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 REPLY BRIEF

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INTRODUCTION

This is a murder case where the State claims that Mr. Buelow stabbed Ms. Link. Mr. Buelow says that she committed suicide by stabbing herself. There are no eye witnesses. Mr. Buelow's fingerprints were not found on the knife. App. v. I, p. 154. Ms. Link was covered in blood but Mr. Buelow was not. *Compare* App. v. II, p. 17, 18 (showing Ms. Link) *with* App. V. II, p. 25 (showing Mr. Buelow). Mr. Buelow has consistently explained—during interrogation on the night of the incident and when testifying at trial—that Ms. Link stabbed herself. During closing arguments, the prosecutor mocked this explanation; calling his version of event "bizarre," 01/18/2018 Tr. 163:19, and asserting 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.

Ms. Link's medical records provided a compelling explanation that supports Mr. Buelow's testimony but the jury was not allowed to know anything about Ms. Link's long history of erratic and suicidal behavior. When she died at the age of 21, Ms. Link had attempted suicide at least three times. App. v. III, p. 57–58. She once grabbed a knife during an argument with a former boyfriend, which led the former boyfriend to wrestle the knife

from her hand before she could hurt herself. App. v. I, p. 73. Ms. Link suffered from bipolar disorder and borderline personality disorder—psychiatric conditions associated with rapid, unpredictable mood swings that dramatically increase the risk of committing suicide. App. v. III, p. 53–54.

I. The jury was not allowed to hear exculpatory evidence.

The State is not even defending the district court's legal analysis that resulted in the exclusion of Ms. Link's medical records (indeed, any mention of her psychiatric condition) and her former boyfriend's testimony. The district court ruled that the medical records were hearsay without an exception. The State concedes on appeal that there is no legal basis for that ruling.

The district court also ruled that evidence of Ms. Link's propensity for self-harm was inadmissible evidence of bad character under Iowa Rule of Evidence 5.404. The State concedes that evidence of mental health problems impelling a person to suicide is not evidence of bad character. Perhaps recognizing that the district court's order is legally untenable, the State does not even mention the only case cited by the district court in support of its ruling, *State v. Jacoby*, 260 N.W.2d 828 (Iowa 1977). App. v. IV, p. 21–23.

So the State is trying to invent a new way to affirm Mr. Buelow's conviction. The State begins by concocting a new theory about the application of Rule 5.404. It invites this Court to hold that very relevant evidence is not character evidence but that less relevant evidence is more likely to be character evidence. Appellee's Br. at 33. Under the State's view of the law, if evidence of Ms. Link's propensity toward suicide is only a little relevant, then it should be considered inadmissible character evidence. This Court should decline the State's invitation to dramatically re-think Rule 5.404. The State's proposed approach makes a mess of existing jurisprudence, and does so without being able to point to any court that has endorsed such an approach.

The State next resorts to the harmless error doctrine. On its face, this is a strange argument because the medical records could not have been released in the first place unless the district court believed that the records were *exculpatory* pursuant Iowa Code § 622.10, which prohibits release of an alleged victim's medical records without such a finding. Equally important, the State's position fails to account for the fact that this was a close case with high stakes. The jury was indisputably divided until a new juror was brought in during deliberations. Even after a holdout juror was

removed, the remaining jurors declined to return the first-degree murder verdict urged by the State but instead returned a verdict for second-degree murder. Jurors have come forward after the trial to publicly renounce their decision. With a lifetime in prison on the line, it is impossible to rest assured that the district court's error was not prejudicial.

II. The trial was a procedural mess that prejudiced Mr. Buelow at every turn.

Mr. Buelow's trial was filled with jaw-dropping procedural flaws that undermine the reliability of the verdict. First, the conviction was only obtained *after* a holdout juror was removed during deliberations. Second, Mr. Buelow, who is black, was convicted by an all-white jury drawn from an all-white jury pool *after* being told that he must waive either his right to a speedy trial or withdraw his objection to the racial composition of the jury pool. Third, Mr. Buelow has *never* been allowed to publicly present exculpatory evidence related to Ms. Link's propensity for self-harm. According to the State, however, the law is a dead letter to Mr. Buelow: the State asserts waiver on the first two issues and mootness on the last issue.

First, the State asserts that Mr. Buelow's acquiescence to replacing a juror during deliberations amounts to waiver of his right to an impartial jury. Here, the State relies on error preservation while ignoring the rule that the

waiver of a constitutional right must be knowing, voluntary, and intelligent. This could not have been a knowing waiver or an intelligent waiver because there was no investigation conducted to determine whether the disagreement between the holdout juror and the other jurors stemmed from divergent views about the merits.

The State fails to address several disturbing facts surrounding the replacement of the holdout juror. There was a note from the holdout juror that was delivered to the trial judge. The note was not read but was instead destroyed by the trial judge. (A copy of the note was eventually obtained directly from the juror after the verdict—it says he believed that the State failed to prove its case.) The trial judge had ex parte, off-the-record communications with the previously dismissed alternate jurors to discuss having the jurors come back to join ongoing deliberations. The previously dismissed alternate juror that was later substituted back onto the jury told the district court before the substitution that he had not discussed the case but, in fact, he had posted about it on social media. These facts were not known at the time of Mr. Buelow's acquiescence to the juror substitution but could have been known had any investigation occurred.

Second, after two continuances and nearly a year since he was charged, Mr. Buelow participated in a pre-trial conference where the district court demanded that he either relinquish his speedy trial right or withdraw his objection to the jury venire. Mr. Buelow resisted the judge's demand; his counsel insisted that the Sixth Amendment simultaneously guarantees "the right to a speedy and public trial" and an "impartial jury." After being told that he had to pick between the two rights, Mr. Buelow decided to move forward with trial. The State responds that Mr. Buelow "cannot have his cake and eat it too." Appellee's Br. at 61. In this glib analogy, the State analogizes constitutional rights to cake. But constitutional rights may only be voluntarily, knowingly, and intelligently waived. In the face of judicial pressure, no such waiver could be obtained.

Finally, the State argues that Mr. Buelow's assertion of his public trial right during the course of this appeal is moot because this Court already decided to strike his initial proof brief due to its extensive quotations to Ms. Link's medical records. The issue is not moot because Mr. Buelow remains unable to fully and publicly present exculpatory evidence. The full Iowa Supreme Court is capable of un-striking Mr. Buelow's initial proof.

ARGUMENT

I. Evidence of Ms. Link's mental health, including her prior suicide attempts, is admissible and exculpatory.

A. The State concedes that the district court's legal analysis is indefensible.

The district court said that Ms. Link's medical records were hearsay without an exception. The State is not defending that ruling. The district court said that it would not permit evidence of Ms. Link's mental health because such evidence is a "character assault" and impressible under *State v. Jacoby*, 260 N.W.2d 828 (Iowa 1977). The State now agrees with Mr. Buelow that mental health evidence is not evidence of bad character. Appellee's Br. at 33. Seemingly agreeing with Mr. Buelow's argument that *Jacoby* is inapposite, the State does not even cite *Jacoby* in its brief.

The State is urging this Court to adopt, for the first time, an analysis of the character evidence rule that incorporates an assessment of the probative versus prejudicial effect of the proposed evidence. The State's test would be: "If evidence of a mental health issue–here, risk of suicide–is highly relevant, it is less likely to be character evidence. But if the evidence is less relevant the more likely it is to be prejudicial or used only to show action in conformity therewith or both." Appellee's Br. at 33. This is

nonsense because the character evidence rule is separate and distinct from the relevance rule. Blending the relevance rule and the character evidence rule creates an unworkable test that is without precedent.

First, the character evidence rule requires courts to determine in the first instance if the proposed evidence speaks to a person's character. Thus, the character evidence rule never enters the discussion if the evidence in question does not bear on 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).

Behavioral propensity evidence is common and routinely admitted without the character evidence rule ever coming into play. Symptoms or behaviors of mental illness observed in a clinical setting are frequently used to show behavior consistent with a particular diagnosis. *Isely v. Capuchin Province*, 877 F. Supp. 1055, 1067 (E.D. Mich. 1995) (PTSD symptoms); *Gier v. Educational Serv. Unit No. 16*, 845 F. Supp. 1342, 1353 (D. Neb.

1994), *aff'd*, 66 F.3d 940 (8th Cir. 1995) (behaviors of abused child); *State v. Alberico*, 861 P.2d 192, 210 (N.M. 1993) (behaviors consistent with sexual abuse); *State v. Kinney*, 762 A.2d 833, 844 (Vt. 2000) (characteristics and conduct of victims of rape trauma syndrome); *Carnahan v. State*, 681 N.E.2d 1164, 1168 (Ind. Ct. App. 1997) (battered woman syndrome behaviors offered for limited purpose).

Second, Iowa courts have even expressly rejected the notion that the purpose of the character evidence is tied to relevance. The public policy for excluding evidence of other crimes, wrongs, or acts is not that the evidence is irrelevant. *State v. Nelson*, 791 N.W.2d 414, 425 (Iowa 2010). "Rather, the public policy for excluding such evidence is based on the premise that a jury will tend to give other crimes, wrongs, or acts evidence excessive weight and the belief that a jury should not *convict a person based on his or her previous misdeeds*." *Id.* (emphasis supplied).

Third, even if the relevance rules were somehow embedded in the character evidence rule, what is the prejudice that the State seeks to avoid by excluding evidence of Ms. Link's propensity for self-harm? How will the jury be confused? The State has no answer to these questions.

The State seems to wish that the district court would have excluded the evidence related to Ms. Link's propensity for self-harm as more prejudicial than probative. But that is not what happened. Admittedly, there are statements in the record where the district court expresses concern about the relevance of the evidence, but the parties were unclear about the judge's ruling. So the parties requested clarification. Here is the judge's final ruling on the matter:

> 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.[1]

[1] To argue that the district court excluded evidence of Ms. Link's propensity for self-harm as more prejudicial than probative, the State relies solely on orders and transcripts the pre-date the January 19, 2018 Order where the district court was specifically attempting to clarify its position.

The district court, therefore, did not rule that evidence of Ms. Link's suicidal tendencies or mental health was barred as more prejudicial than probative. The district court did not explain how prejudice would result from the introduction of such evidence, and the State fails to explain where the prejudice exists. Mr. Buelow, on the other hand, explained in the Appellant's Brief, and again below, that such evidence is probative to the central issue in the case: whether Ms. Link may have taken her own life. Appellant's Br. 35–41 (explaining that for centuries courts have held admissible and probative evidence that an alleged murder victim committed suicide).

B. The harmless error doctrine does not apply.

The reason that evidence of Ms. Link's behavioral propensities is so important is that is corroborates Mr. Buelow's testimony and is consistent with physical evidence at the scene.

To wiggle its way into the harmless error doctrine, the State takes numerous liberties with the record that must be corrected. Most notably, the State consistently describes Ms. Link as having two independently fatal stab

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The January 19, 2018 Order relies only upon the hearsay and character evidence rules. It is something of a moot point, however, because Mr. Buelow explained the probative value of such evidence at length in the Appellant's Brief at pages 14 to 35.

wounds. The argument is, of course, that she could not have stabbed herself twice. In fact, there was no dispute between the parties that the stab wounds were not instantly fatal, and the State conceded that it was possible for suicide victims to have multiple such stab wounds as observed for Ms. Link. 01/16/2018 Tr. 120:8–23.

Likewise, the State conceded at trial that the blood splatter evidence allowed for the fact that Mr. Buelow may have been as much as 10 feet away from Ms. Link at the time that she was stabbed. 01/12/2018 Tr. 211:25–212:4. Finally, the wounds to Ms. Link's hand, according to Mr. Buelow's expert, were more consistent with the knife slipping in her hand while she stabbed herself than with a defensive stab wound. 01/17/2018 Tr. 32:22–33:16.

With some of the facts set straight, it is easy to see how the medical records and other evidence of a propensity for self-harm could tip the balance.[2] As Justice Appel explained in a Special Concurrence in *State v.*

[2] The State's has gone so far as to feign some confusion about exactly what medical records and other evidence of self-harm Mr. Buelow is referring to in his Second Amended Proof Brief. *See* Appellee's Br. n.7. If there was any true confusion, the State could have simply looked at the medical records quoted in Mr. Buelow's initial proof brief that are still accessible to counsel and the Court. Despite claiming confusion, the State

Neiderbach, 837 N.W.2d 180, 224–29 (Iowa 2013): "In considering content and persuasive power, medical or mental health records occupy a special place in the evidentiary pantheon and are generally superior to the recalled memory of an interested witness for multiple reasons." Justice Appel wrote:

> First, jurors tend to believe that which is written over that which is spoken. Second, the mental health records are contemporaneously generated. Third, the medical records themselves are usually generated by trained observers who are unbiased regarding the issues in litigation. Fourth, medical records frequently contain information unknown to the patient, including detailed diagnoses, comments regarding causation, and observations regarding a patient's appearance and demeanor, which may be relevant in a given case.

In Mr. Buelow's case, the persuasive value of the evidence supporting Ms. Link's suicidal behavior is particularly weighty and uniquely exculpatory because the evidence could not have been known to him before he explained to the police that she committed suicide.

The district court's error in excluding these records is not harmless if it "'injuriously affected' the rights of the complaining party, resulted in a 'miscarriage of justice,' or a different result would have been reached 'but for' the admission of the evidence." 7 Ia. Prac., Evid. § 5.103:14 (internal

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nonetheless managed to find extensive information about Ms. Link's mental health in Court's Exhibit C.

citations omitted). This was a very close case. The jury was indisputably deadlocked until an alternate juror was brought in. First-degree murder was charged but the verdict was for second-degree murder. Jurors have come forward to disavow their verdict. Under these circumstances, the State cannot prove that the trial outcome would have been the same even if evidence of Ms. Link's suicidal disposition was admitted.

II. Mr. Buelow did not waive his right to a fair and impartial jury.

A. Mr. Buelow did not fail to assert a known or existing right during trial.

At the time of Mr. Buelow's trial, Iowa law was unclear on the procedure for substituting jurors after the commencement of deliberations. Specifically, Iowa Rule of Criminal Procedure 2.18(15) provided no guidance on the appropriate procedure for a judge to follow when contemplating discharging a juror in the middle of deliberations. With the unclear state of the law, Mr. Buelow had no way of knowing that the judge in his trial was erring when substituting a juror mid-deliberation. Therefore, he did not contemporaneously object to the removal and replacement of a juror he believed to be refusing to deliberate.

As predicted, the State has taken the approach that by not objecting at trial, Mr. Buelow has waived his right to argue this error on appeal. The

State's position is misguided, however, as it overlooks this Court's precedent in *State v. Wisnieski*, 171 N.W.2d 882 (Iowa 1969) which persuasively supports that Mr. Buelow did not, and in fact, could not have, waived his right to an impartial jury given the state of the law.

In *Wisnieski*, the defendant was not estopped from raising an issue for the first time on appeal where "[a]ny objection made would have then been without merit." *Id.* at 887. This Court astutely observed that Mr. Wisnieski had not failed to assert a known or existing right during trial, the usual grounds for estoppel, because "no such right" existed under which the defendant could have objected. *Id.* In so doing, this Court was neither "depart[ing] from, nor dilut[ing], the rule that failure to assert a known or existing right in the district court is fatal." *Id.*

The same is true in this case—Mr. Buelow did not fail to assert a known right at trial and waive the issue on appeal because *no such right existed* under Iowa Rule of Criminal Procedure 2.18(15). The Rule did not then, and still does not now, address the appropriate procedure for judges to follow when removing a juror after deliberations commence. The lack of clarity in Iowa law surrounding Rule 2.18(15) is the reason Mr. Buelow could not have known that the judge was erring in her mid-deliberation juror

substitution and is the same reason this Court must preserve the right of a criminal defendant to a fair and impartial trial in Iowa by delineating appropriate procedures for judges to follow in removing a juror after deliberations begin.

B. There is no evidence that Mr. Buelow made a voluntary, knowing, and intelligent waiver of his right to a fair and impartial jury.

Just as Mr. Buelow could not have objected based on a right under Rule 2.18(15) that did was not clearly established, he also could not have possibly made a knowing, voluntary, and intelligent waiver.

In *State v. Sanchez*, the Supreme Court of New Mexico considered the question of waiver in a nearly identical context. 6 P.3d 486 (N.M. 2000). Among other things, Mr. Sanchez's appeal challenged a mid-deliberation juror substitution occurring during his trial as an issue of first impression under the New Mexico Rules of Criminal Procedure. The Supreme Court rejected the State's "characterize[ation of the] Defendant's willingness to accept the first alternate juror as a waiver of his right to a fair and impartial jury" because "the protection provided by [the governing] rule remained unclear." *Id.* at 496. In finding that the rule's protections were unclear, the Court concluded that waiver was not an issue in the case. *Id.*

Like Mr. Sanchez, Mr. Buelow also acquiesced to a juror substitution after the commencement of deliberations at a time when the protections afforded by the governing rules of procedure were unclear. When confronted with a question of possible juror misconduct necessitating removal during Mr. Buelow's trial, Iowa law did not offer the judge or the parties any guidance on how to proceed. Indeed, "[u]ntil this opinion is final, the quantity and quality of the procedural safeguards required by [Rule 2.18(15)] will remain a matter of first impression" which therefore prohibits any finding that Mr. Buelow could have possible voluntarily, knowingly, and intelligently waived his right to appeal this issue. *Id.*

C. Iowa law is unclear as to the process for removing a juror after the commencement of deliberations.

Attempting to undermine a central tenant of Mr. Buelow's error preservation position, the State insists that the law was not as unclear as Mr. Buelow claims. But its insistence, however ardent, simply cannot overcome the facts of what unfolded during this trial.

When confronted with the allegation that a juror was refusing to deliberate, the trial judge was so uncertain as to what she should do under Rule 2.18(15) that she felt compelled to consult a number of outside sources. She discussed the issue with Judge Linda Fangman, looked at the related

Federal Rule of Criminal Procedure 24(c), reviewed a Corpus Juris Secundum article from 2017, and analyzed case law from Indiana, New York, and Kansas. The trial judge's actions demonstrate that Iowa law on the question of juror discharge and substitution during Mr. Buelow's trial was every bit as unclear as he claims.

D. *State v. Escobedo* is not controlling precedent and should not be applied to this case.

The State similarly unpersuasively and incorrectly argues that *State v. Escobedo* controls this Court's decision. 573 N.W.2d 271 (Iowa Ct. App. 1997). *Escobedo* is neither controlling on this Court, nor is it applicable as the facts now before this Court are distinguishable from those in *Escobedo*.

At the time of Mr. Escobedo's trial, Rule 2.18(15) clearly prohibited replacing a juror after the commencement of jury deliberations. Therefore, when the trial judge dismissed and substituted a juror mid-deliberations, Mr. Escobedo would have had legal grounds to lodge an objection and request a mistrial but he did not do so. Knowing that the plain text of Rule 2.18(15) prohibited the judge's substitution, Mr. Escobedo made the decision to voluntarily and intelligently waive his right to an impartial trial under the Rule.

As it stood during Mr. Buelow's trial, Rule 2.18(15) did not afford him the same benefit that Mr. Escobedo enjoyed. After the 2016 amendment, the Rule was so unclear that there was no way for Mr. Buelow to read the Rule, conclude that the judge was acting in error, and none-the-less choose to consent to the substitution by making a knowing, voluntarily, and intelligent waiver as Mr. Escobedo did.

Escobedo, a decision of the Iowa Court of Appeals, and has not been adopted by the Iowa Supreme Court. For the reasons stated above, this Court should not consider *Escobedo* in deciding this case as it neither applicable nor controlling on this Court. To apply *Escobedo* in this case would actually be to extend its holding and create bad law in the process.

III. Mr. Buelow could not have voluntarily waived his objection to the racial cross-section of the jury.

The State's brief goes to great lengths to portray the prosecutors and the trial judge as obliging of Mr. Buelow's Sixth Amendment rights and to portray Mr. Buelow as uncooperative and unwilling to accept accommodations proposed to him regarding the exercise of those rights. But in its efforts to favorably frame the issue, the State has missed the point. The judge and the prosecutors were clearly on notice that Mr. Buelow was asserting his right to a speedy trial and his right to a jury comprised of a fair

cross-section of the community. Otherwise, they would not have been suggesting ways to accommodate those rights. There is no question therefore that Mr. Buelow asserted his rights and preserved this issue for appeal.

Once Mr. Buelow asserted his rights to a speedy trial and to a jury comprised of a fair cross-section of the community, the only thing to be done was to observe those rights in full, not to find partial accommodations of those rights. Unfortunately, this did not happen. Instead, after Mr. Buelow rejected proposed solutions that did not fully observe both of his Sixth Amendment rights, the trial judge told Mr. Buelow that he must waive either his right to a speedy trial or withdraw his objection to the racial composition of the jury pool. Under judicial pressure with no alternative, Mr. Buelow involuntarily decided to proceed with a speedy trial rather than persist in his objection to the composition of the jury pool. Subsequent to this involuntary waiver, Mr. Buelow convicted by an all-white jury drawn from an all-white jury pool.

Deflecting from the trial judge's forced waiver, the State's brief speaks about the trial judge's "willingness" to remedy any deficiencies with Mr. Buelow's trial, implying that the judge was somehow doing more than was required of her. This is not so. Regardless of the judge's *willingness* to

accommodate Mr. Buelow, she was *constitutionally obligated* to ensure that he was given the speedy trial in front of a jury comprised of a fair cross-section of the community. The judge did not live up to this obligation. Instead, she told Mr. Buelow "you've got to give me an answer" as to which one of his two constitutionally-guaranteed rights he wanted to assert.

In the same vein, the brief portrays the prosecutors as being willing to accommodate Mr. Buelow's rights. It does so without any mention, however, of the prosecutors' vested interest in assuring that the trial was not continued from January 8, 2018 without a speedy trial waiver. At the time of the final pretrial conference when Mr. Buelow asserted these rights, his speedy trial deadline was set to expire on January 9, 2018. With the trial then scheduled for the day before the deadline's expiration, any possible continuance of trial would have placed the State's charges in jeopardy. It was therefore essential to the prosecutors that Mr. Buelow waive his speedy trial right or that trial commence as scheduled to avoid forever losing the criminal charges against him. The prosecutors' vested interest was directly contrary to Mr. Buelow's best interest. He had no reason to accept anything less than both a speedy trial and a trial to a jury comprised of a fair cross-

section of the community—that is until the judge forced him to pick between the two.

The State side-steps the weighty implications of the rapidly approaching speedy trial deadline by cavalierly asserting that trial could have simply been continued if a new jury venire had to be drawn. This view is colored by its assumption that the Court could have found good cause to continue the trial past the speedy trial date.

It was not a forgone conclusion that trial could have been delayed without a speedy trial waiver, however. Trial had already been continued twice. Moreover, the judge had prior knowledge that it was difficult to obtain a racially diverse jury venire in Dubuque County and still failed to prepare for a situation in which the jury venire for Mr. Buelow's trial did not comprise a fair cross-section of the community.[3] Any finding of good cause under these circumstances may well have been an abuse of discretion.

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[3] In the trial judge's own words, "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. at 20:19–23. It is clear that the judge knew far in advance of trial that "Dubuque is less than two percent populated with African American individuals" and yet, did nothing to prepare for this reality in advance of trial. Instead, the court waited until the eve of trial to compile a jury venire and distribute information on the venire's composition to the parties. 01/05/2018 Tr. at 20:24–25.

The State's need to promote this colored version of reality makes sense because to accept the true reality would have been fatal to the criminal charges against Mr. Buelow. Had the judge allowed Mr. Buelow exercise both of his Sixth Amendment rights, there almost certainly would have been no trial at all because the record is clear that a new jury venire could not be compiled before Mr. Buelow's speedy trial deadline expired. The Court would have therefore been required to order dismiss the trial information against Mr. Buelow under Iowa Rule of Criminal Procedure 2.33(2)(b).

Ultimately, Mr. Buelow's trial did begin on January 8, 2019; not because the judge was successful in compiling a venire representing a fair cross-section of the community by the scheduled trial date, but because she forced Mr. Buelow to choose between his Sixth Amendment rights. Because of the judge's actions, Mr. Buelow was essentially made to assist the State in its prosecution of him where all criminal charges against him may have otherwise been lost.

IV. Mr. Buelow has never been allowed to publicly explain exculpatory evidence relating to Ms. Link's mental health.

Mr. Buelow's ability to publicly and plainly present exculpatory evidence does not merely present an issue of benign procedure. This question has significant constitutional implications. As Justice Frankfurter

once wrote, "The history of American freedom is, in no small measure, the history of procedure." *Malinski v. New York*, 324 U.S. 401, 414 (1945) (Frankfurter, J., concurring). Mr. Buelow has a Sixth Amendment and Fourteenth Amendment due process right to "a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). Under the First Amendment and the Sixth Amendment, Mr. Buelow is entitled to present his defense in public. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984). On this point, Mr. Buelow rests on the arguments made in motion practice on this subject, and respectfully requests that this Court overturn the three-Justice panel.

CONCLUSION

For the above stated reasons, Mr. Buelow respectfully requests that this Court reverse his conviction and grant a new trial.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on May 20, 2019, I electronically filed the foregoing Reply 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.

IOWA ATTORNEY GENERAL CRIMINAL APPEALS DIVISION
for the STATE OF IOWA

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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 5,319 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 __, 2019

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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 Reply Brief was zero dollars.