erroneous application of the law. *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000).

Preservation of Error. Error was preserved through motions in limine, offers of proof, questions objected to and sustained at trial, and a new trial motion.[13]

In a murder trial where the defense is that the decedent committed suicide, the district court errs by excluding from evidence medical records, expert testimony, and the personal observations of a lay witness tending to demonstrate the decedent's suicidal disposition. Mr. Buelow was prepared to offer a variety of evidence, including Ms. Link's own statements to medical professionals, that would have established Ms. Link's suicidal disposition. This included evidence of past suicide attempts, descriptions of her suicidal ideations that matched the way that Mr. Buelow described how she killed herself, and statements from medical providers that Ms. Link was at an increased risk of suicide given her drug use and mental disorders.

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[13] Mr. Buelow resisted the State's motion in limine to preclude introduction of Ms. Link's mental health records or any discussion of her tendency for suicidal behavior. App. v. I, p. 9–10, 19–35, 78–101. Mr. Buelow's counsel attempted to have an expert psychiatrist offer an opinion as to Ms. Link's risk of suicide and an explanation of her various mental disorders. 01/17/2018 Tr. 84:2–15 & 89. The State objected and the judge sustained the objection. Mr. Buelow made an offer of proof as to the actual medical records he would have submitted into evidence if allowed. 01/18/2018 Tr. 101. Those records are labeled Court's Exhibits A and C. 01/19/2018 Tr. 101. Mr. Buelow's counsel also made an offer of proof as to the testimony of a lay witness that would have testified about the Ms. Link's propensity for impulsive, dangerous behavior that corroborated Mr. Buelow's defense. *Id.*

For centuries, courts have held that in murder trials "there ought to be no doubt about the admissibility of plans or desires to commit suicide, even when no other evidence of its particular probability or feasibility is offered." 1A Wigmore, Evidence § 143 (Tillers Rev. 1983) (citing 1 England: Spencer Cowper's Trial, 13 How. St. Tr. 1106 (Assizes 1699)). This Court has long understood that if the decedent committed suicide then the defendant cannot have committed murder, and evidence tending to support suicide as the cause of death is admissible. *State v. Meyer*, 163 N.W. 244 (Iowa 1917) ("evidence tending to prove a predisposition toward self-destruction is admissible"); *State v. Beeson*, 136 N.W. 317 (Iowa 1912) (finding error in exclusion of testimony regarding the decedent's statements about suicide). For that reason, courts have universally recognized[14] the relevance of evidence that a decedent may have had suicidal plans, made prior suicide

[14] *State v. Drach*, 1 P.3d 864, 868–69 (Kan. 2000) (acknowledging that a clear majority and nearly all cited jurisdictions have held that evidence of suicide is admissible as tending to show the decedent's state of mind, and that the cases indicate that evidence of a suicide theory is generally admissible since the jury is capable of determining its validity and attaching the proper weight); *State v. Jaeger*, 973 P.2d 404, 407 (Utah 1999) (holding past suicide attempts made three years before the alleged murder were not so remote as to be irrelevant); *People v. Salcido*, 54 Cal. Rptr. 820, 827 (1966) (holding evidence of the decedent's earlier suicide attempts should have been admitted); *Bowie v. State*, 49 S.W.2d 1049 (Ark. 1932) (same); *State v. Ilgenfritz*, 173 S.W. 1041 (Mo. 1915) (same); *Commonwealth v. Trefethen*, 157 Mass. 180 (1892) (same); *Blackburn v. State*, 23 Ohio St. 146 (1872) (same); *Jumpertz v. People*, 21 Ill. 375 (1859) (same).

attempts, or had "feelings impelling to suicide." 1A Wigmore, Evidence § 144; *State v. Davis*, 77 P.3d 1111, 1120 (Or. 2003) (holding that excluding evidence of prior suicidal behavior was reversible error in the context of a murder case where the defendant argued that his girlfriend killed herself).

The trial judge nonetheless excluded evidence of Ms. Link's mental health on the grounds that statements in the medical records were hearsay and that mental health evidence in general was impermissible character evidence. App. v. IV, p. 21–26 (01/19/2018 Order). On the hearsay issue, the judge said that she "would not permit hearsay evidence to be permitted and to the extent any of the reports offered by the Defendant's witnesses attempted to testify to the specifics contained within the [medical] records, they [sic] testimony would not be permitted." *Id.* at 2–3. On the character evidence issue, the judge said that she "intended to follow the holding of *State v. Jacoby*, 260 N.W.2d 828 (Iowa 1977) and its progeny, which barred the admission of evidence of the victim's mental health and propensities without the defense of self-defense being raised." *Id.* at 3.

The rules against the admission of hearsay and character evidence simply do not apply. First, Ms. Link's statements about her mental health contained in the medical records are admissible as proof of a then-existing mental or emotional condition (Iowa R. Evid. 5.803(3)) and as statements

for the purpose of medical diagnosis or treatment (*id.* 5.803(4)). The remainder of the medical records, including the doctor's diagnosis, are admissible as records of regularly conducted activity (*id.* 5.803(6)). Second, evidence of a suicidal disposition is evidence of mental illness bearing on the cause of death not character evidence under Rule 5.404.

A. Ms. Link's medical records were improperly excluded as hearsay.

Statements in Ms. Link's medical records related to her mental health and suicidal disposition are admissible as proof of a then-existing mental or emotional condition, as statements made for the purpose of medical diagnosis or treatment, and as records of regularly conducted activity.

The district court erred by excluding statements about Ms. Link's plans to commit suicide, the manner in which she contemplated doing it, and all other statements bearing on her state of mind because Rule 5.803(3) permits such statements whether or not the statements were made to a medical professional. *See, e.g.*, *State v. Richards*, 809 N.W.2d 80, 95 (Iowa 2012) (holding that victim's out-of-court statements that she was afraid of the defendant are admissible under exception to rule against hearsay for statements relating to a then-existing mental or emotional condition).

The statements by Ms. Link that relate to her thoughts about suicide are literally textbook examples of the exception to the hearsay rule for

statements of a then-existing mental condition. McCormick on Evidence writes: "Statements of intent to commit suicide have been admitted when offered by the accused in homicide cases to prove that the victim took his or her own life and similarly in insurance cases to show suicide." McCormick on Evidence § 275 (7th ed. 2013). Thus, according to McCormick, statements of a decedent's then-existing mental condition are not only evidence of what her condition was when the statement was made but are also evidence tending to support the occurrence of a subsequent act. *See, e.g.*, *Mut. Life Ins. Co. v. Hillmon*, 145 U.S. 285, 295–96 (1892) (reversing district court's exclusion of statement by the decedent about his future intentions because the statement is proof that his future intention did, in fact, come to fruition).

The fact that these statements were made to a medical professional is another independent reason why the hearsay rule does not exclude the statements. *State v. Tracy*, 482 N.W.2d 675, 681 (Iowa 1992) (requiring that the declarant's motive in making the statement must be consistent with the purposes of promoting treatment and the content of the statement must be such as is reasonably relied on by a physician in treatment or diagnosis); McCormick on Evidence § 277) ("The statement need not have been made to a physician; one made to a hospital attendant, ambulance driver, or

member of the family may qualify if intended by the patient to secure treatment. Psychologists and social workers have been included within the exception.").

The entirety of the medical records pertaining to Ms. Link, exclusive of her statements contained therein, are also not excluded by the hearsay rule. Hospital records are "admissible upon the same basis as other regularly kept records." McCormick on Evidence § 293. "This result is appropriate, for the safeguards of trustworthiness of records of the modern hospital are at least as substantial as the guarantees of reliability of records of business establishments generally." *Id.* "Professional standards for hospital records contemplate that entries will be made of diagnostic findings at various stages. These entries are clearly in the regular course of the operations of the hospital." *Id.* Iowa law comports with McCormick's guidance. Rule 5.803(6) specifically contemplates the admission of "a record of an *act*, *event*, *condition*, *opinions or diagnosis*." Iowa R. Evid. 5.803(6) (emphasis added); *Beachel v. Long*, 420 N.W.2d 482, 485 (Iowa Ct. App. 1988) (recognizing that medical records may meet the hearsay exception for records of regularly conducted activity).

B. Proof of Ms. Link's suicidal disposition is not character evidence.

It is a category error to consider medical evidence of Ms. Link's mental health as character evidence or, as the judge put it, a "character assault." 01/05/2018 Tr. 46:14–20. Evidence of past behavior is admissible if there is a "noncharacter theory of relevance." *State v. Plain*, 898 N.W.2d 801, 814 (Iowa 2017). The fundamental flaw with the judge's ruling is that it misunderstands the difference between "*character-driven propensity*" and all other evidence of past behavior. The New Wigmore: Evidence of Other Misconduct and Similar Events § 1.3 (2009) (emphasis in original); *State v. Duncan*, 710 N.W.2d 34, 37 (Iowa 2006) (recognizing that evidence of prior bad acts is admissible if offered for a purpose other than a general propensity to commit wrongful acts). Here, Mr. Buelow sought to prove Ms. Link's propensity for self-harm and erratic behavior as a result of her medical condition, not some blameworthy character trait.

State v. Jacoby, the only case cited by the district court, is inapposite. The issue in *Jacoby* was "whether the jury must be instructed that specific prior violent and quarrelsome acts of the victim may be considered in determining *who was the aggressor* in the fatal incident." 260 N.W.2d at 837 (emphasis added). The *Jacoby* court recognized that the decedent's prior violent or turbulent character or reputation is ordinarily immaterial and

furnishes another no excuse to become his or her private executioner." *Id.* The *Jacoby* court recognized an exception, however, in cases of self-defense because the decedent's prior acts are relevant to determining the degree of apprehension of danger experienced by the defendant or to determine who was the aggressor during the encounter. *Id.*

The judge reasoned that Mr. Buelow could not offer evidence of Ms. Link's suicidal disposition as he had not raised self-defense or asserted that she was the aggressor. This misses the point. *Jacoby* begins with the premise that the evidence being offered is character evidence. *Jacoby* does not discuss whether evidence of a suicidal disposition is evidence of a character trait.

Suicidal disposition in virtually all cases, and certainly in this case, is an expression of mental illness not a person's bad character. *State v. Stanley*, 37 P.3d 85, 92 (N.M. 2001) ("We hold that that evidence of suicidal tendencies of a deceased should not be considered character evidence."); *State v. Guthrie*, 627 N.W.2d 401, 410–11 (S.D. 2001) (holding that expert testimony concerning the risk factors for suicide, such as mental illness, depression, significant physical illness, chemical dependency, suicidal ideation or previous suicidal behavior, was relevant).

State v. Stanley from the Supreme Court of New Mexico is instructive. The defendant was convicted of First Degree Murder following a trial where he was not permitted to present the decedent's medical records. 37 P.3d at 89. The decedent had multiple prior suicide attempts, suffered from severe depression and schizophrenia, and abused drugs and alcohol. *Id.* The decedent's suicide attempts also frequently coincided with substance abuse. *Id.* The Supreme Court of New Mexico reversed the trial court finding that "suicidal dispositions typically stemmed from a mental illness, not from a person's 'bad character' or trait of character." *Id.* at 92 (citing *In re Joseph G.*, 667 P.2d 1176, 1178 (Cal. 1983) (en banc) (recognizing that suicide in the United States has continued to be considered an expression of mental illness)).

As McCormick explains, evidence of propensity that is explained by a diagnosable medical condition as opposed to one's character is not forbidden. "An amputee may have a tendency to limp, a person with a cold may have a tendency to sniffle, and an individual with Parkinson's disease may have a tendency to shake under stress." § 186 n.1. "[T]hese propensities are not traits of character because the behaviors are not particularly blameworthy or praiseworthy, and jurors are not likely to misestimate the ability of these conditions to predict the behavior on a given occasion." *Id.*

Thinking about Ms. Link's mental health problems and the clinical observations that support those diagnoses as evidence of "character" is contrary to modern conceptions of psychiatry and mental health. The most recent version of the Diagnostic and Statistical Manual of Mental Disorders defines mental disorder, in part, "as a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual." American Psychiatric Association, DSM-V at 20 (5th ed. 2013). In common usage, character has many definitions but its closest definition to mental illness refers to a personality trait. *Webster's Third New International Dictionary* 376 (unabr. ed. 2002). In legal usage, character evidence is evidence of "someone's general personality traits" especially as those traits may pertain to the individual's "praiseworthy or blameworthy nature; evidence of a person's moral standing in the community." *Black's Law Dictionary* 674 (10th ed. 2014).

The obvious difference between a mental disorder and a character trait that might fall under Rule 5.404 is that a mental disorder is based on "clinically significant" behavioral patterns capable of professional diagnosis. The medical community has long tried to dispel the myths and stigmas surrounding mental health problems; among those myths is the notion that a mental disorder is simply a negative character trait or somehow less

"medical" than physical illness. *See, e.g.*, U.S. Dept. of Health and Human Services, *Mental Health: A Report of the Surgeon General* 3 (1999) ("This seminal report provides us with an opportunity to dispel the myths and stigma surrounding mental illness…. In fact mental illnesses are just as real as other illnessess, and they are like other illnesses in most ways."). The judge's ruling, therefore, tosses aside any learned understanding of mental health in favor of a harmful stigma about people who are disposed to suicide. *See* Center for Disease Control and Prevention, *Preventing Suicide: A Technical Package of Policy, Programs, and Practices* 8 (2017) (recognizing that continued efforts to reduce stigma associated with mental illness is an important aspect of suicide prevention).

C. Evidence of Ms. Link's suicidal disposition does not offend traditional justifications for the character evidence rule.

Evidence of Ms. Link's mental disorders and prior suicidal behavior that matches her behavior on the night of her death is not the kind of evidence that the character evidence rule was designed to protect against. The character evidence rule exists (1) to stop jurors from putting undue weight on the predictive value of a person's character and (2) to prevent jurors from concluding that the victim merely "got what she deserved." Neither of those justifications are present here.

First, courts have continually held that where there is a dispute as to whether an alleged homicide victim committed suicide that evidence may be received to show the decedent's "feelings impelling to suicide." 1A Wigmore, Evidence § 144. This makes sense because jurors are able to weigh medical and experiential testimony about the victim's propensity for self-harm. Without evidence of Ms. Link's mental disorders and prior suicide attempts, her actions are considerably harder for a jury to understand. Jurors are left wondering why a young woman would so suddenly and violently hurt herself. This evidence explains why Ms. Link's behavior was not aberrant and simultaneously corroborates Mr. Buelow's description of events.

The jury was led to believe that Mr. Buelow had no evidence to support what the State referred to as his "bizarre" version of the events from that evening when, in fact, he had a compelling explanation. 01/18/2018 Tr. 163:19. In closing argument, the State asserted that "[Mr. Buelow]'s got no explanation that makes any sense, nor actually, I don't think he even offered one." 01/18/2018 Tr. 169:5–6. The judge's improper exclusion of evidence and the State's subsequent argument did not get the jurors closer to the truth—it got them further from it.

The record is full of examples that could have helped the jurors understand Mr. Buelow's testimony. Ms. Link suffered from Borderline Personality Disorder. The manifestations of Borderline Personality Disorder corroborate Mr. Buelow's version of events whether or not there is any evidence of a past act repeating itself. Mr. Buelow testified that Ms. Link killed herself after he ended their relationship. This fact was not disputed. Exhibit 12 is a cell phone video taken immediately prior to her death where Mr. Buelow can be heard ending their relationship and ordering her to leave the house. When this happens, the video shows that she attacks him.

Mr. Buelow's account of Ms. Link's response is a textbook description of a person suffering from Borderline Personality Disorder. The DSM-V explains that Borderline Personality Disorder "is a pervasive pattern of instability of interpersonal relationships" that includes "marked impulsivity." DSM-V § 301.83. "Individuals with borderline personality disorder make frantic efforts to avoid real or imagined abandonment," which "may include impulsive actions such as self-mutilating or suicidal behaviors." *Id.* "These self-destructive acts are usually precipitated by threats of separation or rejection." *Id.*

The fact that Ms. Link had on multiple prior occasions attempted suicide is also an example of a propensity toward suicidal behavior. Ms.

Link's prior suicide attempts occurred when she was drinking and using drugs just as she was on the night of her death. Dr. Bean was prepared to testify that substance abuse increases the likelihood of suicidal behavior in general and for Ms. Link in particular.

Second, no one argued that Ms. Link got what she deserved. To the contrary, this is a case of immense tragedy and Mr. Buelow simply asked the jurors not to exacerbate the tragedy by imprisoning an innocent man.

II. The district court erred by removing a holdout juror after deliberations commenced.

Standard of Review. This Court has not articulated a standard of review for removal of a juror once deliberations begin. The federal standard, which Mr. Buelow urges this Court to adopt, is abuse of discretion bound by the rule that "'a court may not dismiss a juror during deliberations if the request for discharge stems from doubts the juror harbors about the sufficiency of the evidence.'" *United States v. Symington*, 195 F.3d 1080, 1085 (9th Cir. 1999) (quoting *United States v. Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987)).

Preservation of Error. Error was preserved solely through a motion for a new trial. Mr. Buelow's failure to contemporaneously object is excusable because, as explained below, Iowa law in this area was and remains unclear. To the extent Mr. Buelow is alleged to have waived this

right to a fair and impartial trial, the trial judge failed to confirm that any waiver was knowing, voluntary, and intelligent.

The Sixth Amendment does not allow a trial judge to discharge a juror on account of his views of the merits of the case. Accordingly, courts deciding whether to discharge a juror mid-deliberation must determine (1) that there is no reasonable possibility that the juror's discharge stems from his views of the merits and (2) that the grounds for discharge are valid and constitutional. In this case, the judge failed to make either determination and, in so doing, violated Mr. Buelow's right to a fair and impartial trial. In this regard, the Iowa Constitution provides at least as robust protection as the United States Constitution. *See State v. Senn*, 882 N.W.2d 1, 8 (Iowa 2016).

"The essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." *Williams v. Florida*, 399 U.S. 78, 100 (1970) (emphasis added). Only the jury can determine guilt. *United Bhd. of Carpenters & Joiners of Am. v. United States*, 330 U.S. 395, 408 (1947) ("a judge may not direct a verdict of guilty no matter how conclusive the evidence" in a criminal case). "It would similarly vitiate the essential role of a jury to act as a safeguard

against both the power of the state and the court for a judge to selectively dismiss jurors based on the views of the merits of the case they express during deliberations." *Williams v. Cavazos*, 646 F.3d 626, 643 (9th Cir. 2011). An arbitrary dismissal of a juror is thus prohibited because a court cannot "do indirectly that which it has no power to do directly." *Sparf v. United States*, 156 U.S. 51, 106 (1895).

At the same time, investigating whether a juror ought to be dismissed creates tension with the well-established rule that no one, including the judge, is even supposed to be aware of the views of individual jurors during deliberations. *Clark v. United States*, 289 U.S. 1, 16 (1933). Courts must, therefore, proceed delicately with the inquiry into juror misconduct. A limited investigation must be designed, however, to safeguard a defendant's right to a fair and impartial jury. That investigation must ensure (1) that there is no reasonable possibility that the juror's discharge stems from his views of the merits and (2) that the grounds for discharge are valid and constitutional.

The trial judge in this case failed to make either of these inquiries. This error was not due to inattention to the law; however, it was due to a lack of guidance under Iowa law. In Iowa, the law is unclear as to what investigation process the judge must undertake in order to ensure that jurors

are not unfairly removed. Iowa Rule of Criminal Procedure 2.18(15) does not explicitly require an investigation process before a juror can be removed and this Court has not had occasion to address the process for removing a juror under the Rule. Because Iowa law did not address the process for juror substitution, the parties and the judge were unclear as to the proper course of action when faced with a juror substitution situation. As a result, no investigation was undertaken before the substitution took place and Mr. Buelow's rights were violated when a holdout juror was dismissed from the jury.

A. The juror allegedly engaging in misconduct could not be dismissed because he was a holdout.

In cases involving juror illness or intoxication, it is obvious that the basis for discharge is independent of the juror's views of the merits. A constitutional problem arises, as it did here, when there is an indication that basis for dismissal is related to the juror's view of the evidence.

The polestar case is *United States v. Brown*, 823 F.2d 591 (D.C. Cir. 1987). The D.C. Circuit held unconstitutional the dismissal of a juror who requested to be discharged after five weeks of deliberations. The juror told the court that "the problem" he had was "the way the R.I.C.O. conspiracy act reads. . . . If I had known at the beginning of this trial what the act said, I would have not said I could be impartial." *Id.* at 594. He acknowledged that

he "disagree[d] with the law," but did not say he would refuse to follow it. Rather, he stated, "If the evidence was presented in a fashion in which the law is written, then, maybe, I would be able to discharge my duties." *Id.*

Reviewing this episode, the D.C. Circuit held that "a court may not dismiss a juror during deliberations if the request for discharge stems from doubts the juror harbors about the sufficiency of the government's evidence." *Id.* at 596. "A discharge of this kind," the court explained, "would enable the government to obtain a conviction even though a member of the jury that began deliberations thought that the government had failed to prove its case. Such a result is unacceptable under the Constitution." *Id.* Recognizing that "the reasons underlying a request for a dismissal will often be unclear," and that "a court may not delve deeply into a juror's motivations because it may not intrude on the secrecy of the jury's deliberations," the court held that "if the record evidence discloses any possibility that the request to discharge stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request." *Id.* Because there was a "substantial possibility that [the juror] requested to be discharged because he believed that the evidence offered at trial was inadequate to support a conviction," the court determined that the defendant's Sixth Amendment rights had been violated. *Id.*

Federal and state courts across the country have adopted the rule in *Brown*.[15] This Court, however, has not addressed this issue.

One reason this Court has not addressed this issue is because Iowa Rule of Criminal Procedure 2.18(15) specifically prohibited substituting an alternate juror once deliberations commence until June 30, 2016. On June 30, 2016, the Rules Committee substantively amended Rule 2.18(15). The amendment, permanently effective on August 30, 2016, removed the language that prohibited the replacement of jurors during deliberations. Prior to the amendment, Rule 2.18(15) provided, "Alternate jurors shall, in the order they were drawn, replace any juror who becomes unable to act, or is disqualified, before the jury retires, and if not so needed shall then be discharged." At that time the rule was clear, the replacement of jurors with alternate jurors could only occur prior to deliberations and alternate jurors were required to be discharged at the commencement of deliberations. The rule was unclear, however, at the time of Mr. Buelow's trial.

The July 2016 amendment removed the specific directives as to juror substitution and the discharge of alternate jurors. While Rule 2.18(15) as

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[15] *United States v. Thomas*, 116 F.3d 606 (2d Cir. 1997); *United States v. Abbell*, 271 F.3d 1286 (11th Cir. 2001); *United States v. Kemp*, 500 F.3d 257 (3d Cir. 2007); *Sanders v. Lamarque*, 357 F.3d 943 (9th Cir. 2004); *People v. Allen*, 264 P.3d 336 (Cal. 2011); *Garcia v. People*, 997 P.2d 1 (Colo. 2000); *People v. Nelson*, 922 N.E.2d 1056 (Ill. 2009).

amended does not expressly prohibit juror substitution during deliberations, it also does not address the appropriate procedure for judges to follow when removing a juror after deliberations have begun.

This Court need not delineate every procedure that a judge must follow when faced with whether or not to replace a juror during deliberations. It is sufficient and appropriate on the facts of this case to adopt the rule in *Brown*. The rule in *Brown* precluded the substitution of juror A.W. because there was evidence that his conflict with the other jurors stemmed from his views on the case. The judge's failure to conduct any investigation before removing A.W. violated the rule in *Brown*.

Refusing to deliberate is misconduct that permits the removal of a juror in some cases. LaFave, et al., 6 Crim. Proc. § 24.9(f) (4th ed.). Courts only permit removal, however, when there is proof of misconduct satisfying the good cause standard. *Id.* The supposed proof of misconduct is too thin to satisfy the good cause standard.

Here, it is clear that A.W. was dismissed because of his views about the case. Even without having read his affidavit, the judge knew (1) that the jurors were arguing because she heard them, (2) that the jurors could not agree on the murder charge but *could agree* on the cocaine charge, and (3) that the allegation of refusing to deliberate came after notes indicating that

the jurors were deliberating but just not agreeing. Based on the information that the judge had before even reading the note, the rule in *Brown* prohibits the dismissal of A.W. because there is a possibility that the allegation of failing to deliberate stems from his views of the evidence.

A.W.'s affidavit makes it clear that he was, in fact, deliberating.[16] Nothing in his affidavit indicates that he was refusing to deliberate. His note explains the situation whereas the note from the foreperson is merely a conclusory allegation.

A.W.'s affidavit may be considered by this Court, and should have been considered by the district court when it was presented in a motion for a new trial because it completes a record that was destroyed by the district court. The affidavit and the note accompanying it do not, in and of themselves, impeach the jury verdict and therefore do not run afoul of Iowa Rule of Evidence 5.606(b).

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[16] Although juror affidavits are prohibited in certain circumstances under Iowa Rule of Evidence 5.606, neither of the juror affidavits being offered in this appeal contravene Rule 5.606. Juror A.W.'s affidavit *is not* being offered to "inquir[e] into the validity of a verdict or indictment," but is instead being offered to complete a record that was destroyed by the district court. Iowa. R. Evid. 5.606(b)(1). On the other hand, Juror C.C.'s affidavit *is* being offered to "inquir[e] into the validity of [the] verdict," however, it is being offered for the limited purpose of showing that "[a]n outside influence was improperly brought to bear on [C.C.]" because it explains the effect of the judge's threat of contempt to the jury. Iowa R. Evid. 5.606(b)(2)(B).

B. Mr. Buelow did not waive his right to an impartial jury.

Mr. Buelow consented to replacing the juror who he believed to be refusing to deliberate. He also consented to the judge not reading the note from the holdout juror. This was not, as the State will surely argue, a waiver of his rights. First, the law in Iowa regarding how to deal with a juror allegedly engaging in misconduct was not sufficiently clear for him to know that the judge was making an error. *State v. Wisniewski*, 171 N.W.2d 882 (Iowa 1969) (permitting a criminal defendant to raise on appeal an objection not raised at trial "when it was not the law and when it would have been apparent error for the trial court to sustain any objection made").

Rule 2.18(15) was substantively amended in July of 2016. The earlier version of Rule 2.18(15) expressly prohibited the substitution of an alternate juror once deliberations commence. The explicit prohibition was removed in July of 2016 without comment by the Rules Committee. This Court, therefore, has not had the occasion to explain, and Rule 2.18(15) does not address, the appropriate procedure for judges to follow when removing a juror after deliberations commence.

Second, the record does not indicate that Mr. Buelow made a knowing, voluntary, and intelligent waiver of his right to a fair and impartial jury. Mr. Buelow cannot be faulted for assenting to a procedure about which

no Iowa rule or court decision offered any guidance. *State v. Sanchez*, 6 P.3d 486 (N.M. 2000) ("In fact, until this opinion is final, the quantity and quality of the procedural safeguards required by [the procedural rule governing the use of alternate jurors after deliberations begin] will remain a matter of first impression. We cannot characterize the Defendant's willingness to accept the first alternate as a waiver of his right to a fair and impartial jury while the protection provided by that rule remained unclear.").

As Mr. Buelow voluntarily consented to replacing the allegedly non-deliberating juror, the State will undoubtedly raise *State v. Escobedo*, 573 N.W.2d 271 (Iowa Ct. App. 1997).[17] In *Escodebo*, the jury was in the middle of deliberations when the county attorney informed the trial judge that he had "received information from a person who reported hearing a juror make racial remarks about Escobedo at a bar a few nights earlier." *Id.* at 275. The

[17] This Court does "not subscribe to the plain error rule." *State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999). To the extent Mr. Buelow is deemed to have waived his right to an impartial jury, Mr. Buelow wishes to preserve for certiorari that Iowa's lack of a plain error rule elevates form over substance to such a degree that it violates United States Constitutional norms embodied in the Sixth and Fourteenth Amendments. *See United States v. Ross*, 77 F.3d 1525, 1539 (7th Cir. 1996) ("The plain error rule is protective; it recognizes that in a criminal case, where a defendant's substantial personal rights are at stake, the rule of forfeiture should bend slightly if necessary to prevent a grave injustice."); *see also United States v. Young*, 470 U.S. 1, 15 (1985) ("The plain-error doctrine … tempers the blow of a rigid application of the contemporaneous-objection requirement.").

trial judge conducted an inquiry into the report, which included testimony from the juror and the informant, and dismissed the juror from the case." *Id.* The judge then notified the parties of its intention to substitute the reported juror with the dismissed first alternate juror and Escobedo knowingly assented to the substitution. *Id.*

While the Court of Appeals agreed with Escobedo that the rules did not authorize the judge to substitute a juror during deliberations, it concluded that he had waived his claim of error by requesting substitution. To the extent that the State raises *Escobedo* as grounds to deny Mr. Buelow's appeal, the facts of the cases are distinguishable for three reasons.

First, in *Escobedo*, the rule at the time of trial was clear—juror substitution was prohibited once the jury began deliberations. Despite that fact, the defendant chose to waive his right under the rule and allow the juror substitution. In Mr. Buelow's case, however, the rules were not clear at the time of trial. Rule 2.18(15) tacitly authorized the substitution of jurors during deliberations; however, the rule provided no procedure for the judge to follow.

Second, a factual investigation was undertaken by the trial judge prior to Escobedo's decision to authorize the juror substitution. Juror misconduct was reported to the trial judge in both cases, however in *Escobedo*, the "trial

judge conducted an inquiry into the report, which included testimony from the juror and the informant" before dismissing the juror. *Id.* No such investigation occurred when juror misconduct was reported to the trial judge in Mr. Buelow's case and that is precisely what Mr. Buelow is asking this Court to require of the trial judge in his appeal.

Third, in *Escabedo* the juror in question was removed to the benefit of the defendant—the juror was allegedly bias against Hispanics. Mr. Buelow, on the other hand, merely acquiesced under the circumstances without any apparent benefit to him.

III. The district court erred by forcing Mr. Buelow to waive either his right to a speedy trial or his objection to the racial cross-section of the jury venire.

Standard of Review. Constitutional issues are reviewed de novo. *State v. Plain*, 898 N.W.2d 801, 810 (Iowa 2017).

Preservation of Error. The very error Mr. Buelow challenges here is that the trial judge impermissibly forced him to pick between constitutional rights. Mr. Buelow asserted both his right to a speedy trial and fair racial cross-section at a pretrial conference on January 5, 2018. The trial judge demanded waiver of one of those rights at the same pretrial conference.

Mr. Buelow's speedy trial deadline was January 9, 2018. 01/05/2018 Tr. 29:5–6. During the pretrial conference on Friday, January 5, 2018, Mr.

Buelow objected to the underrepresentation of potential black jurors in the venire. Faced with the prospect of proceeding with a defective jury pool or failing to bring the case to trial in the constitutionally mandated time period, the judge told Mr. Buelow and his counsel that "you've got to give me an answer" as to whether or not he was going to waive either his right to a speedy trial or his objection to the racial cross-section of the jury venire. In doing so, the judge guaranteed that any subsequent waiver would not be voluntary. The result is a violation of Mr. Buelow's right to a fair and impartial jury.

The right to a jury trial in a criminal case establishes two fundamental rights at issue here: (1) "the accused shall enjoy the right to a speedy and public trial" and (2) "an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. Amend. VI *accord* Iowa Const. Art. I, § 10. The right to an impartial jury entitles the criminally accused to a jury drawn from a fair cross-section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); *Plain*, 898 N.W.2d at 821.

"A jury that represents a fair cross-section of the community enables 'the commonsense judgment of the community [to serve] as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge.'" *Plain*, 898

N.W.2d at 821 (quoting *Taylor*, 419 U.S. at 530). "It also helps legitimize the legal system and is 'critical to public confidence in the fairness of the criminal justice system.'" *Id.*

"Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970). A waiver is not valid when the defendant is presented with a "Hobson's choice" to pick between constitutional rights. *See Gilbert v. Lockhart*, 930 F.2d 1356, 1360 (8th Cir. 1991) (holding that writ of habeas corpus shall issue when "[the defendant] was offered the 'Hobson's choice' of proceeding to trial with unprepared counsel or no counsel at all").

Mr. Buelow unambiguously asserted his right to a jury drawn from a fair cross-section of the community. 01/05/2018 Tr. 22–27. Counsel began the argument by walking through the three-part *Duran* test as applied by this Court in *Plain*. *See Duren v. Missouri*, 439 U.S. 357, 364 (1979). Under the first prong, it was established that Mr. Buelow is black or African-American and is thus a "distinctive" group in the community. 01/05/2018 Tr. 23. The

judge inquired whether Mr. Buelow was "100% African-American" and counsel proffered that he is.[18]

Under the second prong, the judge acknowledged that African Americans are underrepresented in the venire both in Mr. Buelow's case and generally in Dubuque County. As counsel began to develop proof on this prong of the test, the judge cut her off, saying "I don't think you needed to do that. The Court can simply acknowledge that it's zero." 01/05/2018 Tr. 23:21–23. Earlier in this colloquy, the judge acknowledged that the underrepresentation of African-Americans in the venire in Dubuque County is a persistent problem. She explained that "I have had numerous trials lately that have raised this issue, and I for one am at a complete loss as to how to handle the Defendant's right to have a jury of his peers with the cross-reference of the community." 01/05/2018 Tr. 20:19–23. The judge identified the problem as "[b]asically, you have Germans and Irishmen here." 01/05/2018 Tr. 21:12.

Moving to the third prong, Mr. Buelow's counsel requested the opportunity to compile data of "how juries were comprised in Dubuque" and to "reserve the right to do that at the time the trial starts." 01/05/2018 Tr.

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[18] Mr. Buelow is black. *See* App. v. II, p. 25. Inquiring into the ratio of a person's African heritage versus any other heritage is a practice that district courts would do well to avoid. *See Plessy v. Ferguson*, 163 U.S. 537 (1896).

24:1 This is the very request that this Court sanctioned in *Plain*, 898 N.W.2d at 828, but for the trial judge it was asking too much.

> **The Judge**: Are you taking the position that you do not want to go forward with this trial based on the zero percent of proportionate members of African Americans in this community?
>
> **Defense Counsel**: No, Your Honor. I and my client would like his right to speedy trial to be afforded and go forward with trial.

Mr. Buelow's counsel responded by asserting that the accused would like to maintain both his right to a speedy trial and to an impartial jury comprised of a fair cross-section of the community. But the judge was having none of it.

> **The Judge**: You understand that the Court has acknowledged that there is a zero percent cross-section. I don't know how much more clear that could be. So I think the State's question is valid, as to whether or not you are waiving the fact that this Court cannot bring in a better cross-section or whether or not we don't go forward, because the Court can't bring in that cross-section?

Before Mr. Buelow's attorney was able to respond to the acknowledgment above that a fair cross-section could not be brought in before the speedy trial deadline, the judge said: "So I need the answer. You've got to answer." 01/05/2018 Tr. 28:13–15.

Having sat in jail from the moment of his arrest under the strictures of a $1,000,000 cash bond, Mr. Buelow decided that he wanted his day in

court. Under the circumstances, Mr. Buelow did not voluntarily waive his right to an impartial jury.[19]

IV. This Court erred by requiring Mr. Buelow to remove extensive quotations to Ms. Link's medical records in his initial proof brief.

Standard of Review. Correction of errors at law applies to this constitutional challenge. *State v. Canal*, 773 N.W.2d 528, 530 (Iowa 2009).

Preservation of Error. Mr. Buelow resisted the State's motion to strike his initial proof brief, and sought further review of the Court's Order dated November 29, 2018.

Mr. Buelow is serving a 50 year prison sentence without any Iowa court ever permitting him to publicly set forth his most crucial exculpatory evidence. Every time that he sought to even discuss the medical records at issue, the district court judge cleared the courtroom. When Mr. Buelow sought to publicly explain the exculpatory nature of the medical records in

[19] Dubuque's long struggle with racial tension has been recognized throughout Iowa and the nation. *E.g.*, Timothy Trenkle, *Racism still festers in Dubuque*, The Des Moines Register, May 11, 2016; Isabel Wilkerson, *Seeking a Racial Mix, Dubuque Finds Tension*, The N.Y. Times, Nov. 3, 1991; ABC News 20/20, *The Most Racist Town in America*, Dec. 20, 1991, available at https://www.youtube.com/watch?v=lZN5flc8Q44 (last visited Aug. 26, 2018). Against this backdrop, the trial judge's treatment of Mr. Buelow in this exchange—coupled with a conviction after the removal of a holdout juror—makes this a trial capable of eroding public trust in the judicial process.

this Court, the State moved to have the exculpatory evidence hidden from public view.

This Court's removal of exculpatory evidence from the public domain strikes at the heart of the Sixth Amendment's guarantee of a public trial. *See In re Oliver*, 333 U.S. 257, 271 (1948) ("Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.").

Strict scrutiny applies to closing a criminal proceeding from public view. *Waller v. Georgia*, 467 U.S. 39, 48 (1984). In *Waller*, the United States Supreme Court held that "the party seeking to close the [proceeding] must advance an overriding interest that is likely to be prejudiced." *Id.* Mr. Buelow submits that the removal of his most exculpatory evidence from public view amounts to a closure of proceedings because it equally eliminates the public's ability to scrutinize the decisions of both the trial court and this Court. *Estes v. Texas*, 381 U.S. 532, 588 (1965) (Harlan, J., concurring) ("judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings"); *In re Oliver*, 333 U.S. at 270 ("contemporaneous review in

the forum of public opinion is an effective restraint on possible abuse of judicial power").

Here, the requirement that Mr. Buelow provide the Court (but not the public) the actual contents of the medical records violates the rule in *Waller*. Mr. Buelow's right to present a complete defense in public is made subordinate to Ms. Link's right to privacy in her medical records. Neither the State in its Motion to Strike nor the Court in its Order dated November 29, 2018, cited to any court that has ever permitted such treatment of exculpatory evidence. Harm sought to be avoided by an alleged crime victim cannot overcome the integrity of the fact-finding process. *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988). Whatever harm the State fears may come from Mr. Buelow publicly disclosing exculpatory evidence in the form of the decedent's medical records, the United States Supreme Court has explained that in the context of the Sixth Amendment "constitutional protections have costs." *Id.*

CONCLUSION

For the foregoing reasons, Mr. Buelow respectfully requests that the Court vacate the conviction and remand for a new trial.

REQUEST FOR ORAL ARGUMENT

Mr. Buelow respectfully requests oral argument on the issues addressed above.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on May 30, 2019, I electronically filed the foregoing Amended Final Brief with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System which will send notice of electronic filing to the following. Per Rule 16.317(1)(a), this constitutes service of the document for purposes of the Iowa Court Rules.

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FOR THE STATE OF IOWA

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 13,756 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Word 2010 in Times New Roman 14 pt.

Dated: May 30, 2019

By /s/ David N. Fautsch
David N. Fautsch

COST CERTIFICATE

The undersigned hereby certifies pursuant to Rule 6.905(13) of the Iowa Rules of Appellate Procedure that the true cost of producing the necessary copies of the foregoing Amended Brief was zero dollars.