IN THE SUPREME COURT OF IOWA
Supreme Court No. 18–1737

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARIO DESEAN GOODSON,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY
THE HON. JOEL DALRYMPLE, JUDGE (TRIAL & MOTION),
THE HON. LINDA FANGMAN, JUDGE (ENHANCEMENT),
& THE HON. GEORGE L. STIGLER, JUDGE (SENTENCING)

APPELLEE'S BRIEF

THOMAS J. MILLER
Attorney General of Iowa

LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
Louie.Sloven@ag.iowa.gov

BRIAN WILLIAMS
Black Hawk County Attorney

ISRAEL KODIAGA & MICHELLE WAGNER
Assistant Black Hawk County Attorneys

ATTORNEYS FOR PLAINTIFF-APPELLEE

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Goodson was charged with four crimes arising from an episode that could only be understood in the context of the history of domestic abuse in his relationship with this specific victim. Did the trial court err in admitting evidence of prior instances of domestic abuse?

Authorities

Old Chief v. United States, 519 U.S. 172 (1997)
United States v. Roux, 715 F.3d 1019 (7th Cir. 2013)
Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)
People v. Illgen, 583 N.E.2d 515 (Ill. 1991)
People v. Zack, 184 Cal.App.3d 409, 229 Cal. Rptr. 317 (1986)
State v. Castaneda, 621 N.W.2d 435 (Iowa 2001)
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State v. Richards, 809 N.W.2d 80 (Iowa 2012)
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State v. Rodriquez, 636 N.W.2d 234 (Iowa 2001)
State v. Sullivan, 679 N.W.2d 19 (Iowa 2004)
State v. Taylor, 689 N.W.2d 116 (Iowa 2004)
State v. Teeters, 487 N.W.2d 346 (Iowa 1992)
State v. Wills, 696 N.W.2d 20 (Iowa 2005)

II. The trial judge, decades ago, prosecuted Goodson on a factually unrelated charge. Goodson raised that as a basis for recusal, just before sentencing. Goodson also raised a post-trial motion alleging juror misconduct involving the judge—but he did not move for recusal, list the judge as a witness, or attempt to call the judge as a witness. Was the judge required to recuse from trial or from the post-trial proceedings, *sua sponte*?

Authorities

Hinman v. Rogers, 831 F.2d 937 (10th Cir. 1987)
DeVoss v. State, 648 N.W.2d 56 (Iowa 2002)
Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)
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State v. Farni, 325 N.W.2d 107 (Iowa 1982)
State v. Gardner, 661 N.W.2d 116 (Iowa 2003)
State v. Hanes, 790 N.W.2d 545 (Iowa 2010)
State v. Kelsen, No. 13–0652, 2014 WL 69825 (Iowa Ct. App. Jan. 9, 2014)
State v. Mann, 512 N.W.2d 528 (Iowa 1994)
State v. Millsap, 704 N.W.2d 426 (Iowa 2005)
State v. Morris, No. 07–1835, 2009 WL 1676663 (Iowa Ct. App. June 17, 2009)
State v. Pickett, 671 N.W.2d 866 (Iowa 2003)
State v. Rodriquez, 636 N.W.2d 234 (Iowa 2001)
State v. Toles, 885 N.W.2d 407 (Iowa 2016)
Iowa R. App. P. 6.807
Iowa R. Evid. 5.606(b)(2)(B)
Iowa R. Evid. 5.605
Iowa Code of Judicial Conduct 51:2.11, cmt. 2

III. Goodson was convicted of third-degree sexual abuse. He was also convicted of first-degree burglary, with two alternatives for the aggravating element: assault causing bodily injury, and sexual abuse. The sexual abuse conviction carries an enhancement that makes its punishment greater than applicable punishments for first-degree burglary, and it also carries a lifetime special sentence under section 903B.1. Did the court impose an illegal sentence by failing to merge this sexual abuse conviction into the burglary conviction?

Authorities

James v. State, 858 N.W.2d 32 (Iowa Ct. App. 2014)
State v. Bullock, 638 N.W.2d 728 (Iowa 2002)
State v. Halliburton, 539 N.W.2d 339 (Iowa 1995)
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Iowa Code § 903B.1
Iowa Code § 902.14
Iowa Code §§ 901A.2, 902.14 63
Iowa Code § 901A.2(3)

IV. Did the court impose an illegal sentence by specifying a length of sex offender registration? Did it also impose an illegal sentence by failing to impose the mandatory sentences under section 903B.1 and section 901A.2(8)?

Authorities

Barker v. Iowa Dep't of Public Safety, 922 N.W.2d 581 (Iowa 2019)
Jefferson v. Iowa Dist. Ct., 926 N.W.2d 519 (Iowa 2019)
State v. Coleman, 907 N.W.2d 124 (Iowa 2018)
State v. Dempsey, No. 08–1611, 2009 WL 2170229 (Iowa Ct. App. July 22, 2009)
State v. Draper, 457 N.W.2d 600 (Iowa 1990)
State v. Yates, No. 12–2273, 2014 WL 2600212 (Iowa Ct. App. June 11, 2014)
Iowa Code § 903B.1
Iowa Code § 901A.2(8)

ROUTING STATEMENT

The State agrees with Goodson's routing statement. *See* Def's Br. at 15. This case involves established legal principles, and it may be transferred to the Iowa Court of Appeals. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

This is Mario Desean Goodson's direct appeal from conviction on four counts: first-degree burglary, a Class B forcible felony, in violation of Iowa Code section 713.3 (2016); operating a motor vehicle without its owner's consent, an aggravated misdemeanor, in violation of Iowa Code section 714.7; domestic abuse assault causing bodily injury, a serious misdemeanor, in violation of Iowa Code section 708.2A(2)(b); and third-degree sexual abuse, a class C forcible felony, in violation of Iowa Code section 709.4(1)(a), with a repeat-offender enhancement under section 901A.2(3). The sentencing court imposed terms of incarceration on each count and set them to run concurrently, resulting in a 25-year term of incarceration with an 85% minimum before parole eligibility. *See* Sentencing Order (10/4/18); App. 40.

In this direct appeal, Goodson argues: **(1)** the trial court erred in admitting prior-bad-acts evidence of domestic violence between Goodson and the victim; **(2)** the trial court judge should have recused

because he was the prosecutor who secured Goodson's conviction for sexual abuse in 1999, and because he rode a courthouse elevator with two jurors and escorted those jurors to the incorrect jury room on the morning of the fifth day of trial; **(3)** his convictions for first-degree burglary and third-degree sexual assault should have merged; and **(4)** the sentencing court erred in its sentencing order by specifying the duration of Goodson's sex offender registration requirement.

Statement of Facts

Annie Thomas and Goodson were in a romantic relationship. Goodson moved into Thomas's house, and they had a son together in March 2016. *See* TrialTr.V2 17:25–18:7; TrialTr.V2 19:22–22:21. Around that time, Goodson "was getting more controlling or insecure with the relationship and abusive," both "verbally and physically." *See* TrialTr.V2 22:22–23:14. Goodson's behavior got progressively worse and Thomas "tried to take legal action to get him out of the house." *See* TrialTr.V2 23:15–24:3. Goodson (and his eight-year-old son from a prior relationship) moved out and took their possessions with them. *See* TrialTr.V2 25:21–27:7. Thomas wanted Goodson to return the key to her house, but Goodson said he had lost it. *See* TrialTr.V2 27:8–20.

Thomas kept in touch with Goodson to arrange for childcare for their son. When Thomas went back to work after her maternity leave, Goodson watched their son; then, when Goodson went back to work, Goodson's mother (Sarah Hoskins) watched their son. *See* TrialTr.V2 27:21–29:6. Goodson would visit Thomas's house and stay the night or store belongings—but he always needed to be let into the house. *See* TrialTr.V2 29:7–31:18. Goodson was still violent, and Thomas was still trying to end the relationship. *See* TrialTr.V2 32:9–33:16.

On December 8, 2016, Thomas either called or texted Goodson and told him that she was seeing someone else. *See* TrialTr.V2 32:22–34:20. Goodson responded by saying that he was going to kill her. *See* TrialTr.V2 34:21–35:13. That conversation occurred while Thomas was at work, and she knew that Goodson knew where she worked—so at the end of her workday, Thomas took precautions against being ambushed by Goodson in the parking lot:

> [B]ecause of him telling me all of that, I remember specifically going up to the second floor and looking for his car through the top window to the parking lot to make sure that his car was there. And he has a big body Impala, so it's not one that you can miss. And it wasn't out there so I felt comfortable enough to leave the building and get in my car.

See TrialTr.V2 35:14–37:17. But as Thomas walked towards her car, she heard a car running—and when she saw Goodson's mother's car,

she knew it was Goodson. *See* TrialTr.V2 37:22–38:18. Thomas tried to run back into the building, but Goodson grabbed her from behind and "put [her] in a headlock," snatched her keys away, threatened to gouge her with those keys if she kept screaming, and dragged her into the backseat of his mother's car. *See* TrialTr.V2 38:19–41:14. This was captured on nearby security cameras; the footage was admitted at trial. *See* State's Ex. AA; TrialTr.V2 14:22–15:20; TrialTr.V2 42:3–44:22.

Once Goodson and Thomas were in the backseat of the car, Goodson slapped Thomas in the face, twice. *See* TrialTr.V2 45:5–11. Goodson demanded Thomas's phone, then searched her for it and found it in her pocket. Goodson went through her phone, opening messaging applications and going through her recent calls—and all the while, he was "screaming and yelling and he's just very angry" *See* TrialTr.V2 45:12–48:12. Thomas was crying and desperate to leave. Goodson's eight-year-old son was in the front seat of the car, and he kept turning around to look at them, but Goodson "would tell him to turn around and play on [his own] phone." *See* TrialTr.V2 48:25–49:22. Thomas begged Goodson not to do anything in front of his son, and she convinced Goodson that the two of them should go to *her* car to smoke a cigarette and calm down. *See* TrialTr.V2 49:23–50:23.

Then, while they sat in Thomas's car, Thomas convinced Goodson to let her leave—by promising to meet him at her house, later that night:

> . . . I just kept saying anything to get him to go. He didn't want to let me leave and we had sat in my car for quite awhile. And so at some point I said, I will go get our son. My mom had been watching my son. I said, I will go get our son. You can come home — you can come over to my house tonight, you know. You can come over tonight and stay with us or be there. You and [your son] can. And I will go get our son and I will meet you back at my house.

Goodson liked the idea and let her leave. *See* TrialTr.V2 50:24–52:15.

Thomas did not return to her own house because she knew Goodson was there, and she was scared—so she stayed the night at her mother's, instead. *See* TrialTr.V2 52:20–53:14. The next morning, she reported the assault to police. *See* TrialTr.V2 53:15–20. After that, Thomas tried to stay elsewhere and she only returned home sparingly, because she expected Goodson to be there. *See* TrialTr.V2 54:7–55:10.

The next time Thomas saw Goodson was fifteen days later, on December 23, 2016. *See* TrialTr.V2 53:21–54:6; TrialTr.V2 55:11–13. Thomas had spent the night at a friend's house. She arrived at home sometime around 1:00 p.m., parked her car in her driveway, picked up her son, and went to unlock her front door—and then, she noticed "the dead bolt was locked." But it was impossible to lock the deadbolt from outside the house, and Thomas had left through the front door—

which meant somebody had been in her house. *See* TrialTr.V2 55:14–58:20. Thomas walked around the house to look for footprints in the fresh snow, but she did not see any. Then, she went to a side door to unlock it and let herself into the house, but the door opened as she was trying to unlock it. It was Goodson—he grabbed her by the coat, pulled her into the house, and said something like: "I'm going to hurt you really bad this time." *See* TrialTr.V2 58:23–59:23.

Thomas tried to stay calm, "thinking if [she] stayed calm maybe it would rub off on him and he would try to stay calm too"—which she said might have been a tactic that she learned "along the way." *See* TrialTr.V2 59:24–60:12. Again, Goodson grabbed Thomas's phone and started going through it. *See* TrialTr.V2 60:13–19. Thomas went into the bathroom and sat on the toilet. Goodson followed her and told her to stand up—and then, he "smacks [her] really hard," and Thomas felt blood "gushing out" of her nose. *See* TrialTr.V2 60:13–62:8. And then:

> I crouched down, I bent down and I was crying and just telling him to stop. And I didn't know what to do so I was just trying to bend down so that he couldn't hit me again, and then he lifted me up.
>
> [. . .]
>
> So once my face is back up then he, I don't know if it was with a closed fist or like an open fist, but he hit my head back really hard and it — the back of my head hit my vanity mirror and my vanity mirror shattered.

TrialTr.V2 62:9–22. Thomas desperately tried to calm Goodson by telling him they could "get back together" and "make it work," or "anything that [she] thought at that point he wanted to hear so that he wouldn't keep hitting [her]." *See* TrialTr.V2 62:23–63:22.

Goodson still had Thomas's phone, and he kept looking through it while calling Thomas various names ("bitch, whore, slut, whatever, you know, comes to his mind"). *See* TrialTr.V2 63:23–64:25. Thomas and Goodson had moved out of the bathroom and into the living room, and Thomas could see the front door. Thomas tried to position herself near the door, so she could try to escape—but Goodson noticed, and he "kicked the coffee table so that it went all the way across the room and hit the front door," blocking Thomas from leaving. *See* TrialTr.V2 65:1–23. The coffee table left visible scratches in the wood floor. *See* TrialTr.V2 66:5–15. Thomas knew she could not escape through the front door with the coffee table blocking it—but she remembered that she had recently bought a "Mace gun" to protect herself, and she had left it inside the coffee table. *See* TrialTr.V2 66:16–68:14.

> I, like, kind of wanted to allow him to look in the phone so that he would be distracted. And as soon as he did that, I ran as fast as I could to the coffee table, opened it up as fast as I could, grabbed the gun out, and tried to Mace him.
>
> [. . .]

> It went so fast I didn't think that it was successful at that moment. He grabbed the Mace gun from me.
>
> [. . .]
>
> Then he throws me on the floor and he starts — he takes the Mace gun and he's slamming my hand. He's slamming it so hard I'm pretty sure it broke. He's slamming my hand with the Mace gun and then he's slamming me over the head repeatedly with the Mace saying, oh, you thought you were going to Mace me with this Mace gun, bitch? Like just basically upset that I would try to do that.

See TrialTr.V2 68:15–69:24.

As Goodson was hitting Thomas with the Mace canister, it "kind of exploded and it was just everywhere"—and she "couldn't breathe." Eventually, Goodson stopped hitting Thomas and ran to the sink to try to wash out the Mace. *See* TrialTr.V2 69:25–70:9. Thomas knew she had to get her son out of that room. She grabbed him, took him to the kitchen, and put him in his high chair. *See* TrialTr.V2 70:10–14.

Goodson ordered Thomas into the unfinished basement, but she did not want to go. She thought "[i]t wasn't logical why he would want [her] to go to the basement," unless he was about to kill her—so as Goodson pushed her down the stairs, she expected she would die. *See* TrialTr.V2 70:15–71:5. Once in the basement, Goodson continued looking through Thomas's phone. She "didn't want him to continue to look in the phone and get angrier and angrier"—so she "grabbed the phone and smashed it against the cement." *See* TrialTr.V2 74:2–75:8.

Goodson calmed down after that; he allowed Thomas to go upstairs. *See* TrialTr.V2 75:9–18. Thomas noticed their son was crying, and "the Mace was still burning." Goodson told Thomas to take their son and get in the shower with him, to flush out the Mace. *See* TrialTr.V2 75:19–76:4. Thomas did as he said. A few minutes later, Goodson got in the shower with them. He was still angry. *See* TrialTr.V2 76:5–77:21.

Thomas got out of the shower and told Goodson that she was "going to take a nap with the baby"—she was hoping to "kill time or calm the situation down some more." She got dressed, laid down in her bed with their son, and fell asleep. *See* TrialTr.V2 77:4–25. After a while, Goodson came upstairs and was "angry all over again"—he was "pacing along the bed," making one demand "[o]ver and over again":

> [H]e was just saying like you're gonna give me the same respect you gave to those niggers, and you're going to give it to me like you gave it to them, and things like that.

See TrialTr.V2 78:1–79:5. From Goodson's tone and his position next to the bed, Thomas knew he meant that he wanted sex—but she felt "disrespected and belittled," so she "kept ignoring it or telling him no." *See* TrialTr.V2 79:6–17. But Goodson "had taken his pants off and gotten into the bed," and Thomas was afraid that he might attack her. *See* TrialTr.V2 79:18–23. Thomas asked Goodson if he had a condom.

Goodson replied: "[D]on't make me backhand you. You know we don't use condoms, you know." *See* TrialTr.V2 79:24–80:8. She was scared that he would resume his assaultive behavior if she refused—so when Goodson told her to get on top of him, she did as Goodson demanded. They had sex without Thomas's consent, until Goodson ejaculated. *See* TrialTr.V2 80:5–81:3; *see also* TrialTr.V2 165:9–22

Goodson got dressed and said he needed to go to the doctor because he hurt his leg by chasing Thomas on December 8 (which he blamed on Thomas). *See* TrialTr.V2 81:4–18. As soon as Goodson was gone, Thomas scrambled to gather up everything she needed to leave. She planned to drive to the police station, but could not find her keys. Then, she noticed that her car was gone—so she knew that Goodson had found her keys and used them to take her car without permission. *See* TrialTr.V2 81:19–83:19. Instead, Thomas ran across the street to her neighbor's house, asked to use his phone, and called 911. *See* TrialTr.V2 82:14–83:22; TrialTr.V2 127:14–128:22; State's Ex. BB.

Waterloo Police Department Officer Marc Jasper responded to Thomas's 911 call, and found Thomas at her home—and he observed "she was crying, she was emotional, she was fearful," and "[s]he was gasping for breath." *See* TrialTr.V3 134:4–136:13.

Officer Jasper related Thomas's statements, which matched her trial testimony. *See* TrialTr.V3 136:14–140:3. Officer Jasper went into the house and found "blood in the locations that she said [he] would find blood." *See* TrialTr.V3 140:4–18. The State introduced photos of the damage to Thomas's house, including the broken vanity mirror in her bathroom and various items/places stained with her blood. *See* TrialTr.V2 92:22–97:15; TrialTr.V2 105:21–107:13; State's Ex. C3–C8; ExApp. 17–22; *see also* State's Ex. F1–F6. It also introduced photos that depicted scratches on the hardwood floor that showed the coffee table's path of motion after Goodson kicked it. *See* TrialTr.V2 97:16–103:22; State's Ex. D1–D3 & D8; ExApp. 23–26.

Abbie Hatton is Thomas's sister. *See* TrialTr.V3 91:7–15. She went to Thomas's house on December 23, 2016, after police had already arrived, and she remembered Thomas was crying to the point where she "was just so upset she could hardly talk." *See* TrialTr.V3 91:16–92:23. Hatton eventually got the story out of Thomas:

> She was saying that she had been hit, well, I asked her if she was hurt. She was telling me that [Goodson] had hit her. She was showing me her hand. I asked her if we needed to go to the hospital. Her hand was all swollen and red. She was — her head, she said her head hurt. I felt the back of her head and she had a big lump on her head. She had a scratch on her face that she was showing me.

> She said she had not been home the night before. She got home, when she walked in her house [Goodson] was in the house and the altercation began. She tried to get the Mace to defend herself; that he grabbed it from her and was using the Mace gun to hit her in the back of the head and her hand and… (crying). She was just so upset and scared. She was just so scared.

TrialTr.V3 92:24–94:2. Thomas told Hatton that Goodson attacked her as soon as she got there, and that he took her car when he left. *See* TrialTr.V3 95:10–96:4. Hatton confirmed that she already knew that Thomas had gone out of her way to avoid any face-to-face contact with Goodson after December 8, 2016. *See* TrialTr.V3 96:23–98:5.

Police took Thomas to the police station, and they took photos of her various injuries (which generally matched Hatton's testimony about what she observed) and her bloodstained boots. *See* TrialTr.V2 84:6–92:21; State's Ex. A1–A9, B1–B4; ExApp. 4–16. When Thomas's mother met her there, Thomas was still shaken; she could talk, but she was still on the verge of breaking down. *See* TrialTr.V3 117:3–120:11.

Thomas went to the hospital for treatment and a sexual assault examination. *See* TrialTr.V2 113:25–114:22. The nurse who conducted that examination documented Thomas's injuries and her description of events leading to her injuries; the nurse testified about the injuries and Thomas's statements, and it all matched Thomas's testimony. *See*

TrialTr.V3 51:18–56:14; TrialTr.V3 58:24–63:25; State's Ex. HH; CApp. 4. A few days later, Goodson started sending Thomas threatening e-mails, promising that he would "pop up on [her]." Thomas forwarded them to the police, but they still made her afraid to go back to her home. *See* TrialTr.V2 130:22–132:9; TrialTr.V2 115:6–127:13; State's Ex. DD; ExApp. 27.

Jacob Miller lived across the street from Thomas. He testified about seeing Goodson punch Thomas in the face on a prior occasion:

> I remember I had come out front to smoke a cigarette on the front porch. They were sitting on the front porch also. They were arguing a little bit. You know, out of the corner of my eye I'm, like, watching them. I'm acting like I'm not paying attention, but I certainly saw him punch her in the face for sure.

See TrialTr.V3 29:7–30:22. This happened "a couple months before" December 2016. *See* TrialTr.V3 30:23–31:10.

Thomas said she didn't see Goodson in person between December 8 and December 23, but they did communicate, and she knew he spent some of that time in Las Vegas. *See* TrialTr.V2 130:22–132:9; TrialTr.V2 138:22–139:20; TrialTr.V2 178:14–180:17. Later, after the trial court revisited its earlier ruling on a motion in limine, Thomas could explain why she was sure they did not meet in person during that specific timeframe:

> Why I'm so certain that I didn't see him between this time period is because of the December 8th incident and there being a warrant out for his arrest. And I just, you know, I remember getting the Mace gun and everything. I was scared of him.

See TrialTr.V2 192:21–196:13; *accord* TrialTr.V2 206:7–207:3; TrialTr.V2 209:9–211:4; TrialTr.V2 214:3–24.

Goodson testified. He said that the security video from the December 8, 2016 incident showed him running at Thomas because he "wanted to know why she was running like that." *See* TrialTr.V4 107:10–109:11. He denied hitting Thomas, putting her in a headlock, and threatening her—instead, he said he just put his arm around her and "asked her, can we walk and talk." *See* TrialTr.V4 109:12–111:4. He said that Thomas returned home the next day (and that he was still living there), and he said she told him that she had reported what happened to police and that there was a warrant for his arrest. *See* TrialTr. 112:5–115:15. This perplexing exchange occurred:

> **DEFENSE**: [D]oes it upset you that [Thomas] tells you she filed a complaint against you?
>
> **GOODSON**: It did in a way, but I understood.
>
> **DEFENSE**: Well, how did you understand that?
>
> **GOODSON**: Because how things appear to be, but as far as me physically doing anything to her, no.

See TrialTr.V4 115:24–116:8. Goodson denied Thomas's account of what occurred on December 23—instead, he said that Thomas had harangued and attacked him when he informed her that he might move to Las Vegas, and that she used her phone to antagonize him with evidence of her conversations with other men. *See* TrialTr.V4 125:15–131:9. Goodson said that he was "pissed" and he "punched the mirror in the bathroom," causing it to break and injuring his hand. *See* TrialTr.V4 131:10–132:7. Then, Goodson said, he "was a little bit overwhelmed and [he] threw [his] hands at her and [he] made contact with her"—striking her in the face, but not punching her in the nose and not causing her to bleed. *See* TrialTr.V4 132:8–134:9. Goodson said that he never moved the coffee table and that it was already in front of the door, and he said that Thomas retrieved the Mace gun to continue an attack on him. *See* TrialTr.V4 136:16–138:25. He said that he grabbed the Mace gun as Thomas was trying to use it on him, threw it on the kitchen floor, and "jumped up and stepped on it." *See* TrialTr.V4 139:20–141:25. He agreed that they all took a shower, and that after the shower Thomas took their son with her to the bedroom while he stayed downstairs. *See* TrialTr.V4 142:1–147:11. He said that he and Thomas had consensual sex. *See* TrialTr.V4 147:12–151:6.

Goodson described Thomas's mood after sex as "comfortable," and he testified that "[t]here was no hostility." *See* TrialTr.V4 151:14–152:7. He said that Thomas gave him permission to use her vehicle to go see a doctor about his leg, and that she gave him the keys. *See* TrialTr.V4 152:8–154:22. He said that he did not return because his mother had called him, told him that "[Thomas] has the police around the corner," and cautioned him to stay away. *See* TrialTr.V4 156:7–158:8.

On direct examination, Goodson said that he never went to the police because he "didn't know what [he] would be telling them" and because Thomas was alleging "[v]ery hurtful things." *See* TrialTr.V4 158:9–159:18. Goodson admitted to sending the threatening e-mails to Thomas; he said he was just angry about not getting to see his son and angry about how Thomas was treating his mother. *See* TrialTr.V4 159:19–160:13. He admitted that he might "[p]ossibly" be responsible for Thomas's injuries as shown in the photos. TrialTr.V4 160:14–23; *see also* TrialTr.V4 141:6–11 (downplaying their severity). He denied punching Thomas in the face during any prior incident on the porch, but had no alternative explanation for what Miller described seeing. *See* TrialTr.V4 161:18–163:7.

Goodson's explanation for the incident on December 8, 2016 disintegrated on cross-examination—it was plainly at odds with the video evidence, and he had no explanation for why he would wait to confront her in this parking lot if they still lived together at her home, as Goodson insisted was the case. *See* TrialTr.V4 171:16–193:3. And on cross-examination, he changed his testimony about his reaction to Thomas's disclosures about conversations with other men—he said that he "didn't care." *See* TrialTr.V4 210:25–212:17. But he still said that he punched the bathroom vanity mirror because he was "mad." *See* TrialTr.V4 215:3–216:1. He agreed that the third e-mail that was part of State's Exhibit DD contained a phrase that was shorthand for "this time the police won't save you, or no one will save you this time, bitch." *See* TrialTr.V4 238:3–240:14; State's Ex. DD at 3; ExApp. 29.

Additional facts will be discussed when relevant.

ARGUMENT

I. Evidence of prior incidents of domestic violence was properly admitted. It was all relevant to show intent, motive, capacity, and lack of mistake or accident, and evidence of the December 8 incident was relevant to establish a contested element of the burglary charge.

Preservation of Error

The State agrees with Goodson that error was preserved on three challenges: his challenge to the December 8 video; his challenge to Thomas's testimony about Goodson's arrest warrant that issued after that December 8 incident; and his challenge to Jacob Miller's testimony about a prior incident. *See* Def's Br. at 51–52; TrialTr.V2 14:22–15:20; TrialTr.V2 182:22–194:2; TrialTr.V3 30:2–10. Rulings on each objection before admission of that evidence preserved error. *See Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

Goodson is also correct that error was not preserved for any of his other challenges to evidence/testimony about prior acts of abuse in his relationship with Thomas. *See* Def's Br. at 52–53. If this Court finds SF 589 is not applicable to pending appeals, it may address any ineffective-assistance claims if it finds the record on direct appeal is sufficient to enable it to rule. *See State v. Wills*, 696 N.W.2d 20, 22 (Iowa 2005). Here, the record establishes no possibility of breach.

Standard of Review

Evidentiary rulings pertaining to prior-bad-acts evidence are reviewed for abuse of discretion. *See State v. Putman*, 848 N.W.2d 1, 8 (Iowa 2014). An abuse of discretion occurs when "discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Long*, 814 N.W.2d 572, 576 (Iowa 2012) (quoting *State v. Teeters*, 487 N.W.2d 346, 349 (Iowa 1992)).

Merits

To be admissible under Rule 5.404(b), the evidence of prior domestic abuse "must be probative of 'some fact or element in issue other than the defendant's criminal disposition.'" *See State v. Taylor*, 689 N.W.2d 116, 123 (Iowa 2004) (quoting *State v. Castaneda*, 621 N.W.2d 435, 440 (Iowa 2001)). If the prior-bad-acts evidence is relevant for a non-character purpose, it is admissible unless "its probative value is *substantially* outweighed by the danger of unfair prejudice to the defendant." *See id.* at 124 (quoting *State v. Sullivan*, 679 N.W.2d 19, 25 (Iowa 2004)).

Goodson argues that *Taylor* should be limited to a recognition that evidence of prior domestic violence is admissible to prove intent, which would mean *Taylor* is only applicable when intent is disputed.

See Def's Br. at 56–57. Goodson argues that intent was *not* disputed because he had "admitted that he got 'pissed' and hit or backhanded Thomas during the December 23 incident." *See* Def's Br. at 58. But he still did not admit to the required specific intent for assault. *See* Jury Instr. 29; App. 18; Jury Instr. 33; App. 19. And to prove Goodson committed burglary, the State needed to prove that Goodson had "the specific intent to commit an assault" when he "broke or entered into" Thomas's house, without permission—which was *before* the moment when he admitted he got "pissed." *See* Jury Instr. 19; App. 17. And even if Goodson had offered to stipulate to all specific intent elements on all charges, "the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away." *See Old Chief v. United States*, 519 U.S. 172, 189 (1997). Moreover, at the moment when each challenged item of evidence was admitted, Goodson had not yet testified, had not offered any sort of admission or stipulation, and had not signaled any willingness not to contest intent elements. Goodson's minor premise that his intent was undisputed is incorrect.

Goodson's major premise that *Taylor* was limited to evidence of prior domestic abuse to prove intent elements is also incorrect. When it is unclear if a crime was committed, *motive* becomes relevant too:

> In addition to evidencing intent or the absence of an innocent state of mind, a defendant's prior acts of violence against the victim may also provide evidence of motive, in this case, a hostility showing him likely to do further violence. Here, the evidence that the defendant physically assaulted his wife throughout their marriage was relevant to show their antagonistic relationship and, thus, tended to establish the defendant's motive to kill her. Therefore, the evidence was relevant for a purpose other than to show the defendant's propensity to commit crime and was properly admitted.

Taylor, 689 N.W.2d at 126 (quoting *People v. Illgen*, 583 N.E.2d 515, 520 (Ill. 1991)). Iowa courts have recognized that "domestic violence is a pattern of behavior, with each episode connected to the others," and prosecutors tasked with proving up an episode of domestic abuse may explain the defendant's motive by showing "how the defendant has reacted to disappointment or anger directed at that person in the past, including acts of violence, rage, and physical control." *See State v. Richards*, 809 N.W.2d 80, 93 (Iowa 2012) (quoting *Taylor*, 689 N.W.2d at 125, 129 n.6). This evidence was relevant to establish that Goodson's motive was to coerce and compel Thomas into continuing the sexual relationship against her will, which is probative because it helps establish what happened—that unique, victim-specific motive explained *why* Goodson would control Thomas with violence and why he would coerce her into having sex with him, against her will. *See*

United States v. Roux, 715 F.3d 1019, 1024 (7th Cir. 2013) (noting that "the defendant's motive—an explanation of *why* the defendant would engage in the charged conduct—becomes highly relevant when the defendant argues that he did not commit the crime"). Goodson "was not entitled to have the jury determine his guilt or innocence on a false presentation that his and the victim's relationship and their parting were peaceful and friendly." *See Taylor*, 689 N.W.2d at 130 (quoting *People v. Zack*, 184 Cal.App.3d 409, 229 Cal. Rptr. 317, 320 (1986)). The State could present this relevant evidence of his motive to commit these specific crimes to establish that he committed them. It also helped show Goodson's *capacity* for violence against Thomas, even as he professed to want to continue a relationship with her. *See, e.g.*, *Richards*, 809 N.W.2d at 93–94 (holding "[t]he earlier incidents were relevant to show Richards had been angry enough at Cyd in the recent past to commit acts of violence against her," and distinguishing its capacity/identity/motive theory of relevance from propensity uses because "[t]he State's thesis was not that Richards was a violent man generally, but rather that he was explosive toward Cyd specifically"). Like in *Richards*, the point was not that Goodson was a bad person—just that he had the motive and capacity for violence against Thomas.

Goodson argues that he was prejudiced because his testimony was at odds with Thomas's testimony, and "[t]he jury had to resolve the disputed evidence to reach its verdicts." *See* Def's Br. at 61–62. That is the point. "Evidence reflecting the nature of the relationship between the defendant and the victim would be crucial to a fact finder resolving the inconsistencies in the witnesses' testimony." *See Taylor*, 689 N.W.2d at 127. This is critical because Thomas was describing Goodson acting in ways that, on their face, would seem incongruous with evidence that they recently had a romantic relationship. Indeed, Thomas and Goodson had a child together, so reasonable jurors may ordinarily be skeptical of any testimony that Goodson did not have Thomas's permission to be in her house (which needed to be proven to establish an element of burglary) or that Goodson had sex with her against her will (because she had obviously had sex with him before). Without context, jurors might even believe that Thomas fabricated her narrative to try to win sole custody of that child. *See* TrialTr.V5 57:13–22. Thus, the history of domestic abuse within this relationship was exceedingly important context for these events—it explained why Goodson would know that he did not have Thomas's permission to be in her house, and it explained how Goodson could coerce her into sex.

It also explained why Thomas would break her own phone: to prevent Goodson from seeing her communications with other men, which she knew would prompt him to abuse her more. *See* TrialTr.V2 74:4–75:8. And it explained why Thomas attempted to mollify Goodson after her initial attempts to escape, to the point where she fell asleep: to escape, she needed to convince Goodson that she was *not* trying to escape. *See* TrialTr.V2 77:4–25; TrialTr.V2 159:6–161:10; *accord Taylor*, 689 N.W.2d at 128 n.6 ("The relationship between the defendant and the victim, especially when marked by domestic violence, sets the stage for their later interaction."). That evidence of prior domestic abuse is helpful in understanding Thomas's testimony and resolving apparent inconsistencies within her description of events, which makes it "highly relevant to the truth-finding process." *See State v. Laible*, 594 N.W.2d 328, 335 (S.D. 1999), quoted in *Taylor*, 689 N.W.2d at 130.

Goodson also challenges the "clear proof" of prior incidents of domestic abuse described in Miller's testimony and from December 8 (which was partially caught on security camera) because the evidence was "heavily disputed." *See* Def's Br. at 59. But Goodson's disputes do not rob the evidence of its conditional relevance, and the requirement of "clear proof" is satisfied through testimony of any victim or witness.

E.g., *State v. Jones*, 464 N.W.2d 241, 243 (Iowa 1990) ("[A] victim's testimony, standing alone, satisfies the requirement of clear proof."); *Taylor*, 689 N.W.2d at 130 ("In assessing whether there is clear proof of prior misconduct, it is not required that the prior act be established beyond a reasonable doubt, nor is corroboration necessary."). None of this evidence required "engaging in speculation or drawing inferences based on mere suspicion." *See Jones*, 464 N.W.2d at 243.

Goodson's challenge to the "clear proof" of these incidents underlines the *need* for extrinsic evidence of prior domestic abuse, beyond Thomas's testimony: because Goodson and Thomas were the only people who were present in Thomas's house during these events (aside from their infant child), probative circumstantial evidence of the quality of past interactions between them was sorely needed. *See State v. Rodriquez*, 636 N.W.2d 234, 242 (Iowa 2001) (finding "the need for other evidence on the issue of confinement was substantial" because "[t]he circumstances surrounding the alleged confinement of Enriquez on October 11 were disputed by the only persons present: the defendant and Enriquez"). Beyond that, the need for this evidence was especially heightened because Goodson coerced Thomas into sex against her will by leveraging the effect of prior violence against her—

jurors could never understand how Goodson overcame her resistance without understanding that Thomas already knew, from experience, that Goodson's advances were backed by implied threats of violence.

> The relationship and the nature of the relationship of this victim with the defendant goes to explain the reasonableness of the victim's fear. If the State is going under the theory that he was threatening to harm her, the reasonableness of a fear will be something the jury will have to judge, and it can only be judged by showing previous acts of assault which have made her fear the defendant to the extent that she would agree to have sex with him when he terrorizes her or tells her that she has to.

See TrialTr.V1 38:1–17; *accord* TrialTr.V1 51:4–22. And evidence of the December 8 incident and Thomas's subsequent report to police was necessary proof that any permission Goodson once had to be at Thomas's house was rescinded. *See* TrialTr.V2 183:1–187:16 ("[T]he existence of the warrant from the 8th to the 23rd certainly suggests that he didn't have a right, license, or privilege to be in the home."); *accord* TrialTr.V2 150:16–154:10. All of this evidence was needed, because there was no way for the jury to understand what happened on December 23 without it. *See Taylor*, 689 N.W.2d at 127–30.

Goodson claims that its probative value was outweighed by danger of unfair prejudice, both because of the nature of the evidence and the amount of time spent litigating it. *See* Def's Br. at 59–61. But

assessing unfair prejudice means weighing "the comparative enormity of the charged and uncharged crimes," and none of the prior incidents were close to as bad as the episode giving rise to the instant charges, which involved a home invasion, an ambush, continued confinement, and repeated assaults that culminated in demands for unwanted sex. *State v. Larsen*, 512 N.W.2d 803, 808 (Iowa Ct. App. 1993) (holding that "[t]he potential prejudicial effect" of prior-bad-act evidence "is neutralized by the equally reprehensible nature of the charged crime"). And Goodson's challenge to the scope and volume of that evidence ignores that Thomas described very few specific acts of prior abuse; she only described the December 8 incident (which was entwined with the facts establishing elements of the burglary charge) and the incident that Miller saw (which was necessary to establish that Miller was corroborating Thomas's testimony). *See* TrialTr.V2 112:5–113:2; TrialTr.V2 197:20–198:13. This was not excessive or otherwise unfair.

Goodson cannot escape the long line of Iowa cases holding that prior domestic abuse against the same victim is "highly probative" on a variety of legitimate, non-propensity issues. *See State v. Richards*, 879 N.W.2d 140, 151–52 (Iowa 2016) (collecting cases). This evidence was similarly probative, necessary, and properly admitted.

II. The trial judge did not err by failing to recuse himself, *sua sponte*. None of his prior work as a prosecutor was in the matter in controversy. Inadvertent interactions between the judge and two jurors were not improper.

Preservation of Error

Goodson does not claim that error was preserved—instead, he quotes a comment to the code of judicial conduct for the principle that a "judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed." *See* Def's Br. at 63 (quoting Iowa Code of Judicial Conduct 51:2.11, cmt. 2). But that does not waive the requirement that Goodson preserve error through timely motion for recusal. *See State v. Biddle*, 652 N.W.2d 191, 198 (Iowa 2002) ("The State contends Biddle failed to preserve error on this issue by objecting or moving for recusal . . . . Biddle first raised the issue in a motion for new trial. Clearly, that was too late."); *see also State v. Kelsen*, No. 13–0652, 2014 WL 69825, at *1 (Iowa Ct. App. Jan. 9, 2014) ("Though in [Kelsen's] motion for reconsideration of sentence she requested a new sentencing hearing and that the judge recuse himself, raising this issue in a motion post-motion-sentencing does not satisfy the timeliness component of our error preservation rules, given the district court could not consider the issue at a time when corrective action could be taken.").

Judicial ethics may require a judge to act, but Goodson cannot claim to be entitled to reversal and new trial based on a violation of the code of judicial conduct. It would be unfair if Goodson were able to "choose to remain silent in the trial court in the face of error, taking a chance on a favorable outcome, and subsequently assert error on appeal if the outcome in the trial court is unfavorable." *See State v. Pickett*, 671 N.W.2d 866, 869 (Iowa 2003) (quoting *DeVoss v. State*, 648 N.W.2d 56, 60 (Iowa 2002)). Goodson did not raise any motion for recusal until the motion for new trial, and he only raised it in his *second* motion for a new trial (and he did not move for recusal in the *first* motion for new trial, either retrospectively or prospectively). *Compare* MotionTr. (4/20/18) at 140:5–141:18, *with* MotionTr. (9/17/18) at 3:6–6:25. "Clearly, that was too late." *See Biddle*, 652 N.W.2d at 198; *accord Rodriquez*, 636 N.W.2d at 246. Because error was not preserved for this claim, this Court should not consider it.

Standard of Review

There is no standard of review for unpreserved claims, because there is no ruling to review. If error had been properly preserved, the trial court's ruling would be reviewed for abuse of discretion. *See, e.g.*, *State v. Farni*, 325 N.W.2d 107, 110 (Iowa 1982).

Merits

Goodson argues the trial judge should have recused himself from presiding over the trial because he prosecuted Goodson on an unrelated matter years ago, and because he interacted with two jurors in the courthouse and led them to an incorrect jury room. *See* Def's Br. at 70–78. Goodson also argues that the judge should have recused himself from involvement on the motion for new trial, because he was essentially a fact witness. *See* Def's Br. at 78–81. None of these claims could show any abuse of discretion, even if they had been preserved.

A. *Toles* establishes that the judge's involvement in prosecuting Goodson on unrelated charges, many years ago, did not create any need for recusal.

Goodson recognizes that *Toles* held that a judge need not recuse from a criminal case due to involvement in prosecuting the defendant on an unrelated matter. *See* Def's Br. at 70 (citing *State v. Toles*, 885 N.W.2d 407, 408 (Iowa 2016)). He argues this was the same matter because the judge was involved in Goodson's 1999 prosecution for sexual abuse, which was the basis for the applicable enhancement under section 901A.2(3). *See* Def's Br. at 73. But the facts *about* that conviction were not relevant, even to the sentencing enhancement—the fact that the conviction was entered was all that mattered, and

Goodson stipulated to that anyway, before a different judge. *See* StipulationTr. (8/9/18). Certainly the facts of that prior conviction were not relevant to the actual trial on the merits of these charges; while the State alleged the enhancement, the prior conviction was so immaterial to the actual trial on these charges that Goodson alleged it was "newly discovered evidence," five months later. *See* MotionTr. (9/17/18) at 3:12–18. These criminal charges arise from Goodson's conduct in 2016, and this is not the same matter as his prosecution that concluded in 1999; no sentencing enhancement can change that.

An analogous claim was considered in *State v. Gardner*, where Judge Stigler presided at the guilt phase of trial and was subsequently listed as a witness on the habitual offender enhancement, which was tried before Judge Fister. *See State v. Gardner*, 661 N.W.2d 116, 117 (Iowa 2003). Then, after Gardner was found to be a habitual offender, Judge Stigler presided over his subsequent sentencing hearing. *See id.* Gardner argued that judge "served as a witness in the same matter over which he presided because the habitual violator allegation did not charge a separate offense." *Id.* at 118. The Iowa Supreme Court rejected that claim because "the habitual violator issue was tried in a separate proceeding where Judge Fister, not Judge Stigler, presided,"

and "Judge Stigler did not preside at the proceeding in which he served as a witness." *See id.* at 118–19. As applied to this case, that means that Judge Dalrymple did not preside at the proceeding that implicated his prior work as a prosecutor—a separate judge did that. *See* StipulationTr. (8/9/18). Charging an enhancement does not convert the guilt phase into an outgrowth of the prior prosecution.

This is the only part of Goodson's claim that was raised and ruled upon below (although it was still untimely, because it was raised after the opportunity for corrective action had passed). *See* MotionTr. (9/17/18) at 2:19–6:25. Goodson does not engage with the logic of the court's ruling that explained why his untimely claim was meritless—likely because it is impossible to call this an abuse of discretion:

> [I]n this particular case, with all due respect to Mr. Goodson, I find it ironic that Mr. Goodson, despite whatever criminal history he has, and the number of prosecutors that may have been involved in his cases, which may be at most a handful, he bears such concern that I, as the prosecutor, from one of those amongst thousands, not being facetious, thousands of criminal defendants that I have been either presiding as a judge or in my 17-year tenure as a prosecutor, would have handled as a prosecutor.
>
> That I, back in February, am to recognize that I was the prosecutor of one of thousands of defendants, and that I somehow then bear some grudge against him over the course of apparently 19 years later and still had some type of grudge or axe to grind as a prosecutor.

> Taking that and then juxtaposing that against his position that apparently he didn't even recognize I was the prosecutor, and didn't raise it or have any concerns about it whatsoever until August of 2018, months after the trial itself, and so in the end the fact that I was the presiding judge over a case is not, in and of itself, grounds for any type of mistrial.
>
> It's not grounds of any sort to even require me to recuse myself then or now. And so the burden rests upon the defendant to demonstrate somehow or another that the Court was biased and prejudiced against him. I don't have any evidence whatsoever other than the fact that I was the presiding judge and so the motion is denied.

MotionTr. (9/17/18) at 4:11–6:25. Goodson did not and could not prove any facts beyond "the mere fact of the prior prosecution" that would "demonstrate the judge was biased or prejudiced against him," which means he cannot establish any error in the judge's decision that recusal was never required. *See Toles*, 885 N.W.2d at 408.

"[T]here is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is." *State v. Mann*, 512 N.W.2d 528, 532 (Iowa 1994) (quoting *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987)). Goodson has not shown the prior prosecution, decades ago, is the same matter as the prosecution arising out of his 2016 acts of domestic abuse, and he has not shown that his prior conviction created bias or prejudice that would give rise to any duty to recuse. Thus, this claim fails.

B. Nothing about the judge's interaction with these jurors (who he mistakenly believed were on the jury in another trial) was improper, nor did it create any appearance of impropriety.

The test for recusal is "whether a reasonable person would question the judge's impartiality." *See Biddle*, 652 N.W.2d at 198 (quoting *McKinley v. Iowa Dist. Ct.*, 542 N.W.2d 822, 827 (Iowa 1996)). Consider this factual summary with that standard in mind.

On the morning of the fifth day of trial (March 6, 2018), Judge Dalrymple entered the courthouse and encountered two of the jurors for Goodson's trial; they were all waiting for an elevator. *See* MotionTr. (4/20/18) at 64:10–65:25. This appeared to be the same elevator that everyone would use to get up to the fourth floor. *See, e.g.*, MotionTr. (4/20/18) at 90:20–92:8; Def's Ex. B, file 2, at 9:45:15.

Video evidence shows Judge Dalrymple walking in front of the jurors as they exited the elevator. *See* Def's Ex. B, file 2, at 9:48:00. Apparently, off-camera, the judge led those jurors into a jury room associated with a different trial. Goodson testified that he saw them all emerge and walk into a different room, "[a]fter a few minutes." *See* MotionTr. (4/20/18) at 123:10–125:17. Video evidence shows that, at about 9:49:10, the judge and the jurors walked past Goodson and his family as they sat on the bench in the hallway. The judge opened a

door for those two jurors—and although the video is grainy at that distance, it is apparent that only *two* people entered that doorway. *See* Def's Ex. B, file 1; MotionTr. (4/20/18) at 91:4–95:17. That door led to the correct jury room. *See* MotionTr. (4/20/18) at 152:21–155:24.

Goodson's post-trial claim was that this series of events "in not taking the jurors directly to their jury room creates an appearance of impropriety," but he only framed it as a claim about juror misconduct; Goodson did not argue that Judge Dalrymple should have recused from the trial or this hearing. *See* MotionTr. (4/20/18) at 141:10–18; *see also* Motion for New Trial (4/5/18); App. 25.

Everyone agreed that there was another jury trial occurring in the adjacent courtroom, at the same time as Goodson's trial. *See* MotionTr. (4/20/18) at 148:16–149:22. That was the source of the judge's confusion: he forgot these were jurors in *Goodson's* trial.

> On March 6, 2018, at approximately 9:48:03, the Court is observed on Defendant's Exhibit B exiting the elevator. The undersigned is the first to exit the elevator and has no interaction with either of the two jurors following a short distance behind.
>
> At 9:48:10, the undersigned and the two jurors are observed walking out of view of the security camera. The undersigned attempted to walk the jurors to the jury room immediately adjacent to his chambers only to discover that the jurors were not affiliated with that trial, but with the trial in the above-captioned matter. Consequently, the Court immediately walked the jurors to their jury room as

> observed on Defendant's Exhibit B. At 9:49:13, the undersigned is observed leading the two jurors to the correct jury room. Again, the Court is several steps ahead of the jurors and there is no interaction between the undersigned and the two respective jurors. A sum total of 63 seconds exists not otherwise captured on video. . . .
>
> Again, the defendant fails to prove that any misconduct actually occurred. The undersigned specifically states professionally that no conversations took place between the jurors and the undersigned relative to the trial. The undersigned made an error in assuming the jurors were appearing for the trial occurring in 413 (Oberman). Again, the defense has failed to prove that any acts that occurred exceed the tolerable bounds of jury deliberations and/or expectations. Lastly, the defense has failed to establish that any misconduct that is alleged to have occurred was calculated to and with reasonable probability did influence the jury's verdict. Consequently, the defendant's motion again must fail.

Order (5/9/18) at 4–5; App. 35–36. Goodson argues "[t]his contact adds to the reasonable basis for questioning the judge's impartiality," especially when "the judge did not disclose the contact to the parties at that time." *See* Def's Br. at 77–78. But jurors, attorneys, and judges use public elevators together out of necessity, and there is no reason to infer any impropriety out of the extra 60 seconds of contact that occurred as a result of the judge misidentifying the jurors. Goodson has not and does not suggest what improper discussion might have taken place, or why it would have—or why the judge or any observer would have regarded this as noteworthy. As the prosecutor remarked:

> [W]hat the defense has presented is that there was some appearance of improper conduct. I don't know. They have not named a particularized or even pointed to what improper conduct that is. I haven't seen them make an argument per se over it other than saying, well, we saw the judge came out of the elevator with these two jurors and walk with them and therefore we think that was improper.

MotionTr. (4/20/18) at 165:9–22. Even now, Goodson still has not filled that gaping hole in his argument that recusal was required.

Everyone forgets faces. Goodson's counsel did not recognize a juror who was a security guard at the Black Hawk County Courthouse "for roughly seven to eight years" during a time period when counsel would have been practicing in Black Hawk County and would have entered and exited the courthouse through the security checkpoint that juror was staffing, day in and day out. *See* MotionTr. (4/20/18) at 156:3–157:11; *accord* MotionTr. (4/20/18) at 38:17–39:17. There is no reason to infer some nefarious purpose from this honest mistake.

The only real presumption that matters is that "[w]e presume juries follow the court's instructions." *See State v. Hanes*, 790 N.W.2d 545, 552 (Iowa 2010). Voir dire was not reported, but the court later referenced the "lengthy admonition" it had given jurors, which had included directions to resist any efforts to initiate conversations about the case until it was over. *See* TrialTr.V1 82:13–84:3; *accord* MotionTr.

(4/20/18) at 124:13–125:17 ("[Y]ou stated this admonition of what should be going on and what shouldn't be going on."). Goodson could have called those jurors to testify at this post-trial hearing about any improper contact with the judge. *See* Iowa R. Evid. 5.606(b)(2)(B). Indeed, he called *other* jurors to testify. *See* MotionTr. (4/20/18) at 5:4–6:14; MotionTr. (4/20/18) at 11:24–12:18; MotionTr. (4/20/18) at 18:21–19:24. Goodson is not entitled to substitute a presumption of impropriety for actual evidence of some impropriety, unless the facts would suggest impropriety to a reasonable observer—and these facts did not even suggest impropriety to Goodson and his family, watching all three people walk past in real time. *See* Def's Ex. B., file 1; *see also* MotionTr. (4/20/18) at 95:5–17; MotionTr. (4/20/18) at 111:12–112:9.

Moreover, Goodson's claim that the judge should have disclosed this to counsel is ironic because Goodson literally had a front-row seat to this entire sequence of events. *See* MotionTr. (4/20/18) at 123:10–125:17; Def's Ex. B, file 1. No disclosure was necessary. And Goodson's actual contemporaneous knowledge of this interaction underlines that his failure to raise a timely motion for recusal should waive the claim; this Court should not reward obvious sandbagging. *See Rudolph v. Iowa Methodist Medical Center*, 293 N.W.2d 550, 555 (Iowa 1980).

C. The judge was not called as a witness and was not converted into a witness by ruling on this motion.

In the alternative, Goodson argues that "the judge should at minimum have recused himself from consideration of [his] post-trial motions for new trial," because this particular motion raised issues where the judge "had personal knowledge concerning the facts in dispute and was a material witness in the proceeding." *See* Def's Br. at 78–81. The court was careful to establish relevant facts on the layout of the courthouse and their depictions on the admitted video exhibits by consensus among the parties, rather than by proclaiming facts by judicial fiat. *See* MotionTr. (4/20/18) at 146:21–155:24. Moreover, while the judge makes findings of fact that are adverse to Goodson in his ruling, those findings are primarily based on the video—and the only "professional statement" in those findings is one that would arise naturally from the *lack* of proof of impropriety: "that no conversations took place between the jurors and [the judge] relative to the trial." *See* Order (5/9/18) at 5; App. 36. This is not the same as a judge who finds his/her own testimony credible. *See, e.g.*, *Gardner*, 661 N.W.2d at 117–18. Rather, this order highlights Goodson's lack of proof of any impropriety, refuses to draw such a speculative inference, and *then* gives additional explanation. *See* Order (5/9/18) at 4–5; App. 35–36.

Note that Goodson was the only one who knew what he would be alleging when the hearing on the motion for new trial began. *See* MotionTr. (4/20/18) at 4:2–5:5. Even as the only party with advance knowledge of the subject matter of that claim, Goodson did not move for recusal. Ordinarily, this would waive the claim. It is true that Iowa Rule of Evidence 5.605 states: "The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue." *See* Iowa R. Evid. 5.605. But that enables an unpreserved challenge to the *admission* of testimony from a presiding judge at trial (and that is not the challenge Goodson is raising). This rule does not enable an unpreserved and untimely demand for recusal from motions raising allegations of improper judicial conduct during the proceeding. Here, if Goodson wanted the judge to recuse himself, he should have moved for recusal—and if he found fault in the ruling for including the judge's professional statement that "no conversations took place between the jurors and the undersigned relative to the trial," he should have filed a timely motion to raise the issue. *See Lamasters*, 821 N.W.2d 864 n.2.

This claim is interesting because Goodson's motion for new trial implied that he was challenging some impropriety *in the courtroom*, during the trial. *See* Motion for New Trial (4/5/18) at 1; App. 25

(raising "concerns regarding an appearance of impropriety on behalf of the Court in its interactions with members of the jury during trial"). Nobody would question the judge's authority to make factual findings about what happened during trial, even if that required supplementing the record with judicially noticed facts. *See, e.g.*, Iowa R. App. P. 6.807 (providing district court authority to direct that record be corrected if it identifies omissions or misstatements, to ensure that "the record truly discloses what occurred in the district court"). But because this claim alleges impropriety in the hallway outside the courtroom, in a brief interstitial moment where no video footage exists, it manages to blur the line between knowledge acquired by presiding over the trial and factual knowledge acquired extrajudicially. *See State v. Millsap*, 704 N.W.2d 426, 432 (Iowa 2005) (stating "facts learned by the judge from the judge's participation in the case" do not require recusal).

However, that interesting wrinkle obscures the bigger problem with Goodson's claim: the judge was not really implicated as a witness (neither party made an attempt to call him) nor did the judge rely on extrajudicially acquired facts to resolve a disputed fact issue. Rather, the parties *agreed* on the facts. Goodson had alleged "an appearance of impropriety" from these events, more than any actual misconduct.

See Motion for New Trial (4/5/18) at 1; App. 25; *see also* MotionTr. (4/20/18) at 141:10–18 ("We feel that the act of this Court, with all due respect, in not taking the jurors directly to their jury room creates an appearance of impropriety. I cannot explain the reason for that out-of-way detour to the jury room, and it does, at the very least, appear improper."). And while the ruling included a statement that no *actual* misconduct occurred, this was more of a reassurance than anything else—the real operative finding was that Goodson's evidence was simply insufficient to establish any impropriety, misconduct, or other grounds for a new trial. *See* Order (5/9/18) at 4–5; App. 35–36 ("[T]he defendant fails to prove that any misconduct actually occurred. . . . [T]he defense has failed to prove that any acts that occurred exceed the tolerable bounds of jury deliberations and/or expectations."). This did not create any need for the judge to "assess [his] own credibility in determining a matter" because, on undisputed facts, Goodson's claim was facially insufficient. *See Gardner*, 661 N.W.2d at 117. If Goodson wanted to go beyond those facts—if he needed the judge's testimony to prove misconduct occurred—he could have listed the judge as a witness, which *would* create a clear need for recusal. *See id.* at 118. But this claim, as presented below, required nothing of the sort.

If Goodson were correct that the judge should have recused from the hearing on the motion for new trial, the correct remedy is to vacate the ruling that denied that portion of Goodson's motion and remand for a new hearing on that post-trial claim. *See, e.g.*, *State v. Morris*, No. 07–1835, 2009 WL 1676663, at *2 (Iowa Ct. App. June 17, 2009) ("Turning to the remedy, we disagree with Morris that she is entitled to a new trial. Instead, we are convinced she is entitled to a hearing on her new trial motion before a different trial judge."). There would still be no reason to vacate rulings regarding any other claims in Goodson's motion for new trial, because would still be no reason why this particular judge could not resolve those unrelated claims.

III. Merger was not required. The State proved a series of multiple acts that supported multiple convictions. Moreover, the various sentencing enhancements for sexual abuse are clear legislative intent that offenders who commit sexual abuse during a burglary should be charged, convicted, and sentenced for both offenses.

Preservation of Error

Goodson did not raise this issue below. He frames this claim as a challenge to an illegal sentence, which may be raised at any time. *See* Def's Br. at 82–83. If this were a pure question of law about the need for merger when the State proves one act that forms the basis for two convictions, this would be a challenge to an illegal sentence.

But when the State proves multiple criminal acts that would support multiple convictions if the jury had been instructed to complete special interrogatories to that effect, this type of challenge no longer attacks the sentence as *illegal*—the alleged error is a problem with the jury instructions, not the sentence. *See Tindell v. State*, 629 N.W.2d 357, 359 (Iowa 2001) (explaining that Iowa rules "allow challenges to *illegal* sentences at any time, but they do not allow challenges to sentences that, because of procedural errors, are illegally *imposed*").

Goodson claims *Bruegger* changed the law in this area. *See* Def's Br. at 83 n.5. But even after *Bruegger*, it is still true that "[c]hallenges to jury instructions do not implicate the legality of a sentence." *See James v. State*, 858 N.W.2d 32, 33 (Iowa Ct. App. 2014); *accord State v. Love*, 858 N.W.2d 721, 727–28 & n.1 (Iowa 2015) (Mansfield, J., concurring specially) (noting that, when defendant argues for merger after failing to preserve sufficiency challenge that evidence presented was only sufficient to prove *one* criminal act, "merger would not occur so long as substantial evidence supported a determination that two separate criminal acts had occurred," and that "[a]ny other challenge from a defendant who had failed to object at trial would have to be raised as an ineffective-assistance-of-counsel claim").

Goodson will likely argue that Justice Mansfield's last paragraph in *Love* only applies if the State "ensure[s] the defendant is charged and the jury is instructed in a way that requires a finding of separate conduct for each conviction." *See Love*, 858 N.W.2d at 727–28 & n.1 (Mansfield, J., concurring specially). But if Goodson had challenged the jury instructions on this basis, the State or the trial court may have corrected that error. Goodson's failure to preserve error on his complaint about the jury instructions cannot entitle him to a windfall of leniency that he would not receive if he raised a timely objection—adopting any other approach would encourage strategic sandbagging. *See, e.g.*, *State v. Jonas*, 904 N.W.2d 566, 583 (Iowa 2017) (discussing importance of discouraging litigants from "engaging in a sandbagging approach of awaiting the results of a jury verdict before crying foul").

Beyond concerns about sandbagging, it makes sense to require Goodson to prove his sentences are substantively illegal by showing that, as a matter of law, the evidence cannot support a conclusion that this burglary included multiple acts of assault and/or sexual abuse. Without such a showing, his claim only challenges the trial procedure and jury instructions, and not the underlying legality of the sentences imposed for his conduct. *See Love*, 858 N.W.2d at 728.

The upshot is that Goodson's claim only sidesteps requirements of error preservation if he proves that the evidence was insufficient to support convictions for multiple acts of assault and/or sexual abuse (which must include at least one act of sexual abuse), which would render these multiple sentences for his conduct substantively illegal. If he cannot, then this is a challenge to the *manner* of submitting the case to the jury—which is not a challenge to an illegal sentence, and cannot be raised if error is not preserved (which it was not).

Standard of Review

There is no standard of review for unpreserved claims, because there is no ruling to review. If error had been properly preserved, or if this were construed as a challenge to an illegal sentence, review would be for correction of errors at law. *See State v. Bullock*, 638 N.W.2d 728, 731 (Iowa 2002).

Merits

Goodson argues that his conviction for first-degree burglary must merge with his conviction for third-degree sexual abuse, under the instructions as submitted to the jury. But the jury found multiple acts that would sustain multiple convictions. Moreover, there is clear legislative intent to impose separate convictions for these two crimes.

A. The jury found Goodson committed multiple acts that established commission of multiple crimes. The evidence was sufficient to establish a basis for first-degree burglary that was separate from acts constituting sexual abuse.

Commission of multiple criminal acts will generally support conviction on multiple counts and imposition of multiple sentences. Merger may still occur in cases where "the jury was never asked to do the fact-finding necessary to support two separate [crimes]." *See, e.g.*, *Love*, 858 N.W.2d at 724–25. But where that fact-finding does occur, merger is not appropriate. *See State v. Newman*, 326 N.W.2d 788, 793 (Iowa 1982). Here, the State proved and the jury found that Goodson inflicted bodily injury on Thomas, which is separate from the acts constituting sexual abuse—so those charges were proven by separate criminal acts, and merger is not required.

Goodson's argument hinges on the marshalling instruction for the charge of first-degree burglary, which included this element:

> 6. During the [burglary] incident:
>
> a. The defendant intentionally or recklessly inflicted bodily injury as defined in instruction 30 on Annie Thomas, or
>
> b. The defendant performed or participated in a sex act as defined in instruction 38 with Annie Thomas which would constitute sexual abuse as defined in [marshalling] instruction 36.

Jury Instr. 19; App. 17. The State agrees with Goodson's point that alternative (b) subsumes the marshalling instruction for the charge of third-degree sexual abuse into the analysis, which seems like it would fit the preliminary test for merger in *Blockburger* and section 701.9. *See* Def's Br. at 87–89. But alternative 6(a) allowed proof of element 6 through another showing (by proving Goodson inflicted bodily injury), so it would be incorrect to state that establishing first-degree burglary *required* proof of sexual abuse. That means this technically survives the legal elements test: proof of third-degree sexual abuse required the State to prove that Goodson committed a sex act with Thomas against her will, which was a fact that was not *required* to establish that Goodson committed first-degree burglary. Thus, in a legal sense, each crime required proof of some facts that the other did not require.

Of course, Goodson's response to that would be that courts presume merger when multiple theories were submitted to the jury, when merger would be required under one theory, and when there is no indication which theory the jury accepted. *See State v. Hickman*, 623 N.W.2d 847, 851 (Iowa 2001) ("If the greater offense is defined alternatively and the State charges both alternatives, the test for included offenses must be applied to each alternative.").

Here, it is clear which alternative under element 6 was proven: both of them. The jury convicted Goodson on charges of third-degree sexual abuse *and* domestic abuse assault causing bodily injury, on top of the first-degree burglary charge. *See* Verdict Forms (3/16/18); App. 21. The marshalling instruction for domestic abuse assault required the jury to find that Goodson assaulted Thomas and that his assault caused bodily injury. *See* Jury Instr. 33; App. 19. The effect of the conviction for domestic abuse assault causing bodily injury is that this Court does not need to speculate that the jury might have convicted Goodson on first-degree burglary in reliance on alternative 6(b) alone. Because the jury returned another verdict that established facts satisfying alternative 6(a), this Court can be confident that jurors found Goodson committed a distinct criminal act to satisfy this element of first-degree burglary, beyond his acts of sexual abuse.

"Where the alleged acts occur separately and constitute distinct offenses there can be no complaint that one is a lesser included offense of the other." *See State v. Spilger*, 508 N.W.2d 650, 652 (Iowa 1993). Goodson's failure to preserve error means that the only question at this stage of the analysis is whether "substantial evidence supported a determination that two separate criminal acts had occurred." *See*

Love, 858 N.W.2d at 728 (Mansfield, J., specially concurring). The record is replete with evidence showing multiple instances of assault causing bodily injury, along with one instance of sexual abuse. *See, e.g.*, TrialTr.V2 60:13–62:22; TrialTr.V2 68:15–69:24; TrialTr.V2 79:18–81:3. Therefore, Goodson cannot show merger was required.

B. Under *West*, there is a clear legislative intent to authorize multiple punishments. Even if there were no injuries and only one act of sexual abuse, merger would not be required.

The Iowa Supreme Court recently confirmed that merger is not always required when offenses overlap. Merger is only required when the legislature did not intend to authorize multiple punishments. But in situations "where the greater offense has a penalty that is not in excess of the lesser included offense, a legislative intent to permit multiple punishments arises. Otherwise, there would be little point to the greater offense." *State v. West*, 924 N.W.2d 502, 511 (Iowa 2019) (citing *State v. Halliburton*, 539 N.W.2d 339, 334–35 (Iowa 1995) and *State v. Lewis*, 514 N.W.2d 63, 69 (Iowa 1994)). That situation arises here because of the enhancement under section 901A.2(3), which elevated Goodson's punishment for third-degree sexual abuse to a 25-year term of incarceration with an 85% mandatory minimum. *See* Iowa Code § 901A.2(3); Order (10/4/18); App. 40. There is also

legislative intent to impose punishment of even greater magnitude for those who repeatedly commit sexual abuse. *See* Iowa Code § 902.14. As a result, sexual abuse does not merge with first-degree burglary, based on the general principle that "a penalty scheme providing that the greater offense has a lesser punishment than the included offense indicates a legislative intent that multiple punishments be permitted." *See West*, 924 N.W.2d at 511.

Goodson argues this case is distinguishable from *West* because third-degree sexual abuse "generally carries a lesser penalty than the offense of First Degree Burglary," so this is not a situation where there would *never* be a reason to charge first-degree burglary and where the sexual-abuse alternative in the statute would be rendered useless. *See* Def's Br. at 91–92. Goodson is correct that the enhancement is separate from the crime (though that undermines his recusal claim). But the possibility of enhanced punishment for sexual abuse crimes in *some* cases is enough to demonstrate a legislative intent to permit this multiple punishment in *all* cases. It would be nonsensical for this merger analysis to work out differently for each defendant, based on whether each defendant has prior convictions for sexual abuse. And even for first-time offenders, the availability of these enhancements

establishes clear legislative intent to authorize multiple punishments because the legislature sought to prescribe enhanced punishment for their *subsequent* convictions for crimes that qualify as sexual abuse. *See, e.g.*, Iowa Code §§ 901A.2, 902.14. For that to work, sexual abuse cannot be subsumed into any crimes that do not trigger section 902.14 (other than Class A felonies, like first-degree kidnapping). *Cf. State v. Morgan*, 559 N.W.2d 603, 611 (Iowa 1997); *State v. Whitfield*, 315 N.W.2d 753, 755 (Iowa 1982). In order to apply that enhancement in line with legislative intent and identify when a defendant commits a *second* sexual-abuse offense, courts must be able to enter convictions for a defendant's *first* sexual-abuse offense, even when committed contemporaneously with another crime. These grave enhancements indicate a clear legislative intent to charge and convict offenders for sex-abuse crimes separately, both to deter recidivism and to punish it.

West also applies because of the lifetime special sentence under section 903B.1, which applies to defendants convicted of "Class 'C' felony or greater offenses" under chapter 709 or section 728.12. *See* Iowa Code § 903B.1. The lifetime special sentence would be imposed on any defendant who is convicted of third-degree sexual abuse, but would *not* be imposed if that merged into first-degree burglary. *See id.*

The Iowa Supreme Court views this as additional punishment. *See State v. Lathrop*, 781 N.W.2d 288, 295–97 (Iowa 2010). Because that punishment was legislatively mandated for third-degree sexual abuse, but not triggered by first-degree burglary, merger was not intended.

Whether because of the State's proof of multiple criminal acts and the jury verdicts finding that multiple criminal acts were proven beyond a reasonable doubt, or because of application of the principle from *West* that the legislature's choice to authorize greater punishment for the "lesser" offense is clear legislative intent to authorize multiple convictions and multiple punishment, any claim seeking merger of these two convictions in these circumstances must fail. This Court should reject this claim and affirm both convictions and sentences.

IV. The State agrees: The sentencing court misidentified the lifetime special sentence under Iowa Code section 903B.1 as a sex offender registration requirement. This Court should direct the district court to correct the illegality and impose the mandatory sentences under section 903B.1 and section 901A.2(8).

Preservation of Error

A sentence not authorized by statute is an illegal sentence. An actual challenge to an illegal sentence evades error preservation rules and may be brought at any time. *See, e.g.*, *Jefferson v. Iowa Dist. Ct.*, 926 N.W.2d 519, 522, 524 (Iowa 2019).

Standard of Review

A claim that a sentence is not authorized by statute is reviewed for correction of errors at law. *See id.* (citing *State v. Coleman*, 907 N.W.2d 124, 134 (Iowa 2018)).

Merits

Goodson claims "[t]he sentencing court directed Goodson to register as a sex offender for a lifetime duration." *See* Def's Br. at 94. That is correct, because the sentencing court mistakenly described section 903B.1 as a registration requirement, rather than as a lifetime special sentence: "There is also a requirement that you be required to register as a sex offender and that you pay a $250 civil assessment and under 903B.1 there is a lifetime registration requirement as well." *See* Sent.Tr. 20:14–18. Its written order described the sentence for the sexual abuse conviction, and included "903B.1 lifetime registry on sex abuse registry." *See* Order (10/4/18) at 2; App. 41.

Goodson argues that "[a] sentencing court lacks authority to determine the duration of the defendant's future registration." *See* Def's Br. at 95 (citing *Barker v. Iowa Dep't of Public Safety*, 922 N.W.2d 581, 586–87 (Iowa 2019)). That is correct. The sentencing court *did* have the power—and the obligation—to impose a sentence

as described in section 903B.1: "a special sentence committing the person into the custody of the director of the Iowa department of corrections for the rest of the person's life, with eligibility for parole as provided in chapter 906." *See* Iowa Code § 903B.1.

Goodson is right that this Court should vacate the portion of the sentencing court's order that specifies a registration duration. And in addition, this Court should direct the district court, on remand, to correct the remaining illegality by imposing a lifetime special sentence as required by section 903B.1. Additionally, the court was required to impose an additional two-year term of parole or work release under section 901A.2(8). *See* Iowa Code § 901A.2(8).[1] This court should direct the district court to correct both of those illegalities on remand. "[A]n illegal sentence is a nullity subject to correction, even though correction may result in an increase in the sentence on remand." *See*

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[1] The district court entered an order correcting that omission, which was problematic because Goodson was not present for the pronouncement of a more onerous sentence and because Goodson had already initiated this appeal that included sentencing challenges, divesting the district court of jurisdiction over the sentence. *See* Order (3/29/19). Goodson filed an appeal from that order, and the State has moved to reverse on those grounds—although the court was correct that section 901A.2(8) applies and that Goodson's sentence should be corrected, it needed to wait until this appeal concluded and it needed Goodson to be personally present at pronouncement.

State v. Draper, 457 N.W.2d 600, 606 (Iowa 1990); *accord State v. Dempsey*, No. 08–1611, 2009 WL 2170229, at *3 (Iowa Ct. App. July 22, 2009). Goodson should be personally present when the corrected sentence is pronounced, because correction makes it more onerous. *See, e.g.*, *State v. Yates*, No. 12–2273, 2014 WL 2600212, at 2–3 (Iowa Ct. App. June 11, 2014) (identifying illegality in omission of mandatory two-year term of parole or work release, and remanding "for a hearing on the addition of the applicable section 901 A.2(8) provision to Yates's sentence, with directions to grant Yates's request to be present at that hearing").

CONCLUSION

The State respectfully requests that this Court affirm Goodson's convictions, vacate the illegal portion of Goodson's sentence that specifies a duration for sex offender registration, and remand with directions to correct the identified illegalities in Goodson's sentence.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
louie.sloven@ag.iowa.gov

CERTIFICATE OF COMPLIANCE

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Dated: July 9, 2019

LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
louie.sloven@ag.iowa.gov