IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. DERRIS L. SWIFT, Defendant-Appellant.	)))))))))	S.CT. NO. 18-2197

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR SCOTT COUNTY
HONORABLE HENRY W. LATHAM II, JUDGE (JURY TRIAL, MOTION FOR NEW TRIAL, AND SENTENCING)

APPELLANT'S BRIEF AND ARGUMENT AND CONDITIONAL REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

On December 27, 2019 the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Derris Swift No. 6635121, Clarinda Correctional Facility, 2000 N. 16th Street, Clarinda, IA 51632.

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Jon M. Woodruff, Note, Plain Error by Another Name: Are Ineffective Assistance of Counsel Claims a Suitable Alternative to Plain Error Review in Iowa?, 102 Iowa L. Rev. 1811, 1815 (May 2017)

Wayne R. LaFave et al., 7 Criminal Procedure, § 27.5(d) (4th ed. November 2018 update)

Tory A. Weigand, Raise or Lose: Appellate Discretion and Principled Decision-Making, 17 Suffolk J. Trial & App. Advoc. 179, 199-241 (2012)

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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court to (1) clarify that the provisions of Senate File 589 do not apply to criminal appeals that were commenced prior to July 1, 2019, and (2) to address Defendant's request that this Court adopt plain error review. Iowa Rs. App. P. 6.903(2)(d), 6.1101(2) (c)-(d), (f) (2019).

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by Defendant-Appellant Derris L. Swift from his jury trial convictions for: Intimidation with a Dangerous Weapon With Intent, a Class C felony in violation of Iowa Code section 708.6 (2017) (Count 1); Willful Injury Resulting in Serious Injury, a Class C felony in violation of Iowa Code section 708.4(1) (2017) (Count 2); Possession of Marijuana, a Serious Misdemeanor in violation of Iowa Code section 124.401(5) (2017) (Count 3); and Attempt to Commit Murder, a Class B felony in violation of Iowa Code section 707.11 (2017) (Count 4).

Course of Proceedings: On March 8, 2018, the State filed a Trial Information charging Defendant Derris Swift with: Intimidation with a Dangerous Weapon with Intent, a Class C felony in violation of Iowa Code section 708.6; Willful Injury Resulting in Serious Injury, a Class C felony in violation of Iowa Code section 708.4(1); Possession of Marijuana, a Serious Misdemeanor in violation of Iowa Code section 124.401(5); and Attempt to Commit Murder, a Class B felony in violation of Iowa Code section 707.11 (2017). The charges stemmed from a January 24, 2018 shooting incident involving Ashanti Dixon (Swift's former girlfriend). (TI)(App.5-8).

Swift pled not guilty, and a jury trial was scheduled for July 23, 2018. (3/8/18 Arraignment; 3/30/18 PTC Order)(App.9-10;11-13).

On July 19, 2018, the State filed a motion asking the court to find Swift had forfeited his right to confront the complaining witness (his former girlfriend Ashanti Dixon) based on alleged wrongful conduct by him. The motion alleged

that Swift placed phone calls to Ashanti from the jail, that Ashanti often accepted the calls and spoke with Swift, and that on these calls Swift would request Ashanti's assistance in his defense. The motion further expressed that Ashanti and her family were not presently communicating with the county attorney's office, and that Ashanti's family was not cooperating with service of subpoenas by the State. (7/19/18 Mot.Forfeit)(App.16-18).

On the same date, the State also filed a Motion to Continue Jury Trial seeking "more time to try to communicate with the victim and her family to determine whether or not they intend to testify in the trial in this matter." The motion also stated that Ashanti (who had already been served with a subpoena) now "is not returning calls from the [prosecutor]". The motion stated "If the victim is indeed now refusing to cooperate and essential witnesses are avoiding service of subpoena in this case, the State will have no choice but to resort to issuing material witness warrants for the witnesses

who cannot be served subpoenas." The motion also stated, "In the alternative, if this case ultimately needs to be tried without the cooperation of the victim and her family, the State needs more time to prepare for a trial with that sort of evidentiary challenge." (7/19/18 Mot.Continue)(App.19-21).

Following a hearing, the State's request for continuance was granted over Defendant's resistance. (7/20/18 Tr. p.6 L.13-p.8 L.7); (7/19/18 D's Resist.; 7/20/18 Order to Continue)(App.22-25). The State's forfeiture by wrongdoing claim was not addressed by the court at that time, but defense counsel explained: "I believe that the references made to jailhouse conversations could easily be explained by a person saying, come forward and tell the truth; sign an affidavit. Maybe that will resolve this issue." (7/20/18 Tr. p.9 L.15-19). Defense counsel subsequently filed a Resistance on the forfeiture issue, denying that Defendant engaged in any wrongful conduct with regard to Ashanti. Counsel reiterated: "Requesting that a witness provide truthful testimony prior to,

or at, trial is not misconduct." (10/9/18 Resist.)(App.28-29). Because the witnesses all ultimately appeared at trial, the merits of the forfeiture issue was never ultimately raised or addressed by the court. See (8/16/18 Order)(App.26-27); (Trial p.1 L.1-p.4 L.5, p.19 L.6-p.20 L.4).

Trial had been reset to October 15, 2018, and jury selection commenced on that date. (8/16/18 Order)(App.26-27). Defendant had filed a pre-trial motion in limine which was addressed just prior to jury selection. The motion in limine sought to prohibit the State from introducing Hearsay statements including "Testimony from police or other witnesses as to what other persons told them about what they had observed". The court reserved ruling until hearing the evidence at trial. (7/17/18 Def.Mot.Limine)(App.14-15); (Trial p.1 L.1-25, p.7 L.1-6, p.13 L.15-25, p.15 L.21-p.18 L.11).

A jury was selected and sworn on October 15, 2018. (Trial p.1-25, p.7 L.1-6, p.20 L.5-10, p.28 L.18-19, p.31 L.10-21, p.32 L.14-15). Trial then commenced with opening

statements and the start of evidence on October 16. (Trial p.38 L.3-11, p.42 L.24-p.43 L.1). During opening statements, Swift asserted a defense of identity, arguing that he was not the perpetrator of the shooting. Swift acknowledged being in the area of the shooting, but denied involvement, urging he had merely heard gunshots in the vicinity and fled. (Trial p.47 L.13-16, p.48 L.10-p.52 L.5).

During the first day of trial (October 16, 2018), the State sought to confront a State's witness, Ityleonia Watson (the girlfriend of Ashanti's brother), with her own prior inconsistent statements as recited in the prosecutor's questions. Defense counsel objected to such efforts as improper impeachment of the State's own witness, but the objection was overruled. (Trial p.107 L.1-p.110 L.21).

During the morning of the second day of evidence (October 17, 2018), complaining witness Ashanti Dixon and her mother Ameshia Dixon (both State's witnesses) appeared at the County Attorney's office to testify under the State's

subpoenas. The State informed the court it wished to address scheduling issues caused thereby. (Trial p.252 L.4-6, p.266 L.13-19, p.267 L.13-20, p.269 L.9-24). The court subsequently provided for an extended lunch break to permit the parties to address necessary matters. Lunch recess was taken from 11:23 a.m. to 2:14 p.m. (Trial p.295 L.10-p.296 L.6, p.298 L.6-12). During this lunch recess, the prosecutor met with Ashanti and Ameshia Dixon and confronted both witnesses with recordings of their prior statements implicating Swift. (Trial p.298 L.15-17, p.309 L.25-p.310 L.2, p.310 L.16-25, p.311 L.13-16, p.313 L.21-p.314 L.3, p.316 L.21, p.317 L. 1-3, p.317 L.25-p.318 L.1, p.323 L.15-25, p.336 L.12-p.339 L.25, p.354 L.16-18, p.355 L.17-22). During that lunch-hour meeting, the prosecutor also asked Ashanti if she would agree to show her scar to the jury, and Ashanti refused. (Trial p.323 L.15-25).

When trial resumed that afternoon, the prosecutor presented testimony from Ameshia Dixon and Ashanti Dixon.

(Trial p.298 L.6-22, p.317 L.25-p.318 L.6). During Ameshia Dixon's testimony, the prosecutor attempted to impeach Ameshia by confronting her with her own prior inconsistent statements. Defense counsel objected to such efforts as improper impeachment of the State's own witness, but the objection was overruled. (Trial p.309 L.16-p.310 L.14). During Ashanti Dixon's testimony, the prosecutor similarly attempted to impeach that witness by confronting her with her own prior inconsistent statements. Defense counsel did not specifically object referencing the ground of improper impeachment by the State of its own witness, though he later expressed the belief he had done so. (Trial p.338 L.1-12, p.338 L.10-p.339 L.4, p.339 L.5-25, p.399 L.14-18).

During the third day of trial (October 18, 2018), the State sought to admit video and audio recordings of prior inconsistent statements of Ameshia Dixon and Ashanti Dixon

(Exhibits 85[1], 87, and 88). Defense counsel objected on grounds that the State was improperly seeking to impeach its own witnesses with prior inconsistent hearsay statements, that the witnesses had already acknowledged the underlying inconsistent statements, and that the State was improperly seeking to introduce extrinsic evidence of the prior hearsay statements. The court overruled the Defense objections and the exhibits were admitted into evidence and played for the jury at trial. (Trial p.352 L.20-p.363 L.10, p.372 L.18-23, p.375 L.22-p.377 L.2, p.379 L.18-p.380 L.15, p.385 L.1-p.408 L.12, p.408 L.22-p.409 L.6, p.414 L.17-p.415 L.25, p.440 L.6-p.448 L.1, p.449 L.9-p.450 L.5). The State then rested, and no evidence was presented by the defense. (Trial p.479 L.2, p.487 L.14-19, p.493 L.18-25, p.499 L.3-14).

[1] At trial, Exhibits "85" and "86" were inadvertently used to denote first photographic exhibits and then later video exhibits. (10/23/18 Order: Exh.81-88; 10/31/18 Order)(App.34-38). References to those exhibits herein will be to the videos.

The following day, on October 19, 2018, the jury deliberated and returned verdicts finding Swift guilty as charged on all four counts. (Trial p.493 L.18-25, p.499 L.3-8, p.556 L.13-19, p.557 L.9-p.558 L.2); (10/22/18 Jury Trial Order)(App.32-33).

Swift subsequently filed a post-trial motion for new trial arguing, inter alia, the court erred in overruling Swift's trial objections to: the State's improper impeachment of its own witness Ityleonia Watson with her prior inconsistent statements; and the State's admission of Exhibits 85, 87, and 88 to improperly impeach its own witnesses (Ameshia Dixon and Ashanti Dixon) with prior inconsistent statements. (12/13/18 Mot.New Trial)(App.39-41). The State filed a resistance, and the matter was addressed but overruled by the court at the time of sentencing. (12/13/18 Order Setting Hearing; 12/19/18 Resist.)(App.42-44); (Sent. p.1 L.1-25, p.7 L.9-10, p.9 L.24-p.11 L.13, p.12 L.10-p.13 L.17).

Sentencing was held on October 20, 2018. At that time, the Court entered judgment against Swift for: Intimidation with a Dangerous Weapon With Intent, a Class C forcible felony in violation of Iowa Code section 708.6 (2017) (Count 1); Willful Injury Resulting in Serious Injury, a Class C forcible felony in violation of Iowa Code section 708.4(1) (2017) (Count 2); Possession of Marijuana, a Serious Misdemeanor in violation of Iowa Code section 124.401(5) (2017) (Count 3); and Attempt to Commit Murder, a Class B forcible felony in violation of Iowa Code section 707.11 (2017) (Count 4). The court sentenced Swift to 10 years each on Counts 1 and 2, six months on Count 3, and 25 years with a mandatory minimum of 70% before parole eligibility on Count 4. The court rant the terms concurrently. (12/20/18 Sent.Order)(App.45-47).

Swift filed a Notice of appeal on December 21, 2018. (NOA)(App.48).

Facts: On the morning of January 24, 2018, Ashanti Dixon, Derris Swift (known as "Debo"), and Ashanti's young

daughter Z. pulled up in Ashanti's white SUV and parked behind the Heatherton Avenue apartment Ashanti shared with her mother Ameshia Dixon. Ashanti and Swift were arguing. Ameshia Dixon (Ashanti's mother), Eziah Dixon (Ashanti's brother), and Ityleonia Watson (Eziah's girlfriend, known as "Tete") were inside Ameshia's apartment and witnessed the argument. Ameshia went out and brought Z. inside. Ashanti and Swift entered the apartment building and continued arguing by the back door to Ameshia's downstairs apartment unit. Ashanti then briefly entered Ameshia's apartment (without Swift) through the back door, then left out the front door of the apartment, got into her vehicle (which Swift was no longer in), and drove away up the street. Meanwhile, Swift had knocked on Ameshia's apartment door, asking for the keys to Ashanti's vehicle. Ameshia spoke with him through the closed door, telling him she'd give him the vehicle keys when he came up with the rest of whatever agreement he and Ashanti had as to the vehicle. Ameshia also told Swift Ashanti

had already left. Swift exited the building, walked away up the street, and did not return. (Trial p.75 L.18-p.86 L.2, p.90 L.10-p.91 L.4, p.95 L.13-p.98 L.25, p.99 L.8-14, p.99 L.20-p.100 L.20, p.101 L.17-p.105 L.7, p.109 L.19-25, p.298 L.15-p.300 L.19, p.302 L.7-p.307 L.15, p.308 L.1-3, p.326 L.10-p.331 L.4).

Ashanti testified that, after leaving Ameshia's apartment, she drove around for 10-15 minutes, and then returned to Ameshia's apartment to see if Swift was still there. She'd realized Swift had left his phone in her car and she wished to return it to him. Her family told her Swift wasn't there, so Ashanti got back in her car and drove around to look for him, figuring he was still going to be around the neighborhood. (Trial p.330 L.25-p.332 L.16, p.333 L.9-18). As she was driving on Heatherton in the direction of the Gas Depot gas station, someone dressed in all in black (black shoes, black pants, and black hooded sweatshirt or jacket) with their face mostly covered, whose race was black, suddenly stepped in

front of her vehicle. The person walked around to the side of the vehicle and then fired multiple shots into the passenger side of the vehicle. (Trial p.318 L.25-p.319 L.12, p.325 L.12-p.325 L.6, p.333 L.19-p.335 L.6). One of the shots hit Ashanti's right arm, and she stepped on the gas pedal and fled from the scene. (Trial p.321 L.5-13, p.325 L.4-p.326 L.9). She drove to a nearby gas station (the Gas Depot on Clark and West Central Park) where she asked someone to call 911. (Trial p.44 L.8-15, p.336 L.9-11, p.438 L.2-8). While waiting for law enforcement to arrive, she called her mother and told her she'd been shot and would be heading to the hospital. She then dropped her phone. (Trial p.86 L.4-p.88 L.5, p.335 L.14-22, p.336 L.9-11, p.347 L.7-11). When law enforcement arrived minutes later, Ashanti told Officer James Meier she'd been shot but that she did not know the person who had shot her. (Trial p.185 L.1-12, p.186 L.14-17, p.186 L.25-p.187 L.16, p.189 L.15-p.190 L.9, p.193 L.13-p.193 L.23, p.196 L.5-24).

An ambulance then arrived and Ashanti was transported to the hospital emergency room. (Trial p.184 L.103, p.193 L.15-23). The injury to her arm was determined not to be life-threatening but required surgery to relieve swelling and stabilize the bone with a plate and screws. (Trial p.278 L.11-13, p.257 L.10-16). Within an hour after her transport to the hospital, and prior to surgery, Detective Aric Robinson spoke with Ashanti in the emergency room. She denied knowing who shot her, providing the description of the person as dressed all in black with their hood up. (Trial p. 417 L.15-p.418 L.1, p.419 L.7-19, p.429 L.3-7, p.448 L.2-6, p.456 L.23-p.457 L.4, p.469 L.3-p.470 L.6, p.471 L.16-p.473 L.20).

Several others in the neighborhood had witnessed the shooting and provided descriptions of the shooter to law enforcement. One of these witnesses, Julia Lovel, testified "It's not unusual to hear stuff like that [the sound of gunshots] on our street." (Trial p.68 L.8-11). Lieutenant Kevin Smull also testified the neighborhood is part of the NETS program, a

crime prevention effort wherein law enforcement patrols and has community meetings to try to clean up the area. (Trial p.118 L.5-8, p.119 L.6-13).

Witness Julia Lovel observed the shooting out the back door of her home, and described the perpetrator as an African American, 5'6" to 6' tall, with a skinny build weighing about 120 pounds, wearing a black hoodie with the hood up, baggy blue jeans, and white sneakers. Because the person's hood was up, Lovel could not see the person's hair, could see their race only from their hand, and could not tell the person's gender. (Trial p.66 L.6-24, p.67 L.5-p.69 L.16, p.70 L.7-p.71 L.13, p.72 L.6-11). Crystal Moore, who had been walking behind the perpetrator on Heatherton just prior to the shooting, described the shooter as a black male in his 20s, about 5'5", skinny, wearing a black sweater or hoodie on top, and jeans with white rips or tears and a white design on them. (Trial p.364 L.4-p.368 L.24, p.370 L.3-p.372 L.12). Letter carrier Christine Baehre, who had been delivering mail in the

area, described the perpetrator as an African American man wearing jeans and a sweatshirt, with shoulder length cornrows dreads or braids that were flying as he ran, who was wearing a "horrif[ying]" expression of "[c]omplete madness", "insanity", and "anger" like she'd never seen before. (Trial p.52 L.10-23, p.57 L.13-p.62 L.5).

Five minutes after the shooting, Julia Lovel looked outside again and saw a black male with a red hoodie and medium length dreads briskly walking towards a wooded or thicketed area by Heatherton while pulling their pants up, possibly trying to avoid some sort of pothole. The first person she'd seen had been wearing a black sweatshirt whereas the second person had been wearing a red sweatshirt. She could not say whether they were the same person or two different people. (Trial p.72 L.12-p.74 L.22).

The first 911 call reporting the shots fired incident had been received at 11:44 a.m., and law enforcement arrived at the scene on Heatherton at 11:46 a.m. Law enforcement had

been dispatched on the shots fired call at 11:44 a.m., and arrived at the scene on Heatherton at 11:46 a.m. (Trial p.436 L.3-p.437 L.1, p.437 L.15-p.438 L.14, p.474 L.3-20). That block (the 3300 block of Heatherton) contained multiple apartment buildings. Behind the apartment buildings was a very large open harvested cornfield, the northern edge of which was bordered by a thicketed area. (Trial p.57 L.2-12, p.80 L.13-20, p.122 L.23-p.125 L.14, p.146 L.10-16, p.283 L.6-p.284 L.1); (Exh.77, 79)(Ex.App.6-7).

At approximately 11:58 a.m., Corporal Schneider observed a person in a red sweatshirt running through the wide open cornfield behind the apartment buildings on Heatherton. When initially observed, the person was at about the halfway point of the field proceeding north. The harvested cornfield was wet, muddy, and difficult to traverse on foot. Lieutenant Smull, Corporal Thoeming, and Officer Blocker followed and intercepted that person, ultimately identified as Ashanti's boyfriend Derris Swift. Swift was cooperative and

did not resist. Law enforcement believed he had not been aware officers were following until Lieutenant Smull called out to him once at the northern edge of the field. The latter part of the incident as captured on Officer Bocker's body camera was played for the jury at trail (Exh.80).[2] (Trial p.120 L.19-p.126 L.17, p.141 L.23-p.145 L.13, p.146 L.10-22, p.159 L.14-p.160 L.6, p.283 L.2-p.287 L.7, p.290 L.21-p.291 L.12, p.436 L.3-p.438 L.14, p.474 L.3-p.475 L.10).

Swift told law enforcement he had been walking to a nearby convenience store (Gas Depot) to get cigarette rolling papers when he heard shots and fled into the cornfield. He then decided to continue north through the cornfield to try to reach a different convenience store (Mother Hubbard's), since the Gas Depot had been in vicinity of the shots. (Trial p.128 L.16-22, p.161 L.14-p.163 L.20, p.174 L.17-22).

[2] The timestamps on the body-cam videos are not accurate. (Trial p.438 L.15-p.439 L.17).

Swift was wearing a red zip pullover or zip-up sweatshirt (with no hood) over a black t-shirt, stonewashed jeans, and black tennis shoes. His hair was in dreadlocks pulled up off of his shoulders into a ponytail. (Trial p.126 L.12-p.127 L.8, p.130 L.11-p.131 L.5, p.144 L.17-p.145 L.25, p.457 L.20-22); (Exh.81)(Ex.App.8). Law enforcement patted Swift down and located a small bag of marijuana (less than one gram) inside one of his pockets. (Trial p.133 L.16-10, p.237 L.11-19, p.241 L.5-p.242 L.6). No weapon was found on his person, nor had officers observed any weapon when following him. (Trial p.128 L.2-15, p.291 L.13-p.292 L.2).

Law enforcement acknowledged Swift's clothing and appearance at the time he was taken into custody did not coincide with what the shooter was reported to be wearing or the shooter's reported appearance. Julia Lovel had described the shooter as 120 pounds with a skinny build (Trial p.71 L.6-11), and Crystal Moore also described the shooter as "Skinny" (Trial p.21-p.371 L.5); but Swift was in excess of 200 or 220

pounds and not of slight build (Trial p.158 L.2-p.159 L.13, p.173 L.7-15). Swift also had his braids pulled back, but Christine Baehre had testified the shooter had braids or dreads that were hanging down and flopping around his face. (Trial p.59 L.13-14, p.155 L.17-p.156 L.23, p.173 L.7-15). Crystal Moore did testify the shooter's jeans had a white design that she indicated could have been consistent with the pants Swift wore in the photograph taken of him after being handcuffed and taken into custody (Exhibit 81); but Moore described the shooter's white design as being created by "rips" and "tears", while Swift's pants were stonewashed or tye-dyed rather than having rips and tears. (Trial p.121 L.6-12, p.127 L.3-8, p.368 L.5-24, p.457 L.20-22); (Exh.81)(Ex.App.8). Moreover, both Crystal Moore and Julia Lovel testified the shooter had white sneakers (Trial p.68 L.16-17, p.71 L.12-13, p.371 L.13-p.372 L.3), not black sneakers like Swift was wearing (Trial p.145 L.14-p.146 L.6). And Ashanti maintained the shooter wore all black including the pants (Trial p.334

L.14-16, p.341 L.25-p.342 L.1, p.456 L.20-p.457 L.4). Most significantly, however, Julia Lovel, Crystal Moore, and Ashanti Dixon, were all consistent in testifying the shooter wore a black hoodie, and Lovel and Ashanti were particularly clear the shooter had their hood up (Trial p.68 L.12-23, p.71 L.1-5, p.74 L.19-22, p.334 L.14-16, p.334 L.17-21, p.421 L.18-21, p.341 L.23-p.342 L.3, p.370 L.6-10, p.371 L.6-10, p.372 L.9-12, p.456 L.23-p.457 L.1); Swift however was wearing a red zip-up with no hood at all. (Trial p.127 L.3-8, p.144 L.17-p.145 L.2, p.145 L.23-25); (Exh.81)(App.Ex.8).

Law enforcement speculated Swift could have earlier worn a black hoodie but discarded it and a gun somewhere, and then put his hair up in a hair tie. (Trial p.145 L.1-p.146 L.6, p.166 L.1-10, p.168 L.19-p.169 L.16, p.457 L.2-18). Law enforcement repeatedly searched the area, including with the assistance of a K-9 unit, but did not find any weapon or discarded clothing. The searches encompassed the field, the thicket, the area around nearby apartment buildings, and

even any accessible areas inside the apartment buildings. Detective Robinson also went back over the area again later in the day after his shift. However no discarded gun or clothing was ever located. (Trial p.128 L.7-15, p.134 L.11-p.136 L.16, p.146 L.7-p.155 L.17, p.166 L.11-17, p.292 L.3-15, p.377 L.22-p.379 L.13, p.420 L.6-p.425 L.19, p.453 L.2-p.456 L.13). Further, in addition to locating Swift's cell phone still in Ashanti's vehicle (Trial p.461 L.19-p.462 L.2, p.476 L.4-7), photographs from the interior of Ashanti's vehicle depict a black sweatshirt or jacket had been left inside on the passenger seat[3] which Defense counsel urged was Swift's and (having been left in the vehicle) could not have been utilized during the shooting. (Trial p.452 L.8-p.453 L.1, p.536 L.4-13); (Exh.6, 21)(Ex.App.3-4).

[3] During the January 29, 2018 interview with Detective Robinson, Ashanti stated Swift had left his black hooded jacket and his phone inside her vehicle that morning. (Exh.88 at 11:22-11:30, 11:50-11:57).

Law enforcement spoke with Ameshia Dixon at the shooting scene on Heatherton on January 24. (Trial p.372 L.18-25, p.373 L.22-p.374 L.24). On the same date, officers also spoke with Eziah and Ityleonia at Ameshia's apartment, though Eziah had given the police a false name ("Monta Howard") at that time. At trial, Eziah explained he did not know why he'd provided a false name, but that he had been nervous. (Trial p.89 L.6-p.90 L.9).

At trial, Ashanti testified she did not know who shot her. She denied the shooter was Swift. She testified she could only say the shooter was wearing all black (black sweatshirt or jacket with a hood, black pants, and black shoes), and she could not see his face. She testified she was now certain, however, that the unidentified shooter was not Swift, as she would have recognized him even with his face covered up. (Trial p.334 L.14-p.335 L.8, p.340 L.18-24, p.341 L.20-p.343 L.14, p.350 L.5-21).

Ashanti testified that when she called her mom, she told her she'd been shot and was going to the hospital. She denied telling her mother "Debo shot me." (Trial p.335 L.14-22, p.336 L.9-11). Eziah and Ityleonia testified that after receiving the call from Ashanti, Ameshia told them only that Ashanti had been shot, not by whom. (Trial p.86 L.4-p.88 L.5, p.99 L.1-7, p.105 L.8-p.106 L.14).

Over defense counsel's hearsay objection, the State asked Ameshia what Ashanti had told her over the phone. Ameshia testified Ashanti said she'd been shot, but did not say who shot her. (Trial p.309 L.16-24). The State then sought to impeach Ameshia by referencing a prior inconsistent statement she'd made to Officer Pojar (captured on his body cam video) on January 24, stating Ashanti called and told her "Debo shot me." Defense counsel objected that the State was improperly trying to impeach its own witness, but the court overruled the objection. (Trial p.309 L.25-p.310 L.14). Ameshia then acknowledged that, in reviewing the body cam

video (shortly before testifying), she realized she'd actually told the officer Ashanti said "Debo shot me." Ameshia testified that, while her earlier statement to law enforcement had represented the phrase "Debo shot me" to be a quote from Ashanti, Ameshia had actually been incorrect to frame it that way. Ameshia testified that, in reality, the identification of Swift as the shooter had come not from Ashanti but, rather, from Ameshia's own assumption that Swift must have been the shooter in light of the fact that he and Ashanti had just had an argument that morning. (Trial p.310 L.15-p.311 L.25, p.312 L.13-p.314 L.16, p.315 L.15-p.317 L.18).

Though Ameshia acknowledged and explained her earlier inconsistent statement (telling officers Ashanti said "Debo shot me"), the State was permitted over a defense objection to play for the jury a two-minute body cam video clip capturing Ameshia's January 24 statements to law enforcement (Exhibit 85). The court concluded the video was admissible as an excited utterance (both as to Ameshia's statement to law

enforcement, and as to Ashanti's statement to Ameshia), and also as impeachment with prior inconsistent statements. (Trial p.352 L.20-p.363 L.4, p.372 L.18-23, p.374 L.22-p.377 L.9).

In her trial testimony, Ashanti initially denied ever telling anybody that Swift shot her. (Trial p.335 L.7-22, p.336 L.9-11). The State then sought to impeach her with statements she'd previously made during a recorded August 8, 2018 jail phone call from Calvin Davis (the father of her children). She acknowledged having listened to this call less than an hour earlier, and that she heard herself on this recording making the statements (regarding Swift) "Had he not shot me, he could have had me" and "Who the fuck tries to kill your girlfriend over some dumb shit?" (Trial p.336 L.12-p.339 L.25). On cross-examination, Ashanti explained that, by the time of her August 2018 phone conversation with Calvin Davis, she was aware Swift had been arrested and charged by law enforcement as being the person who had shot her. She

reiterated she did not know who shot her, but testified the fact that she knew law enforcement concluded it was Swift (and charged him accordingly) resulted in her own statement to that effect during the call with Calvin Davis. (Trial p.340 L.4-p.343 L.14).

On redirect examination, the State confronted Ashanti with another prior statement she provided during a January 29, 2018 interview with Detective Aric Robinson at the Davenport Police Department, during which Ameshia was also present. When asked if, in the description she gave to Detective Robinson, she'd stated "that everything was covered except for the eyes", Ashanti testified she did not remember saying that as "His face was still covered." Ashanti testified she also did not recall telling Detective Robinson "I don't have no doubt in my mind it was probably Debo"; she insisted, "I strictly remember saying that the person who shot me was in all black." (Trial p.347 L.5-p.349 L.25). On recross examination, Ashanti testified that, even if she had made such

statements to Detective Robinson, it was at a time she knew law enforcement had concluded Swift to be the perpetrator, having arrested and charged him. She testified that, from the date of the incident, she told officers she did not know who shot her, but that officers kept telling her it was Swift – beginning from the time she arrived at the hospital and was told by officer that they had Swift in custody. She testified she felt both suggestion and pressure to name Swift as the perpetrator, given that he was the person law enforcement concluded was responsible. (Trial p.349 L.2-p.350 L.21).

Subsequently, and over defense counsel's objection, the State introduced into evidence the August 9, 2018 recorded jail call between Calvin Davis and Ashanti Dixon (Exh.87), and a redacted version of the nearly half-hour video of Detective Robinson's January 29, 2018 interview with Ashanti in Ameshia's presence (Exh.88). The State sought and the court granted admission of those exhibits only as impeachment evidence (not as substantive evidence). (Trial p.380 L.2-15,

p.385 L.1-p.409 L.6, p.414 L.17-p.416 L.3, p.440 L.6-p.450 L.5; Sent. p.13 L.8-17).

Over a defense objection, the State also introduced into evidence a January 26, 2018 recorded jail call between Swift and Ashanti Dixon (Exh.86) as containing what could be construed by the jury to be admissions. (Trial p.380 L.2-p.384 L.25, p.408 L.13-p.409 L.6, p.412 L.4-p.414 L.16). Swift's statements on the jail call did not explicitly admit to or take responsibility for the shooting. Nor did anything on the call demonstrate that any potentially apologetic statements by Swift were about the *shooting* as distinct from merely the argument the couple had that morning (without which argument Ashanti would not then have been driving around looking for Swift at the time she'd been shot and injured).

Fourteen 9 mm shell casings were located at the shooting scene in the intersection of Heatherton Drive and Wooddale Drive. Subsequent analysis indicated that at least 13 of those casings were fired from a single gun, and that they all

originated from outside of the vehicle on the passenger side. An estimated seven of those shots ultimately struck Ashanti's vehicle. (Trial p.210 L.2-12, p.220 L.6-21, p.235 L.12-18, p.428 L.1-p.429 L.2, p.430 L.10-17, p.464 L.6-p.465 L.2). No fingerprints or DNA analysis tied the shell casings to Swift or particular person, nor to any particular firearm already logged in connection from other criminal investigations. (Trial p.243 L.22-p.251 L.7, p.265 L.7-p.467 L.10). No gun powder residue or other testing was performed to determine if Swift had recently fired a weapon. (Trial p.163 L.21-p.165 L.24, p.166 L.18-p.167 L.7, p.293 L.22-p.295 L.5, p.430 L.18-p.431 L.17, p.467 L.11-p.469 L.2). No weapon or purportedly discarded clothing was ever located with Swift or anywhere in the area. (Trial p.291 L.13-p.292 L.15, p.423 L.16-19). No testimony was provided that Swift was seen with a gun when observed by Ashanti and her family the morning before the shooting. Nor was any testimony provided that Swift generally carried a gun, that he owned a gun, or even that he had access to a gun.

Other relevant facts will be discussed below.

ARGUMENT

I. The district court erred in admitting the prior statements of Ityleonia Watson, Ameshia Dixon, and Ashanti Dixon as impeachment evidence.

A. Preservation of Error: Defense counsel filed a motion in limine seeking to prevent recitation of out-of-court hearsay statements, including hearsay received from witnesses during police interviews and hearsay within hearsay (such as Ameshia telling officers what Ashanti allegedly told her). The court reserved ruling until the matter arose at trial. (7/17/18 Def.Mot.Limine)(App.14-15); (Trial p.1 L.1-25, p.7 L.1-6, p.13 L.15-25, p.15 L.21-p.18 L.11).

During the course of trial, the prosecutor attempted to impeach the State's own witnesses (Ityleonia Watson, Ameshia Dixon, and Ashanti Dixon) by confronting them with their own prior inconsistent statements. Defense counsel objected to such efforts during Ityleonia Watson and Ameshia Dixon's testimony as improper impeachment of the State's own

witnesses, though counsel did not specifically reference "improper impeachment" as the basis for objection during Ashanti Dixon's testimony. See (Trial p.107 L.1-p.110 L.21) (Ityleonia Watson); (Trial p.309 L.16-p.310 L.14) (Ameshia Dixon); (Trial p.338 L.1-12, p.338 L.10-p.339 L.4, p.339 L.5-25) (Ashanti Dixon). Subsequently, when the State sought to admit video and audio recordings of the prior inconsistent statements of Ameshia and Ashanti Dixon (Exh.85, 87, and 88), defense counsel objected on grounds that the State was improperly seeking to impeach its own witnesses with prior inconsistent hearsay statements, and that the State was also improperly seeking to introduce extrinsic evidence of such prior hearsay statements. The court overruled all of the foregoing defense objections, and the State was permitted to thereby place before the jury the prior inconsistent statements of the State's own witnesses. (Trial p.352 L.20-p.363 L.10, p.372 L.18-23, p.375 L.22-p.377 L.2, p.379 L.18-p.380 L.15,

p.385 L.1-p.408 L.12, p.408 L.22-p.409 L.6, p.414 L.17-p.415 L.25, p.440 L.6-p.448 L.1, p.449 L.9-p.450 L.5).

As to the questions posed by the State to Ityleonia Watson and Ameshia Dixon as well as the State's admission of Exhibits 85, 87, and 88 into evidence, error was preserved by defense counsel's objections that the State was improperly impeaching its own witnesses.

Although counsel did not specifically reference "improper impeachment" as the basis for objection during Ashanti Dixon's testimony, Swift respectfully urges error was also adequately preserved as to the State's confrontation of Ashanti with prior statements during its questioning of Ashanti. Defense counsel "is not required to repeat objections to preserve his right on appeal when subsequent questions raise the same issue." State v. Kidd, 239 N.W.2d 860, 863 (Iowa 1976); State v. Padgett, 300 N.W.2d 145, 146 (Iowa 1981). "Repeated objections need not be made to the same class of evidence." Kidd, 239 N.W.2d at 863 (citing State v. Miller, 229

N.W.2d 762, 768 (Iowa 1975) and State v. Miller, 204 N.W.2d 834, 841 (Iowa 1973)); Padgett, 300 N.W.2d at 146. The court's overruling of defense counsel's improper impeachment challenges during the testimony of Ityleonia Watson and Ameshia Dixon served to "adequately inform defense counsel that additional objections on the same ground to testimony of the same kind would be to no avail." Padgett, 300 N.W.2d at 146. Error should be deemed preserved as to the prior inconsistent statements introduced during Ashanti Dixon's testimony as well.

Further, trial counsel apparently believed he'd also objected to the State's confronting Ashanti with prior inconsistent statements as improper impeachment of its own witness. See (Trial p.399 L.14-20) ("[DEFENSE COUNSEL]: As you recall, *over my objection she [the prosecutor] was trying to impeach her own witness [Ashanti Dixon]*. Basically read into the record all the comments that we see in this interview here. Asked her whether or not she had seen the interview an hour

or so before and asked her whether or not she had said those things.") (emphasis added). The State nor the court appeared to disagree with defense counsel's assertion that he had raised the improper impeachment objection during Ashanti's Dixon's testimony as well. Given that the court repeatedly considered and overruled defense counsel's improper impeachment objections to the State's confronting its own witnesses with their prior inconsistent statements, "the goals of our error-preservation rules have been met". State v. Mann, 602 N.W.2d 785, 790 (Iowa 1999). Error should thus be deemed preserved as to the prior inconsistent statements introduced during Ashanti Dixon's testimony as well.

Alternatively, to the extent this Court determines error was not sufficiently preserved as to any of the evidence challenged herein, Swift respectfully requests such challenge be considered under the Court's familiar ineffective assistance of counsel framework as discussed below in subsection 3. See State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983).

Alternatively, any such unpreserved issues should be considered under a plan error standard as discussed below in subsection 4. See United States v. Olano, 507 U.S. 725, 732-34 (1993).

B. Standard of Review: Hearsay violations, including claims that hearsay evidence was improperly admitted under the guise of impeachment are reviewed for errors at law. State v. Long, 628 N.W.2d 440, 447 (Iowa 2001); State v. Wixom, 599 N.W.2d 481, 484 (Iowa Ct. App. 1999) (Turecek violation). If preserved, such errors warrant relief except where harmless. Wixom, 599 N.W.2d at 484.

1). Violation of Turecek.

Defense counsel's repeated objection that the State was improperly impeaching its own witnesses preserved a claim of a Turecek violation. See e.g., State v. Turecek, 456 N.W.2d 219, 225 (Iowa 1990) ("The right given to the State *to impeach its own witnesses*... is to be used as a shield and not as a sword."); State v. Wixom, 599 N.W.2d 481, 485 (Iowa Ct. App.

1999) ("It was error for the trial court *to allow the State to impeach its own witness* when it knew, prior to calling [the witness], she was denying she made previous statements.") (emphasis added, citing Turecek, 456 N.W.2d at 225.). See also State v. Tracy, 482 N.W.2d 675, 679 (Iowa 1992) (hearsay objection properly preserved error on Turecek issue).

Generally, "Any party, including the party that called the witness, may attack the witness's credibility." Iowa R. Evid. 5.607. But "[t]he right given to the State to impeach its own witnesses" under Rule 5.607 is limited in that it must "be used as a shield and not as a sword." Turecek, 456 N.W.2d at 225. "The State is not entitled under rule [5.]607 to place a witness on the stand who is expected to give unfavorable testimony and then, in the guise of impeachment, offer evidence which is otherwise inadmissible." Id.

This limitation was violated in the present case. In calling Ityleoni Watson, Ameshia Dixon, and Ashanti Dixon, the State put on the stand witnesses "who [were] expected to

give unfavorable testimony", so it could then confront them with their otherwise inadmissible prior hearsay statements. Turecek, 456 N.W.2d at 225. See also Tracy, 482 N.W.2d at 679 (Turecek applies to witnesses "who it expects to give unfavorable testimony").

a). The witnesses were "expected to give unfavorable testimony":

The State was alerted to the fact that Ityleonia Watson, Ameshia Dixon, and Ashanti Dixon would not testify consistently with the minutes of testimony. Prior to trial, the prosecutor expressed that Ashanti Dixon was not returning her calls, and that Ashanti's family members who were listed as State's witnesses appeared to have been avoiding service of the State's subpoena. The prosecutor expressed concerns over whether the victim and her family were "now refusing to cooperate" and whether the case might "ultimately nee[d] to be tried without the cooperation of the victim and her family…." (7/19/18 Mot.Continue)(App.19-21).

At the commencement of trial, the prosecutor expressed continued uncertainty whether Ashanti and her family members (all listed as State's witnesses) would appear and testify. (Trial p.19 L.6-17). During the morning of the second day of trial evidence (October 17, 2018), Ashanti and Ameshia appeared at the County Attorney's office in response to the State's subpoenas. At that time the State alerted the court it wished to address scheduling issues caused thereby. (Trial p.252 L.4-6, p.266 L.13-19, p.267 L.13-20, p.269 L.9-24). The court subsequently provided for an extended lunch break to permit the parties to address necessary matters, and lunch recess was taken from 11:23 to 2:14 p.m. (Trial p.295 L.10-p.296 L.6, p.298 L.6-12). During this lunch recess, the prosecutor met with Ashanti and Ameshia Dixon and confronted both witnesses with recordings of their prior statements implicating Swift. (Trial p.298 L.15-17, p.309 L.25-p.310 L.2, p.310 L.16-25, p.311 L.13-16, p.313 L.21-p.314 L.3, p.316 L.21, p.317 L. 1-3, p.317 L.25-p.318 L.1,

p.323 L.15-25); (Trial p.336 L.12-p.339 L.25,) (Ashanti Dixon acknowledging that, less than an hour ago, she listened to recording of jail call from Calvin Davis); (Trial p.354 L.16-18) ("Having reviewed this video prior to taking the stand, Ameshia did say yesterday that she made these statements."); (Trial p.355 L.17-22) ("—in her testimony in response to examination by the prosecuting attorney Ameshia Dixon did admit that she had seen this video, I'm assuming it was this video, earlier in the day and she did see that she had said that."). During that lunch-hour meeting, the prosecutor also asked Ashanti if she would agree to show her scar to the jury, and Ashanti refused. (Trial p.323 L.15-25).

The foregoing demonstrates the State was alerted the witnesses would not testify consistent with the minutes. This is particularly true with regard to Ashanti and Ameshia Dixon, who the prosecutor had just met with over the lunch hour, confronting them with their prior recorded statements implicating Swift. As to all three witnesses, it is apparent the

State "expected [them] to give unfavorable testimony" but nevertheless placed them on the witness stand intending to impeach them with their prior statements. Turecek, 456 N.W.2d at 225. See also Tracy, 482 N.W.2d at 679.

b). The witnesses' prior statements were hearsay not otherwise admissible as substantive evidence:

At trial, the State proceeded to impeach these witnesses with their otherwise inadmissible prior hearsay statements. The Turecek limitation applies only where the prior statements are not otherwise admissible as substantive evidence under the rules governing hearsay.

As to prior the statements from the Calvin Davis phone call and the January 29 Detective Robinson interview, the court did not find that any hearsay exception applied. (Trial p.380 L.2-15, p.385 L.1-p.409 L.6, p.414 L.17-p.416 L.3, p.440 L.6-p.450 L.5; Sent. p.13 L.8-17). Nor did the State assert any hearsay exception would apply to Ityleonia's prior statements to Officer Johnson. (Trial p.107 L.1-p.110 L.21).

However, as to the prior statement of Ameshia telling Officer Pojar that Ashanti said "Debo shot me" (captured on Exhibit 85), the court found that both (a) Ashanti's statement to Ameshia, and (b) Ameshia's statement to the officers fell within the excited utterance exception to the hearsay rule. Swift respectfully urges the district court erred in holding that the excited utterance exception applied to that statement. (Trial p.352 L.20-p.363 L.4, p.372 L.18-23, p.374 L.22-p.377 L.9).

With regard to "double hearsay" statements, both levels of hearsay must be deemed non-hearsay or fall within an exception to the hearsay rule before admissibility will be found. State v. Sowder, 394 N.W.2d 368, 371 (Iowa 1986). An excited utterance is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement that it caused." Iowa R. Evid. 5.803(2) (2017). To be admissible under this exception, the statement must be "made as the spontaneous reaction to a startling event" rather

than as "the product of reflection or deliberation in response to a question." State v. Tejeda, 677 N.W.2d 744, 753 (Iowa 2004).

As noted by defense counsel below, Ameshia's demeanor when speaking with law enforcement (as captured on Officer Pojar's body cam video) was not excited but rather calm. (Trial p.359 L.8-21); (Exh.85). Further, Ameshia's statement to law enforcement was not spontaneous but, rather, in response to police questioning. (Trial p.357 L.6-15); (Exh.85 at 00:34-00:39) ("Q: Who'd she say shot her? A: She didn't say – She – Oh, she said Debo, she said Debo shot me."). It is true Ameshia made reference to herself as a "distraught parent" during her statement to officers. Specifically, Ameshia testified she was mistaken in her earlier recitation of Ashanti's statement and, in reality, had been speaking as a distraught parent making her own assumption of who the perpetrator was based on the fact that Ashanti and Swift had just argued that morning. (Trial p.310 L.18-22, p.312 l.15-p.314 L.16,

p.316 L.11-25). But the fact a person is distraught and dismayed that a loved one has been hurt does not equate with the conclusion they are under the stress of excitement when making the statement. A person whose loved one has been hurt may well be distraught or dismayed about that fact for the rest of their lives. But that doesn't mean any and all statements they ever make relating to the subject is automatically deemed to be "made while the declarant was under the stress of excitement" caused by the event. What is required is not just that they are distraught or dismayed, but that they are "under the stress of excitement". Iowa R. Evid. 5.803(2). Here, there is a video capturing Ameshia's demeanor at the time she spoke with law enforcement, which demonstrates that she was not "under the stress of excitement" required to fall within the excited utterance exception to the hearsay rule.

Admittedly, it may be a closer question whether the underlying statement from Ashanti to Ameshia would fall

within the excited utterance exception. There is no video or audio recording of that statement to objectively demonstrate Ashanti's demeanor at the time, and it is true that the statement would have been a short time after Ashanti was shot. But nevertheless, both Ashanti and Ameshia indicated that Ashanti was not under the stress of excitement at the time she was speaking with Ameshia. Ashanti had already driven away to the safety of the gas station, knew someone at the gas station had called the police, and knew that help was on the way at the time that she called her mother to say she'd been shot and was heading to the hospital. (Trial p.44 L.8-15, p.335 L.19-22, p.336 L.9-11, p.347 L.7-11, p.336 L.9-11, p.438 L.2-8). Ashanti described her emotional condition at the time of the phone call as "a little distraught." (Trial p.335 L.23-p.336 L.1). Ameshia said Ashanti was crying from the physical pain of her injury, but that she was otherwise calm and not emotional. (Trial p.308 L.10-16, p.309 L.11-15).

Defendant respectfully urges that neither Ashanti's statement to Ameshia, nor Ameshia's statement to law enforcement fell within the excited utterance exception to the hearsay rule. Nor was any hearsay exception asserted as to the remaining prior statements challenged herein. Turecek, in turn, prohibited the State from introducing otherwise inadmissible hearsay evidence under the guise of impeachment.

c). Prejudice:

Where preserved, Turecek errors require reversal except where harmless. Wixom, 599 N.W.2d at 484. The error was not harmless here.

The strength of the State's case rested on its claim that Ashanti had recognized Swift as her shooter, but had deliberately and falsely testified at trial that it was not Swift. The challenged prior statements of the witnesses were crucial to proceeding on this theory.

Absent Ashanti's purported recognition of Swift as the shooter, the State's case against Swift was not strong or overwhelming. There was no physical evidence tying Swift to the shooting. No gun was found on his person, no witness testified to observing him with a gun before or after the shooting, and no evidence was presented that Swift typically carried or even had access to a gun. No fingerprint or DNA evidence tied him to the shell casings. No gunshot residue or other forensic testing of his hands or clothing indicated he had recently fired a weapon. Defendant was located in the vicinity but explained that he had merely heard the shots and (like others in the area) fled in fear for his safety. Law enforcement acknowledged that Swift's clothing and appearance did not match the clothing and appearance of the shooter as described by various witnesses.

Law enforcement suggested Swift could have changed and discarded his clothes, discarded his gun, and put his hair up in the approximately 14 minutes that lapsed between the

shooting and the time Swift was seen by officers in the middle of the field. But no discarded clothing or gun was discovered despite law enforcement's repeated, extensive, and exhaustive search (including with a K-9 unit) of the field, the thicketed area, areas around the apartment buildings, and publicly accessible areas inside the apartment buildings.

Detective Robinson noted the shooting did not appear to be something that was premeditated or prepared for in advance but, rather, a spur-of-the-moment crime. (Trial p.476 L.16-p.477 L.3). This is thus not a crime for which the perpetrator would have been prepared with a change of clothes and a pre-planned hiding spot for the weapon and discarded clothing. There was also no evidence that Swift had someone in the area who would conceal the evidence for him (and Swift was not himself hiding in the care of any such person).

Any discarded evidence would thus have to have been left at a location accessible to the public and searchable by law enforcement. And given that one of the supposedly discarded

items was a gun, it can be inferred that if such an item was subsequently discovered by an unsuspecting member of the public, it would cause some alarm and likely be reported to law enforcement.

Officers suggested that the 14 minute lapse in time between when the shooting was reported (11:44) and the time when Swift was seen in the middle of the cornfield (11:58) would provide ample time for Swift to change, put up his hair, and discard the gun and clothing. (Trial p.437 L.15-24, p.456 L.4-10). But note Swift was already halfway through the cornfield when noticed by law enforcement. (Trial p.121 L.11-12, p.142 L.19-23). Law enforcement described the field as difficult and time-consuming to traverse. (Trial p.125 L.8-14, p.285 L.16-p.286 L.5). It would thus have taken some time (prior to the time law enforcement noticed him at approximately 11:58) for Swift to have traveled half the length of the field. Taking into account the time it would have taken for Swift to traverse that field, it is not reasonable to conclude

that he would have had time to flee the scene of the shooting, change his clothes (being fortunate enough to have for some reason been carrying extra or additional clothing at the time of the unplanned shooting, despite leaving other important belongings – like his phone and a black jacket or sweatshirt – in Ashanti's vehicle when unexpectedly separated from it) thought to tie his hair up, and discarded both the gun and his old clothing, all while numerous law enforcement and civilian witnesses were in the area on watchful alert for suspicious activity following recent gunshots.

The strength of the State's case rested on its claim that Ashanti had recognized Swift as her shooter but deliberately and falsely testified at trial that it was not Swift. The challenged prior statements were thus crucial to the State's case, and the improper admission of those statements was not harmless.

2). Even if no violation of Turecek, still improper impeachment as to Ityleonia Watson and the Admission of Exhibits 85, 87, and 88.

Even if there was no Turecek violation, the State's recitation of Ityleonia's prior statements, and the admission of Ashanti and Ameshia's prior taped statements (Exhibits 85, 87, and 88) after they'd already acknowledged the prior statements was improper. These uses of the witnesses' prior statements did not fall within the limits of proper impeachment. Defense counsel's objections concerning improper impeachment by the State preserved these errors. (Trial p.107 L.1-p.110 L.21, p.352 L.20-p.363 L.10, p.372 L.18-23, p.375 L.22-p.377 L.2, p.379 L.18-p.380 L.15, p.385 L.1-p.408 L.12, p.408 L.22-p.409 L.6, p.414 L.17-p.415 L.25, p.440 L.6-p.448 L.1, p.449 L.9-p.450 L.5). See State v. Gilmore, 259 N.W.2d 846, 852 (Iowa 1977) (discussing limits of proper impeachment).

a). Ityleonia Watson Statements:

During the State's direct examination, Ityleonia Watson testified that: she did not remember much about the argument Ashanti and Swift were having outside (Trial p.102 L.23-p.103

L.5, p.104 L.22-p.104 L.2); that she couldn't remember much of what happened after Z. was brought inside, other than that Swift and Ashanti had left and Ameshia later received a call that Ashanti was shot (Trial p.103 L.22-p.104 L.2, p.104 L.18-p.105 L.4, p.105 L.8-16); and she could not recall whether Ashanti had ever come back into the apartment (Trial p.105 L.5-7).

The State, over defense objections, then confronted Ityleonia with the specific substance of numerous prior statements she allegedly made to Officer Johnson as memorialized in Officer Johnson's written report. Ityleonia did not recall making the statements, but the prosecutor's questions recited them, placing before the jury that Ityleonia previously told officers: "that Ashanti was trying to get her daughter inside the apartment"; "that… Ashanti did get in the apartment"; that Swift "was actually kicking at the door to the apartment building"; "that Ashanti actually let Debo in the building" but "didn't let him into the door to the apartment";

that the argument between Ashanti and Swift was "about the keys to the car"; "that Ashanti wouldn't give up the keys because it was her car"; that they "told Debo that [they] were going to call the police on him" and "after that he left"; "that Debo left first and then Ashanti left"; "And then… that Debo came back asking for the keys"; "And that they told Debo that she had left" and "told him to go look around, the car is gone"; "And at that point Debo went around and saw that the vehicle was not there and walked back down Heatherton toward the east"; "And then it was shortly after that that Ameshia got the phone call that Ashanti had been shot." The prosecutor also asked "do you think your recollection of events would have been better on January 24th than they are today just 15 minutes after it happened", to which Ityleonia acknowledged "Probably." (Trial p.106 L.15-17, p.107 L.1-p.110 L.23).

The district court erred in overruling defense counsel's objection of improper impeachment. The witness's prior statements were not used for a proper impeachment purpose.

Rather, the statements were used for an improper hearsay purpose.

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 5.801(c). On the other hand, "A prior statement of a witness used to impeach the witness' testimony is not hearsay when the statement is not offered to prove the truth of the statement, but rather to prove the fact that the witness made a statement at a previous time." State v. Sowder, 394 N.W.2d 368, 370 (Iowa 1986).

In the present case the prosecutor improperly recited, in detail, the witness's prior out-of-court statements when questioning the witness. In detailing the content of the prior statements, the State attempted to use the prior statements for the truth of the matter asserted. See Id. at 371. ("By bringing out the specific statements made, not merely focusing on the fact a conversation occurred, the State attempted to

establish the truth of the facts asserted in the conversation," exceeding mere impeachment.). The witness denied making the statements, and no other witness testified that she had in fact made the prior statements recited by the prosecutor in her questioning. But by reciting the specific content of the prior hearsay statements in the questions themselves, the prosecutor improperly placed those prior statements before the jury. Once recited and detailed in the prosecutor's questions, it did not much matter what the witness said in response; whether she acknowledged or denied the prior statements, they were nevertheless placed before the jurors and considered by them.

It is well-established that:

> The State is not permitted by means of the insinuation or innuendo of incompetent and improper questions to plant in the minds of the jurors a prejudicial belief in the existence of evidence which is otherwise not admissible and thereby prevent the defendant from having a fair trial.

State v. Carey, 165 N.W.2d 27, 32 (Iowa 1969)(quoting State v. Haney, 18 N.W.2d 315, 317 (Minn. 1945)). "An attorney should not suggest in his questions facts that may be prejudicial unless there is or will be evidence of such facts." Carey, 165 N.W.2d at 33 (other citation omitted). The prosecutor's questions placed before the jury otherwise inadmissible "backdoor hearsay". State v. Huser, 894 N.W.2d 472, 497 (Iowa 2017). "While the form of the question and answer does not produce hearsay in the classic or textbook sense," in that the witness denied the prior statements, "it is nevertheless designed to circumvent the hearsay rule and present the jury with information from unsworn, out-of-court sources." Schaffer v. State, 721 S.W.2d 594, 597 (Tex. Ct. App. 1986).

Further, impeachment by confronting a witness with prior inconsistent statements is not authorized where the witness at trial merely fails to *remember the underlying facts* of the incident, as distinct from testifying the incident occurred

in a manner different and contrary to the way she previously said it occurred. Gilmore, 259 N.W.2d at 852. In such a case, "[t]he State [is] free to try to make her admit she remembered the underlying facts… but [is] not free to read into evidence the prior statement." Id. at 857.

Here, because the witness's trial testimony was that she could not remember the underlying facts after Z. was brought inside (and not that the underlying facts had occurred in a manner differently than she'd stated in her prior statement), "[t]he State was free to try to make her admit she remembered the underlying facts… but was not free to read into evidence the prior statement." Id.

The error was not harmless. The strength of the State's case rested on its claim that Ashanti had recognized Swift as her shooter, but had deliberately and falsely testified at trial that it was not Swift. The suggestion that Ashanti had deliberately changed her story to protect Swift was bolstered by the State's implication that her family members (Ameshia

and Ityleonia) had similarly done so. As to Ityleonia, this implication was created by confronting Ityleonia with (and thereby placing before the jury) her inadmissible prior hearsay statements reciting damaging details left out of her trial testimony.

Further, Ityleonia testified (as had Eziah), that after receiving the phone call from Ashanti, Ameshia told her only that Ashanti had been shot but not by whom. (Trial p.105 L.8-14). The State's improper impeachment of Ityleonia with inadmissible prior hearsay statements improperly undermined Ityleonia corroboration as to this important point of contention.

In light of the prejudicial impact of the erroneously admitted evidence, Swift must be afforded a new trial on Counts 1, 2, and 4.

b). Ashanti and Ameshia Dixon's statements as captured on Exhibits 85, 87, and 88.

In her trial testimony, Ameshia acknowledged that she had previously told officers on January 24 that Ashanti said

"Debo shot me." (Trial p.310 L.25-p.311 L.25, p.312 L.13-p.314 L.16, p.315 L.13-p.317 L.18). Further, in her trial testimony, Ashanti acknowledged that she had previously told Calvin Davis during a jail call, in reference to Swift, "Had he not shot me, he could have had me" and "Who the fuck tries to kill your girlfriend over some dumb shit?" (Trial p.336 L.12-p.339 L.25). Given that the witnesses' trial testimony acknowledged making these prior inconsistent statements, there was no contrary testimonial assertion to impeach with the extrinsic evidence of those statements (the Exhibit 85 and 87 recordings). See State v. Berry, 549 N.W.2d 316, 319 (Iowa Ct. App. 1996) ("If the witness admits to making the prior statement" extrinsic evidence is not necessary to impeach); State v. Wolfe, 316 N.W.2d 420, 422 (1981) (once the witness "admits making the prior inconsistent statement, then that prior statement is not admissible."). Because the purportedly impeaching prior inconsistent statements were already acknowledged by Ameshia and Ashanti, the inconsistency was

already placed before the jury. At that point, playing the actual video for the jury served only to heighten the danger that the prior inconsistent statements (both those acknowledged during the witnesses' testimony and those recited again in the recordings) would have been treated by the jury as *substantive evidence* rather than only *impeaching evidence*. See Berry, 549 N.W.2d at 318 (impeachment evidence is not admissible to prove its truth but only "to demonstrate the witness is not reliable.").

As to the Exhibit 88 recorded interview, Ashanti initially did not remember telling Detective Robinson "that everything was covered except for the eyes", saying instead at trial that "His face was still covered." Ashanti also initially did not recall telling Detective Robinson "I don't have no doubt in my mind it was probably Debo"; she insisted, "I strictly remember saying that the person who shot me was in all black." (Trial p.347 L.5-p.349 L.25). However, on cross-examination, she acknowledged that even if she had made such statements to

Detective Robinson, it was at a time she knew law enforcement had concluded Swift to be the perpetrator, having arrested and charged him. (Trial p.349 L.2-p.350 L.21). Defendant urges that this was a sufficient acknowledgement of the prior statements, so that no further extrinsic evidence of the prior statement (Exhibit 88) was properly admissible for impeachment purposes. The inconsistency was already placed before the jury, and the fact that the witness sought to explain such inconsistency does not amount to a denial. See Berry, 549 N.W.2d at 319 (once acknowledging the prior statement, the witness is allowed to explain the inconsistency).

However, even if this Court concludes Ashanti did not sufficiently acknowledge or admit making the prior inconsistent statements relating to her January 29 interview (that "everything was covered except for the eyes" and "I don't have no doubt in my mind it was probably Debo"), the proper course was to have Detective Robinson testify that these particular statements were made – not to place into the record

the entire nearly 30-minute long videotaped interview during which both Ashanti and Ameshia made numerous other statements. This alternative course was specifically urged by defense counsel below, but denied by the court. (Trial p.393 L.L.19-p.394 L.11, p.401 L.8-11, p.402 L.19-p.402 L.1).

The Exhibit 88 recorded interview included a number of statements (other than the above-quoted impeaching statements) that were not otherwise in the record.

The video contained statements by Detective Robinson purporting that that Ashanti had earlier identified Swift as the shooter when he spoke with her at the hospital on the day of the shooting prior to surgery. (Exh.88 at 14:13-14:26).[4] The

[4] During subsequent cross-examination by the Defense, Detective Robinson acknowledged that Ashanti told him at the hospital that she did not recognize her shooter. In response, Detective Robinson "explained to [Ashanti] that we had Defendant in custody and asked her what he did." He also "presented Ashanti with the information" that her mother (Ameshia) told officers at the scene that Ashanti called from the Gas Depot and told her "Debo shot me". Ashanti responded that "the only thing she said was she told her mother that she was shot, she claims she never told her mother that Swift was the person responsible for the

State relied on this aspect of the video, in particular, during its closing argument. (Trial p.554 L.10-16).

The video also contained additional statements and speculation concerning Swift's clothing, that was not otherwise in the record. Detective Robinson states on the video that when Ashanti identified Swift on Wednesday (the day of the shooting) Ashanti hadn't said mentioned his face being covered up, and he asked if she knows what he was covered up with. Ashanti responded that "He has another black jacket that he bought" and she "guess[ed]" that's what he could have had to cover his face up. Detective Swift asked "So that was the black jacket that was around his red sweatshirt" and Ashanti responded "I'm guessing so, because it wasn't the one in the car, because he had another black jacket and his phone in the car" that got left behind with her. (Exh.88 at 11:22-

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shooting." Again, "At this point of the interview, Ashanti said she never saw Swift with a gun and never saw him shoot her." (Trial p.469 L.3-473 L.20).

11:57). Later on there are statements by Ashanti and her mother referencing a hooded jacket that zips all the way up and covers the area above the mouth and below the nose, like "ninja hood" jacket, a "ski mask" jacket, or something that is worn to go hunting out in the woods. (Exh.88 at 15:27-15:39, 18:51-19:25). These unclear and speculative statements by Ashanti and Ameshia concerning clothing were not otherwise in the record before the jury. They were heard by the jury in Exhibit 88, which was admitted only as impeachment evidence and not as substantive evidence. But the fact that this exhibit contained so much additional information *not otherwise in the record* rendered it an inevitability that the jury would have viewed and treated the prior statements as substantive evidence.

Additionally, Ashanti and Ameshia can be heard on the video construing Swift's statements on the January 26 jail call as being apologetic but careful to avoid self-incrimination. (Exh.88 at 15:52-16:36). Swift's statements on the jail call

itself (Exhibit 86) are not inherently or explicitly admissions by Swift; but when colored by such a construction by Ashanti and Ameshia in the Exhibit 88 video, the jury would perceive or construe Swift's jail call in that way as well.

The video also contains a reference by Ameshia, following Ashanti's statement that she doesn't know why he might perpetrate the shooting, speculating that Swift was on drugs. (Ex.88 at 22:14-22:28). While it was certainly in record evidence that Swift was located with a small amount of marijuana in his pocket, given the fact that marijuana is not typically viewed as triggering violent outbursts, the jury would likely have inferred Swift's involvement in other drug use.

Finally, the Exhibit 88 video also includes statements from Ameshia characterizing Swift's demeanor that morning as "a different type of mad" and "a furious mad" like "at that precipice at that moment just when you're furious at that moment, that's the kind of look he had in his eyes, you know like when he was talking" it "just looked like he wasn't

himself" during the argument that morning. (Exh.88 at 22:26-23:00). This characterization of Swift was not otherwise in evidence at trial but would likely link up Swift in the jury's mind with witness Christine Baehre's testimony that the shooter wearing a "horrif[ying]" expression of "[c]omplete madness", "insanity", and "anger" like she'd never seen before. (Trial p.52 L.10-23, p.57 L.13-p.62 L.5).

For the reasons discussed above, even if there was no Turecek violation, the introduction of the Exhibit 85, 87, and 88 recordings of Ashanti and Ameshia's prior statements was not within the scope of proper impeachment. They should not have been admitted into evidence and placed before the jury. The sheer volume of prior hearsay statements placed before the jury thereby rendered it inevitable that the jury would view the prior statements as substantive evidence and not only for the limited impeachment purpose of evaluating witness credibility. Swift must be afforded a new trial on counts 1, 2, and 4.

3). Ineffective Assistance of Counsel.

A claim of ineffective assistance of counsel is an exception to the general rule of error preservation. State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982). A criminal defendant is entitled to effective assistance of counsel. U.S. Const. amend VI; Iowa Const. art. I, §10; Strickland v. Washington, 466 U.S. 668, 694 (1984); State v. Ambrose, 861 N.W.2d 550, 556 (Iowa 2015). Constitutional claims of ineffective assistance of counsel are reviewed de novo. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984). To establish an ineffective assistance claim, a defendant must demonstrate both (1) a breach of essential duty, and (2) prejudice in the form of a reasonable probability of a different result sufficient to undermine confidence in the outcome. State v. Carrillo, 597 N.W.2d 497, 500 (Iowa 1999); Strickland, 466 U.S. at 694.

a). If error was not preserved as to the improper impeachment evidence challenged above, counsel rendered ineffective assistance of counsel

To the extent counsel failed to properly preserve error concerning the above-referenced errors relating to improper impeachment of the witnesses with their prior statements, Swift respectfully urges that such failure amounted to ineffective assistance of counsel.

Counsel has the duty to know the applicable law and to protect the defendant from conviction under a mistaken application of the law. State v. Hopkins, 576 N.W.2d 374, 379-80 (Iowa 1998). Trial counsel also has a duty to protect defendant from conviction under improper or inadmissible evidence, including hearsay statements improperly admitted as impeachment evidence. State v. Tracy, 482 N.W.2d 675 (Iowa 1992).

For the reasons argued above, the evidentiary challenges asserted herein were meritorious and counsel had a duty to properly object and obtain exclusion of the improper evidence. Further, for the reasons argued above, Swift was prejudiced by the improper admission and use of this evidence. The degree

of prejudice generated by the improperly admitted evidence satisfies even the heightened Strickland standard. There is at least a reasonable probability that, but for counsel's failure to properly procure exclusion of the challenged evidence, the outcome of the trial would have been different. Confidence in the outcome is undermined, and Swift should be afforded a new trial on Counts 1, 2, and 4. Gering v. State, 382 N.W.2d 151, 153-54 (Iowa 1986).

b). Ineffective Assistance as to Limiting Instruction for Impeachment Evidence

It is well-established that "impeachment evidence" may be used "only for the purpose of undermining the witness' credibility, and not as substantive evidence." State v. Belken, 633 N.W.2d 786, 794 (Iowa 2001). That is, where a prior statement is admitted only for an impeachment purpose, it cannot be used as evidence of "the truth of the matter asserted" in the prior statements. Brooks v. Holtz, 661 N.W.2d 526, 530-31 (Iowa 2003). See also State v. Berry, 549 N.W.2d 316, 318 (Iowa Ct. App. 1996).

The jury was provided the following instruction concerning the use of the prior unsworn statements for impeachment, modeled after Iowa Criminal Jury Instruction 200.42 (Contrary Statements – Non-Party – Witness Not Under Oath):

> You have heard evidence claiming Ashanti Dixon, Ameshia Dixon and Eziah Dixon made statements before this trial while not under oath which were inconsistent with what the witnesses said in this trial.
>
> Because the witness did not make the earlier statements under oath, you may use them only to help you decide if you believe the witnesses.
>
> Decide if the earlier statements were made and whether they were inconsistent with testimony given at trial. You may disregard all or any part of the testimony if you find the statements were made and they were inconsistent with the testimony given at trial, but you are not required to do so.
>
> Do not disregard the testimony if other evidence you believe supports it, or if you believe it for any other reason.

(Jury Instruction 15). See also *Iowa State Bar Ass'n, Iowa Criminal Jury Instruction* No. 200.42 (2018). Defense counsel did not object or request different language in this instruction. (Trial p.494 L.1-12, p.497 L.5-13).

Defendant respectfully urges that the foregoing language would not adequately inform a jury concerning the limitations placed on the impeachment evidence admitted in this case. The instruction advises the jury that it may "use [the prior statements] only to help you decide if you believe the witnesses." But this does not convey or inform the jury that they cannot use the evidence *as substantive evidence*, or as *evidence of the truth of the matter asserted in the prior statements*. The instruction should more explicitly advise that: "Any prior inconsistent statements made by a witness can be considered only to evaluate the credibility of the witness. The prior statements cannot be treated as evidence of the truth of the matter asserted in the statement, or as themselves substantive evidence supporting the elements of the offense." These principles are well-established in Iowa Law. See e.g., Belken, 633 N.W.2d at 794; Brooks, 661 N.W.2d at 530-31; Berry, 549 N.W.2d at 318.

Uniform instructions are not "preapproved" by the Iowa Supreme Court. See State v. Robinson, 859 N.W.2d 464, 490 (Iowa 2015) (Wiggins, J., dissenting) ("we can never delegate the formulation of the law to the instruction committee"). Because the jury instruction herein did not adequately convey the distinction between impeachment and substantive evidence and the limited use to which impeachment evidence could be put, trial counsel was ineffective for failing to object to the instruction.

Swift was prejudiced by his attorney's failure. In the present case, numerous prior out-of-court statements were placed before the jury for impeachment purposes, but the jury was not adequately informed of the limited use it could put such statements to. A number of the prior statements, moreover, related specifically to the matter of whether Ashanti had recognized her shooter as Swift. Particularly to the prior statements of Ashanti and Ameshia identifying Swift as the shooter, the above instruction would do little to inform the

jury *that they cannot use such prior statements for the truth of the matter asserted* – that Swift was the shooter. As discussed above, the State's case rested substantially on Ashanti's purported recognition of Swift as the shooter based on the prior out-of-court statements. There is a reasonable probability that, but for counsel's failure to procure a jury instruction properly advising the jury of the limitations placed on prior statements, the jury would have found the State failed to prove Swift's identity as the shooter. Confidence in the outcome is undermined, and a new trial should be granted on Counts 1, 2, and 4.

c). Effect of Senate File 589

i). Not Retroactive

Defendant notes that recently passed Senate File 589 seeks to amend Iowa Code section 814.7 to disallow resolution of ineffective assistance of counsel claims on direct appeal. S.F. 589 Div. V § 31, available at https://www.legis.iowa.gov/legislation/BillBook?ga=88&ba=sf589. That bill, however,

did not take effect until July 1, 2019. See Id. (approved May 16, 2019); Iowa Const. art. III, § 26 (legislation with no express effective date becomes effective on July 1 following its passage); Iowa Code § 3.7(1) (2017) (same). A statute that impacts substantive rights will be applied prospectively only, and even if a statute is deemed procedural our courts have "refused to apply a statute retrospectively when the statute eliminates or limits a remedy." Iowa Beta Chapter of Phi Delta Theta Fraternity v. State, 763 N.W.2d 250, 266-67 (Iowa 2009). Given that the instant appeal was commenced (by the filing of a notice of appeal) before Senate File 589 went into effect, the general savings provision of the Iowa Code renders such amendment inapplicable to this case. Iowa Code § 4.13 (2017).

In depriving Swift of his ability to remedy the constitutional ineffectiveness of his trial attorney on direct appeal despite the fact that the existing appellate record fully establishes his claim for relief, Senate File 589 impacts Swift's

substantive rights and deprives him of a remedy available under the pre-amended version of Iowa Code section 814.7. It thus must be given prospective application and falls within the general savings provision of the Iowa Code. Iowa Beta Chapter, 763 N.W.2d at 266-67; Iowa Code § 4.13 (2017). As such, Senate File 589 has no impact upon the instant case, including any ineffective assistance of counsel claims raised herein.

ii. Unconstitutional

Alternatively, if Senate File 589 does apply to his direct appeal, Swift respectfully urges that it should be invalidated as unconstitutional.

Separation of Powers. The separation-of-powers doctrine prohibits one branch of government from impairing another branch in "the performance of its constitutional duties." Planned Parenthood of the Heartland v. Reynolds ex rel. State, 915 N.W.2d 206, 212 (Iowa 2018). All judicial power in Iowa is vested in the Iowa Supreme Court and its

inferior courts. Iowa Const. art. V §§ 1, 4, 6; Franklin v. Bonner, 207 N.W. 778, 779 (1926).

Although Iowa Code section 602.4102 contemplates the Iowa Supreme Court handling criminal appeals, Senate File 589 would make constitutional claims of ineffective assistance of counsel unreviewable on direct appeal *even where the record is adequate to do so*. Iowa Code § 602.4102(2) (2017). But the Iowa Supreme Court has the inherent jurisdiction and duty to invalidate state actions that conflict with the state and federal constitutions. See Varnum v. Brien, 763 N.W.2d 862, 875-76 (Iowa 2009); Planned Parenthood, 915 N.W.2d at 212-13. By removing consideration of ineffective assistance claims – specifically – from the realm direct appeal even where the direct appeal record establishes the violation, Senate File 589 intrudes on Iowa appellate courts' independent role in interpreting the constitution and protecting Iowans' constitutional rights.

Equal Protection. Both the federal and state constitutions provide for equal protection under the law. U.S. Const. amend. XIV; Iowa Const. art. I § 6. Senate File 589 violates equal protection by treating persons who are similarly situated with respect to the purposes of the law differently. State v. Doe, 927 N.W.2d 656, 662 (May 10, 2019); Varnum v. Brien, 763 N.W.2d 862, 883 (Iowa 2009).

Swift asserts there is a group of criminal defendants who have been convicted based upon trial errors as shown by the record made in the district court. Within this group, Senate File 589 has singled out for disparate treatment those wrongly-convicted defendants who assert a violation of their right to effective assistance of counsel. Strict scrutiny should apply because Swift's claim of disparate treatment involves the deprivation of a fundamental right – the right to effective counsel. Kimmelman v. Morrison, 477 U.S. 365, 374 (1986); U.S. v. Cronic, 466 U.S. 648, 654 (1984).

Regardless of whether this Court considers Swift's claim under strict scrutiny or rational scrutiny, however, Senate File 589 cannot stand. The stated purpose of the bill is to reduce "waste" caused by "frivolous appeals" in the criminal justice system. Senate Video 2019-03-28 at 1:49:10-1:49:20 , statements of Senator Dawson, available at https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20190328125735925&dt=2019-03-28&offset=3054&bill=SF%20589&status=i. But "[p]reserving ineffective assistance of counsel claims that can be resolved on direct appeal wastes time and resources." State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004). To the extent Senate File 589 prevents appellate courts from ruling upon claims of ineffective assistance even where the existing record establishes both the breach and prejudice prongs of the claim, the bill is neither narrowly tailored nor rationally related to its legislative purpose – rather it directly contravenes it.

Senate File 589 denies Swift equal protection under the law and should not be applied to his appeal.

Due Process and Right to Effective Counsel on Appeal. Both the Iowa Constitution and the United States Constitution ensure criminal defendants are accorded due process of law. U.S. Const. amend XIV; Iowa Const. art. I § 9. The right to counsel is a fundamental right made obligatory on the states. Kimmelman v. Morrison, 477 U.S. 365, 374 (1986); Evitts v. Lucey, 469 U.S. 387, 394 (1985). The right to counsel means the right to effective counsel. U.S. v. Cronic, 466 U.S. 648, 654 (1984). This guarantee extends to the first appeal as of right. Evitts, 469 U.S. at 396. "A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Id.

Swift contends Senate File 589 violates his right to counsel on appeal and, therefore his right to due process, by interfering with appellate counsel's ability to effectively

represent him. Senate File 589 purports to prohibit an appellate court from deciding his claims of ineffective assistance of counsel on direct appeal even though the direct appeal record is adequate to do so. Where a state provides an appeal as of right but refuses to allow a defendant a fair opportunity to obtain an adjudication on the merits of his appeal, the "right" to appeal does not comport with due process. Evitts, 469 U.S. at 405.

> A system of appeal as of right is established precisely to assure that only those who are validly convicted have their freedom drastically curtailed. A State may not extinguish this right because another right of the appellant-the right to effective assistance of counsel-has been violated.

Id. at 399-400.

Senate File 589 essentially extinguishes Swift's ability to challenge the trial errors resulting in his conviction because his right to effective counsel had been violated below. Accordingly, Senate File 589 denies Swift due process and should not be applied to his appeal.

4). Plain Error.

To the extent relief is not granted on the above issues as preserved error or under an ineffective assistance of counsel rubric, Defendant urges that this Court should adopt plain error review.

> In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.

United States v. Atkinson, 297 U.S. 157, 160 (1936). Plain error review has been recognized by federal courts since 1896. Jon M. Woodruff, Note, Plain Error by Another Name: Are Ineffective Assistance of Counsel Claims a Suitable Alternative to Plain Error Review in Iowa?, 102 Iowa L. Rev. 1811, 1815 (May 2017). Further, the majority of jurisdictions recognize the authority of an appellate court to reverse on the basis of plain error for unpreserved errors. Wayne R. LaFave et al., 7 Criminal Procedure, § 27.5(d) (4th ed. November 2018 update). See generally Tory A. Weigand, Raise or Lose: Appellate

Discretion and Principled Decision-Making, 17 Suffolk J. Trial & App. Advoc. 179, 199-241 (2012).

The foundation of the plain error doctrine was articulated in Wiborg v. United States, wherein the United States Supreme Court reasoned that "although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it." Wiborg, 163 U.S. 632, 658 (1896) (addressing claim of insufficient evidence not raised in trial court). The federal plain error doctrine articulated in Wiborg has since been codified in Federal Rule of Criminal Procedure 52. Fed. R. Crim. P. 52 (2019) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."). But the advisory committee note accompanying Rule 52 explicitly states that such Rule was merely a codification of already-existing law, citing to Wiborg. Id. (note to subdivision (b)).

The US Supreme Court utilizes a three-part standard for plain error review, requiring that: (1) there must be an error, meaning a "[d]eviation from a legal rule", which has not been affirmatively waived; (2) the error must be plain, meaning clear or obvious; and (3) the error must affect substantial rights, meaning in most cases that the defendant has the burden of proving the error was prejudicial in that it affected the outcome of the district court proceedings. United States v. Olano, 507 U.S. 725, 732-34 (1993).

Iowa courts have not, as yet, adopted the plain error doctrine. See e.g. State v. Rutledge, 600 N.W.2d 324, 325 (Iowa 1999); State v. McCright, 569 N.W.2d 605, 607 (Iowa 1997). However, some of our jurists have recognized that the ineffective assistance of counsel doctrine sometimes functions as a substitute for plain error review of unpreserved claims in Iowa. See e.g., Rhoads v. State, 848 N.W.2d 22, 33 (Iowa 2014) (Mansfield, J., specially concurring, joined by Waterman, J.); State v. Sahinovic, No. 15-0737, 2016 WL

1683039, at *2 (Iowa Ct. App. April 27, 2016) (McDonald, J., concurring).

Our Iowa Supreme Court has previously adopted exceptions to the usual error preservation rules, and it should do so again to recognize the plain error doctrine. See State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982) (ineffective assistance); State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994) (void, illegal or procedurally defective sentences). Indeed, there is a substantial basis for plain error review in Iowa law, as Iowa Code section 814.20 gives the appellate courts broad authority to affirm, modify, or reverse a judgment, order a new trial, or reduce a defendant's punishment. Iowa Code § 814.20 (2017). It was this provision the Iowa Supreme Court relied upon when it corrected an illegal sentence without the benefit of a motion to do so in the district court. See State v. Young, 292 N.W.2d 432, 435 (Iowa 1980). Further, Article V Section 4 of the Iowa Constitution vests in the Iowa Supreme Court inherent supervisory

authority over lower courts, which permits the Court to implement necessary procedures protect the rights of criminal defendants. Iowa Const. art V, § 4; State v. Dahl, 874 N.W.2d 348 (Iowa 2016).

Plain error review is applicable to evidentiary errors. 12 Fed. Proc., L. Ed. § 33:21, *When may error be predicated upon an evidentiary ruling - Notice of plain error*. Plain error review is also applicable to instructional errors. Jones v. United States, 527 U.S. 373, 389 (1999)

For the reasons discussed above, the improper admission of the challenged evidence and the improper jury instruction on impeachment were errors, plain on their face, and affected defendant's substantial rights in that they affected the outcome of the trial proceeding below. If relief is not granted as preserved error or under an ineffective assistance of counsel framework, relief should nevertheless be afforded as plain error.

D. <u>Conclusion</u>: Defendant-Appellant Swift respectfully requests a new trial on Counts 1, 2 and 4.

CONDITIONAL REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument if argument may be of assistance to the court.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $4.65 and that amount has been paid in full by the Office of the Appellate Defender.

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/s/ Vidhya K. Reddy Dated: 12/27/19

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