IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. JERRY LYNN BURNS, Defendant-Appellant.	Supreme Court No. 20-1150

APPEAL FROM THE IOWA DISTRICT COURT
FOR LINN COUNTY
HONORABLE FAE E. HOOVER

APPELLANT'S FINAL REPLY BRIEF

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that this Proof Reply Brief was filed via EDMS on December 6, 2021, and that a copy of this document will be served this date by U.S. Mail upon any counsel of record or unrepresented parties in this action not served by the electronic filing system.

The undersigned further certifies that on this same date he served this Proof Reply Brief upon Defendant-Appellant by U.S. Mail, proper postage prepaid, addressed to Jerry L. Burns, No. 6931989, Anamosa State Penitentiary, 406 N. High Street, Anamosa, IA 52205.

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ARGUMENT

I. The warrantless search of Defendant's genetic material was unreasonable and violated the Fourth Amendment.

A. The rationale of *Greenwood* is not applicable to unavoidably shed DNA.

The State maintains that *Greenwood* "forecloses" Defendant's argument that by extracting Defendant's DNA from the straw, the government performed a search under the Fourth Amendment for which a warrant was required. (State's Br. at p. 34). The State cites two other Supreme Court cases—from 1924 and 1960—for the proposition that a person does not retain any privacy interest in DNA left behind on publicly discarded items. (State's Br. at pp. 34–35).

The short response to the State's argument is that *Greenwood* does not address a defendant's right to privacy in unavoidably shed DNA. The issue in *Greenwood* was whether the Fourth Amendment prohibits the warrantless search and seizure of garbage left for collection outside the curtilage of the home. *California v. Greenwood*, 486 U.S. 35, 37 (1998). *Greenwood* was issued before the advent of modern DNA testing and, of course,

DNA is not mentioned anywhere in the *Greenwood* opinion. *Id.* at 37–44. The other two cases on which the State relies were also issued long before DNA testing became available. The State's assertion that *Greenwood* necessarily defeats Defendant's Fourth Amendment claim is therefore a nonstarter.

The distinction between discarded trash and unavoidably shed DNA is fatal to the State's reliance on *Greenwood*. As laid out in Defendant's brief, the Court's holding in *Greenwood* was based on "common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public." *Id.* at 40. The Court's rationale was that by depositing the inculpatory evidence in an area suited for "public inspection," the defendants "sufficiently" "exposed" the items in such a manner that they could not have had a reasonable expectation of privacy in them. *Id.* at 40–41. Significantly, *Greenwood* and the other Supreme Court cases relied on by the State all relate to abandoned items the probative value of which was readily apparent simply by looking at them. *Id.* at 37–38 (items seized were indicative of narcotics use);

Abel v. United States, 362 U.S. 217, 225 (1960) (items seized were a hollow pencil containing microfilm and a "cipher pad"); *Hester v. United States*, 265 U.S. 57, 58 (1924) (item seized was a jar of distilled spirits).

The same cannot be said for unavoidably shed DNA. DNA is not visible to the naked eye. Moreover, a DNA profile involuntarily left on a discarded item is not "readily accessible" to members of the public. On the contrary, it requires highly specialized training, expertise, and equipment—not to mention resources—to extract DNA from an item, develop a DNA profile, and interpret the data. DNA left on an item is therefore not "readily accessible" for "public inspection" in the manner contemplated by *Greenwood*. Following the rationale of *Greenwood*, a person who leaves unavoidably shed DNA on a discarded item has not "sufficiently" "exposed" his DNA profile to defeat his reasonable expectation of privacy in his DNA. Notably, the State fails to account for this distinction and its implications on the Fourth Amendment analysis anywhere in its brief.

As the Supreme Court has more recently held, "A person does not surrender all Fourth Amendment protection by venturing into the public sphere. To the contrary, 'what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.'" *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018) (citing *Katz v. United States*, 389 U.S. 347, 351–52 (1967)). In that vein, the trend has been for States—including those other than Iowa—to pass laws to safeguard the privacy of genetic information, in some cases even making it a criminal offense to procure and analyze a person's DNA without his consent. *E.g.*, §760.40(2) Fla. Stat. (2021). Considering this trend, it is counterfactual to conclude that an individual has no reasonable expectation of privacy in his genetic material simply because he left a trace of it in a public place.

Later in its brief, the State bemoans what it perceives to be this Court's use of a "results-oriented approach" to interpreting the Iowa Constitution. (State's Br. at p. 60). Yet, the State's mechanical application of *Greenwood* to unavoidably shed DNA is unassailably a results-oriented analysis, the application of which

to the federal constitution has been proscribed by the Supreme Court. *Kyllo v. United States*, 533 U.S. 27, 33–35 (2001) (rejecting a mechanical interpretation of the Fourth Amendment that would require a physical intrusion into a constitutionally protected area before holding that a search occurred). Defendant did not expose his DNA profile to any passerby when he left his straw at the restaurant in the manner contemplated by *Greenwood*. A contrary conclusion can only be reached by ignoring the underpinnings of the *Greenwood* decision as explained above. This Court should recognize the State's argument—and the "persuasive" authority relied on in support of it (State's Br. at pp. 35–36)—for what it is: a desire to aid law enforcement's investigation of crime at the expense of the individual's inherent right to privacy in his own genetic makeup, untethered from any directly applicable precedent.

B. Defendant had a reasonable expectation of privacy in his unavoidably shed DNA.

The State cites a string of cases from other jurisdictions for the proposition that a person has no expectation of privacy in his DNA profile when it is extracted from a DNA sample lawfully obtained by the police. (State's Br. at 37–38) (emphasis added).

Yet, as set forth in Defendant's brief, police here did not lawfully obtain Defendant's DNA profile. (Deft. Br. at pp. 61–63). Specifically, Iowa Code §729.6(3)(a) and (b) explicitly prohibits a person from "obtain[ing] genetic information or samples for genetic testing from an individual without first obtaining informed and written consent from the individual," or "perform[ing] genetic testing of an individual … without the informed and written consent of the individual." Law enforcement did not obtain Defendant's informed and written consent before obtaining his genetic information and testing it, in direct violation of the statute. Because police did not obtain Defendant's DNA lawfully, the precedent on which the State relies is inapposite.

Under the reasonable-expectation-of-privacy rubric, the flaw in the State's reasoning—and all the cases on which it relies—is that it treats a discarded item as equivalent to unavoidably shed DNA on the item. Yet, the State offers no rational basis for doing so. Indeed, there are reasons for treating a discarded straw, cup, or cigarette butt differently than DNA which may have been involuntarily left on it. A discarded straw does not reveal anything

personal about the person who threw it away; on the other hand, genetic material left on the straw has the potential to reveal a catalog of "physiological data" and "private medical facts" about the person who used it, information which "the individual is ordinarily entitled to retain within the private enclave where he may lead a private life." *Skinner v. Railway Labor Executives' Association, et al.,* 489 U.S. 602, 616–17 (1989); *Bloch v. Ribar*, 156 F.3d 673, 685 (6th Cir. 1998) (quoting *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 577 (3rd Cir. 1980)).

The "touchstone" of Fourth Amendment analysis is whether a person has a "constitutionally protected reasonable expectation of privacy." *Katz*, 389 U.S. at 360 (Harlan, J., concurring). For a subjective expectation of privacy in the object of a search to be constitutionally protected, it must be an expectation that society is willing to recognize as legitimate or reasonable. *Smith v. Maryland*, 442 U.S. 735, 740 (1979). To be legitimate, an expectation of privacy "must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and

permitted by society." *Rakas v. Illinois*, 439 U.S. 128, 144 n.12 (1978).

The legitimacy of Defendant's expectation of privacy in his DNA is established, at least in part, by Iowa Code §729.6(3)(a) and (b). The legislature's passage of a law protecting the privacy of individuals' genetic material is "a source outside of the Fourth Amendment" which demonstrates that Defendant's expectation of privacy in his DNA was reasonable. *See*, *Greenwood*, 486 U.S. at 55 n.4 (Brennan, J., dissenting) (noting that a statute prohibiting interference with the mail would reinforce the expectation of privacy in the mail). Significantly, the statute does not distinguish unavoidably shed DNA left on a discarded item from any other type of genetic sample, both of which a person is prohibited from collecting for genetic testing without the individual's informed written consent. The statute therefore recognizes that a person retains a reasonable expectation of privacy in his DNA <u>even in DNA left on a discarded item</u>. None of the cases cited by the State analyze the reasonableness of an expectation of privacy in unavoidably shed DNA in the context of an analogous statute.

The State's reliance on *United States v. Edwards* is misplaced. (State's Br. at pp. 38–39). As noted above, police here did not lawfully obtain Defendant's genetic material for DNA testing. Thus, the Court's ruling in *Edwards* that an examination of the defendant's clothing did not require a warrant because his clothing was lawfully seized is of no aid to the State. 415 U.S. 800, 802–04 (1974). Moreover, probable cause existed for the defendant's arrest in *Edwards*, and a search of his clothing incident to his arrest was therefore justified. *Id.* at 804. Of course, there was no probable cause as to Defendant and he was not under arrest when police surreptitiously collected his DNA. Finally, the search in *Edwards* was for paint chips on the defendant's clothing, and not a search of inherently private genetic information.

The State's reliance on *State v. Christian* is also unavailing. *Christian* was decided before the existence of Iowa Code §729.6(3)—which was not effective until July 1, 2010—and the court therefore was not presented with the question of whether the defendant had a reasonable expectation of privacy in light of the statute. Indeed, the court in *Christian* held that, "In the absence of any definitive

authority to the contrary, we are unable to say Christian had a subjective or objective expectation of privacy in the DNA shed on the items seized." *Christian*, No. 04-0900, 2006 WL 2419031, at *4 (Iowa Ct. App. Aug. 23, 2006). Iowa Code §729.6(3) constitutes "definitive authority to the contrary" that was lacking in *Christian.*

Moreover, *Christian* was decided prior to *Carpenter*, where the Supreme Court reaffirmed its obligation "to ensure that the 'progress of science' does not erode Fourth Amendment protections" as "'[s]ubtler and more far-reaching means of invading privacy have become available to the Government.'" *Carpenter*, 138 S. Ct. at 2223 (quoting *Olmstead v. United States*, 277 U.S. 438, 473–74 (1928) (Brandeis, J., dissenting)). It is unclear whether the defendant in *Christian* distinguished *Greenwood* in the manner Defendant has here, or whether she challenged the application of abandonment to unavoidably shed DNA in an era in which the "progress of science" renders feasible DNA collection from smaller and smaller samples. In short, *Christian*—which is a noncontrolling in any event—does not address the issues to be resolved in this appeal.

C. Law enforcement's use of Defendant's DNA to identify him is irrelevant to whether the search was constitutional.

The State argues that the Fourth Amendment was not violated because the government only tested Defendant's genetic material at specific loci for the purposes of identification. (State's Br. at pp. 41–43). The State's contention misapprehends the analysis: if Defendant had a reasonable expectation of privacy in his genetic material, law enforcement's purpose in searching that genetic material is irrelevant to whether a warrant (or probable cause) was required.

In *Arizona v. Hicks*, a bullet was fired through the floor of the defendant's apartment. 480 U.S. 321, 323 (1987). Police lawfully entered the apartment to search for the perpetrator and weapons. *Id.* During the search, one of the officers noticed expensive stereo components he suspected to be stolen. *Id.* The officer moved some of the components to access serial numbers on a turntable, which he reported to headquarters. *Id.* It was determined that the turntable had been stolen in an armed robbery, and the officer

seized it. *Id.* The defendant was subsequently indicted for the robbery. *Id.* at 323–24.

Addressing the legality of the search, the Supreme Court held that moving the components to record the serial numbers on the equipment constituted a search separate and apart from the officer's objective in lawfully entering the apartment. *Id.* at 324–25. The Court rejected the argument that the object of the search played any role in whether a search under the Fourth Amendment had occurred:

> It matters not that the search uncovered nothing of any great personal value to respondent—serial numbers rather than (what might conceivably have been hidden behind or under the equipment) letters or photographs. A search is a search, even if it happens to disclose nothing but the bottom of a turntable.

Id. at 325 (emphasis added). The Court went on to hold that probable cause was required to sustain the search as constitutional. *Id.* at 326–27.

Likewise, it does not matter that law enforcement did not mine Defendant's genetic material for "physiologic data." The government rifled through Defendant's private genetic information,

from which a host of private facts and information could be obtained. That law enforcement focused on "just" certain loci is a non-event as far as the Fourth Amendment is concerned. E.g., *Patel v. City of Los Angeles*, 738 F.3d 1058, 1062–63 (9th Cir. 2013) (That the [police officer's] inspection may disclose "nothing of any great personal value" to the hotel—on the theory, for example, that the records contain "just" the hotel's customer list—is of no consequence."); *Kyllo*, 533 U.S. at 37 (holding that the Fourth Amendment's protection is not tied to the measurement of the quality or quantity of information obtained).

The ACLU's amicus brief further addresses this issue. As a threshold matter, the ACLU points out that CODIS testing has been expanded to 20 loci, and the portions of our "noncoding" genetic material ostensibly utilized only for identification includes information beyond just identity. Moreover, the Supreme Court has repeatedly rejected the proposition that a search occurs only if law enforcement uses the search to uncover personal, private information. Rather, the Fourth Amendment is implicated when the police rummage through information that has the potential to

reveal the "privacies of life" the Fourth Amendment was designed to protect. (ACLU Br. at pp. 19–21).

Relatedly, the State's comparison between DNA and fingerprints fails. (State's Br. at pp. 33, 36–38, 42–43). Fingerprints can only be utilized for the purpose of identification; they do not have the potential to yield "physiologic data" as does genetic material. Thus, the government's collection of a fingerprint for the purpose of identification is akin to performing a breathalyzer for the purpose of determining BAC, while the government's testing of DNA is comparable to analyzing a blood sample. The former does not implicate significant privacy concerns, while the latter does. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2176–78 (2016).

D. Law enforcement's collection and search of Defendant's genetic material was unreasonable under the Fourth Amendment.

In cursory fashion, the State argues that testing Defendant's "discarded straw" was reasonable. The State contends that Defendant had an "exceptionally limited" expectation of privacy "in the discarded straw" which was diminished by his failure to throw

it away. On the other hand, per the State, the government's interest in solving Martinko's murder was "compelling." The State baldly asserts that DNA was "the only realistic path toward" solving the crime and, therefore, law enforcement's warrantless search of Defendant's DNA was constitutional. (State's Br. at 44–45).

The State's argument is flawed at the outset. The issue in this appeal is not whether Defendant had a reasonable expectation of privacy in the straw. Rather, the question is whether he had a reasonable expectation of privacy in his genetic material. Likewise, the government did not test or search the straw by, for example, determining its physical properties or chemical composition. Rather, law enforcement isolated Defendant's genetic material and analyzed it. The manner in which the State frames the issue is therefore misleading.

The State's claim of reasonableness is belied by Supreme Court precedent. "'Over and again this Court has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes,' and that searches conducted outside the judicial

process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz*, 389 U.S. at 357 (quoting *United States v. Jeffers*, 342 U.S. 48, 51 (1951)); *Riley v. California*, 573 U.S. 373, 382 (2014) ("Our cases have determined that '[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, ... reasonableness generally requires the obtaining of a judicial warrant.'"). In determining whether a warrantless search was reasonable, the government bears the burden of establishing an exception to the warrant requirement. *United States v. Hill*, 386 F.3d 855, 858 (8th Cir. 2004) (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971)).

The prosecution did not assert the existence of an exception to the warrant requirement for the search of Defendant's DNA in the district court. Rather, the prosecution argued that the Fourth Amendment did not apply to the search of Defendant's DNA because it was obtained from a discarded straw. (Brief in Support of State's Resistance to Motion to Suppress; App. pp. 45–47). The

State has therefore forfeited any argument that an exception applied to the warrant requirement for the search of Defendant's genetic material. *DeVoss v. State*, 648 N.W.2d 56, 63 (Iowa 2002).

The State also fails to identify an exception to the warrant requirement in its brief. Instead, the State seeks to justify the warrantless search of Defendant's DNA based on the need for law enforcement to solve a cold case. To the extent the State asserts a "special needs" exception to the warrant requirement, that argument fails. The "special needs" exception applies only to searches the primary objective of which is unrelated to law enforcement. *Ferguson v. City of Charleston*, 532 U.S. 67, 82–84 (2001). Police searched Defendant's DNA for purely law enforcement purposes, *i.e.*, to further its investigation into the victim's murder. The "special needs" exception therefore offers no safe harbor to the State in this instance.

The State's generic assertion of reasonableness also fails. At its heart, the State fails to appreciate the aim of the Fourth Amendment, which is to ensure the "right of personal security against arbitrary intrusions by official power." *Coolidge*, 403 U.S.

at 455 (1971). The protection granted by the Fourth Amendment is secured by the warrant requirement, which in turn requires a finding of probable cause by a neutral and detached magistrate rather than "a policeman or Government enforcement agent." *Johnson v. United States*, 333 U.S. 10, 13–14 (1948).

Prior to the surreptitious collection and harvesting of Defendant's genetic material, law enforcement had no evidence connecting him to the victim or her murder. Presumably, that is why police failed to secure a warrant for Defendant's DNA prior to collecting and searching it. The end result is that Defendant was subjected to the arbitrary exercise of law enforcement authority, which is the very concern the warrant requirement was designed to alleviate. The Fourth Amendment does not countenance such unfettered discretion on the part of police, rendering law enforcement's search of Defendant's genetic material under these circumstances patently unreasonable. *United States v. White*, 401 U.S. 745, 790 (1971) (Harlan, J., dissenting) (arguing that the Fourth Amendment must guard against technological change when "subject only to the self-restraint of law enforcement officials").

II. The warrantless collection and testing of Defendant's genetic material violated article I, section 8 of the Iowa Constitution.

A. Defendant preserved his argument that the warrantless extraction and analysis of his DNA violated article I, section 8 of the Iowa Constitution.

The State attempts to sidestep the merits of Defendant's article I, section 8 argument by maintaining that he did not preserve his claim under the Iowa Constitution. The State's contention is threefold: (1) Defendant did not advance a specific Iowa Constitution claim; (2) Defendant did not obtain a ruling on his Iowa Constitution claim; and (3) Defendant did not argue that the warrantless collection and testing of his DNA amounted to a trespass under state law. (State's Br. at 46–48).

The motion to suppress Defendant filed in the district court asserted that the warrantless collection and analysis of Defendant's genetic material violated his right to be free from unreasonable searches and seizures as guaranteed by article I, section 8 of the Iowa Constitution. (Defendant's Motion to Suppress; App. p. 15). Defendant's brief in support of the motion reiterated his reliance on article I, section 8. (Defendant's Memorandum in Support of Motion to Suppress; App. p. 70). Defendant referenced this Court's

oft-repeated commitment to independently construing the Iowa Constitution when analyzing claimed violations of personal rights. (App. p. 74). Defendant pointed out myriad ways in which this Court has departed from federal jurisprudence, due in no small part to the United States Supreme Court's inability to reach a stable consensus on the proper application of Fourth Amendment law. (App. pp. 74–75). Defendant further argued, citing Justice Appel's concurrence in *State v. Baldon*, 829 N.W. 2d 785 (Iowa 2013), that the application of article I, section I is best suited to address the intersection of advancing technology and personal privacy. (App. p. 76). Defendant challenged the application of abandonment to the search of Defendant's DNA under the Iowa Constitution by distinguishing *State v. Bumpus*, 459 N.W.2d 619 (Iowa 1990). (App. pp. 83–84).

In light of the foregoing, the State's assertion that Defendant did not advance an Iowa Constitution claim below is simply erroneous. Defendant's claim before the district court—and his claim in this appeal—is that the Iowa Constitution prohibits law enforcement from surreptitiously collecting and analyzing a

person's DNA without a warrant, and that the collection and analysis of his DNA violated article I, section 8. The State fails to cite any authority for the proposition that Defendant was required to do more to preserve his state constitutional claim.

In its ruling on Defendant's motion to suppress, the district court noted that Defendant "has cited the protections provided by the United States and Iowa Constitutions." (Ruling on Motion to Suppress Evidence; App. p. 113). The court delineated the two-step approach this Court has developed in addressing claims of a Fourth Amendment or article I, section 8 violation. (App. p. 115 (citing *State v. Lewis*, 675 N.W. 2d 516, 522 (Iowa 2004)). In denying the motion, the court did not specify a distinct rationale for denying Defendant's motion under the separate constitutional provisions; rather, it simply held that Defendant relinquished any expectation of privacy in the straw, his saliva on the straw, and the DNA contained within his saliva. (App. p. 9).

Again, the State's argument that the district court did not rule on his state constitutional claim is incorrect. The court acknowledged Defendant's Iowa Constitution claim, invoked the

framework for addressing the claim, and denied the motion based on the abandonment doctrine. The court did not explicitly identify its ruling as being based on the Fourth Amendment or article I, section 8. Thus, its ruling can only be read as denying Defendant's claims under both constitutional provisions. Defendant therefore preserved error under both constitutions. *Lemasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012) ("If the court's ruling indicates that the court considered the issue and necessarily ruled on it, even if the court's reasoning is 'incomplete or sparse,' the issue has been preserved." (quoting *Meier v. Senecaut*, 641 N.W.2d 532, 540 (Iowa 2002)).

Identical arguments made by the State here were resolved against it in *State v. Gaskins*, 866 N.W.2d 1 (Iowa 2015). In *Gaskins*, the defendant's motion to suppress raised both the Fourth Amendment and article I, section 8. *Id.* at 6. At the suppression hearing, the defendant's counsel did not specify distinct arguments under the United States and Iowa Constitutions. *Id.* The district court's ruling discussed caselaw from both the Iowa and United States Supreme Courts but did not cite either constitution. *Id.* The

State argued on appeal that the defendant's "mere citation" to article I, section 8 was insufficient to preserve error under the Iowa Constitution because the district court did not rule on a distinct state constitutional claim. *Id.* This Court rejected that argument, quoting *King v. State*, 797 N.W.2d 565, 571 (2011) as follows:

> When there are parallel constitutional provisions in the federal and state constitutions and a party does not indicate the specific constitutional basis, we regard both federal and state constitutional claims as preserved.... Even in these cases in which no substantive distinction had been made between state and federal constitutional provisions, we reserve the right to apply the principles differently under the state constitution compared to its federal counterpart.

Id. The same rationale applies here. Defendant raised his Iowa Constitution claim and the district court ruled on it. That the lower court utilized the same analysis to deny both the federal and state constitutional claims does not preclude this Court from reviewing the claim under article I, section 8.

The State's argument that Defendant did not preserve a distinct "trespass" claim is equally flawed. The trespass rationale raised in Defendant's brief is not a freestanding legal claim; instead, it is an alternative argument supporting the legal claim

Defendant made throughout his motion to suppress, *i.e.*, that the surreptitious collection and testing of his DNA without a warrant is unconstitutional under article I, section 8. The rules of error preservation are not so granular as to preclude review of Defendant's claim that police unconstitutionally intruded upon a protected space. *Griffin Pipe Prods. Co. v. Bd. of Review*, 789 N.W.2d 769, 772 (Iowa 2010) ("Our issue preservation rules are not designed to be hyper technical."); *cf. Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."). This is especially true where the State has argued below and in this appeal that law enforcement lawfully possessed Defendant's genetic material. (State's Br. at pp. 37–46).

B. The State's request that this Court interpret article I, section 8 using "neutral interpretive principles" has already been rejected by this Court.

In addressing the merits of Defendant's Iowa Constitution claim, the State urges this Court to adopt "neutral interpretive principles" to state constitutional litigation. The State's

justification for doing so appears to rest on an assertion that Defendant—and other litigants—utilize the Iowa Constitution as a "one-way ratchet to provide only greater rights and remedies than a parallel provision of the United States Constitution." The State urges this Court to employ a constitutional analysis heavily dependent on "decisions of sister states, particularly when interpreting similar constitutional text" and "practical considerations" such as "the need for national uniformity." (State's Br. at pp. 48–50).

As a threshold matter, the State did not urge the district court below to adopt "neutral interpretive principles" to address Defendant's Iowa Constitution claim. (Brief in Support of State's Resistance to Motion to Suppress; App. pp. 31–47). The State has therefore failed to preserve its argument that this Court should do so on appeal. *Baldon*, 829 N.W.2d at 789.

As to the merits, this Court has consistently rejected the use of "neutral interpretive principles" to interpret claims raised under the Iowa Constitution. *Gaskins*, 866 N.W.2d 1, 21–23 (2015) (Appel, J., concurring). The rejection of "neutral interpretive

principles" is rooted in this Court's commitment to exercise its "best, independent judgment of the proper parameters of state constitutional commands." *State v. Short*, 851 N.W.2d 474, 500–01 (Iowa 2014). The Court has repeatedly invoked its duty to interpret the Iowa Constitution independently, especially if doing so requires departure from persuasive but noncontrolling precedent:

> [W]e agree with the commentators and developing case law in other states that a state supreme court cannot delegate to any other court the power to engage in authoritative constitutional interpretation under the state constitution…. We now hold that, while United States Supreme Court cases are entitled to respectful consideration, we will engage in independent analysis of the content of our state search and seizure provisions. A Fourth Amendment opinion of the United States Supreme Court, the Eighth Circuit Court of Appeals, or any other federal court is no more binding upon our interpretation of article I, section 8 of the Iowa Constitution than is a case decided by another state supreme court under a search and seizure provision of that state's constitution.

State v. Ochoa, 792 N.W.2d 260, 267 (Iowa 2010) (citations omitted).

The State does not offer any sound justification for departing from this well-established precedent. Rather, its request appears to be based on a hope that a change in the composition of this Court

will usher in a new willingness to defer to federal precedent and authority from other jurisdictions. As Justice Appel has pointed out, doing so would be the antithesis of stare decisis. *Gaskins*, 866 N.W.2d at 22–23 (Appel, J., concurring). Ironically, such a monumental shift in this Court's approach to state constitutional issues would vitiate the stability and uniformity the State offers as reasons to adopt neutral interpretive principles in the first instance.

C. *Barrett* is inapposite as it does not address either an individual's expectation of privacy in his genetic material nor whether the warrantless search of DNA constitutes a trespass.

The State argues that *Barrett* supports the notion that a person abandons a reasonable expectation of privacy in their unavoidably shed DNA. The State maintains that, as the police's seizure and search of the journal the defendant inadvertently left behind in a restaurant was lawful in *Barret*, law enforcement's seizure and search of "the straw … and its contents" Defendant left behind here was also "lawful." The State goes so far as to argue that this Court would have to overrule *Barrett* to grant him relief. (State's Br. at 66–68).

Unfortunately for the State, *Barrett* has no bearing on the issue pending before this Court. In *Barrett*, this Court held that no constitutional violation occurred because the journal was initially seized and searched by private citizens. *State v. Barrett*, 401 N.W.2d 184, 190 (Iowa 1987). The private citizens contacted police and conveyed the journal to them which, this Court appropriately held, "present[ed] no ground for constitutional challenge." *Id.* The same was true in *Flynn*—the defendant left business records under a tarp at a golf club. *State v. Flynn*, 360 N.W.2d 762, 763–64 (Iowa 1985). A private citizen recovered the documents and brought them to the police station. *Id.* at 764.

In contrast to *Barrett* and *Flynn*, the warrantless seizure and search of Defendant's genetic material was performed by law enforcement. It is axiomatic that the Fourth Amendment and article I, section 8 apply only to searches performed by the government, and not the actions of private individuals. *State v. Brown*, 890 N.W.2d 315, 322 (Iowa 2017) (citing *State v. Campbell*, 714 N.W.2d 622, 631 (2006); *Flynn*, 360 N.W.2d at 764–65 (1985)). Because both *Barrett* and *Flynn* involve searches initially

performed by private citizens, neither bears on whether law enforcement's conduct in surreptitiously obtaining Defendant's DNA and testing it was constitutional.

To the extent *Barrett* and *Flynn* comment on the nature of the location in which the private citizens found the seized items, the decisions offer no aid to the State. As noted in *Flynn*, it was the "accessib[ility]" of the records to the public that diminished the defendant's objective expectation of privacy in them. *Id.* at 766. ("The open area of the country club was accessible to all of the private members and others given permission to enter.") Just as *Greenwood* does not apply to unavoidably shed DNA, neither do *Barrett* or *Flynn*. The DNA left on the straw was decidedly not easily accessible to the public; such accessibility was limited to an entity like the State who had the technology and resources to collect and analyze it.

Finally, it bears repeating that neither *Barrett* nor *Flynn* involved items the privacy of which were protected by statute. As pointed out above, Iowa Code §729.6(3)(a) and (b) evidence a reasonable expectation not only in a person's genetic material, but

also in genetic material that a person leaves on an object discarded in public. The statute dispels the legal fiction that a person "abandons" their right to privacy in their genetic makeup simply by going out in public and shedding DNA, a process over which a person has no control.

D. Law enforcement violated Iowa Code §729.6(3)(a) and (b) and, even if it did not, the law enforcement exception does not negate the reasonable expectation of privacy in genetic material manifested by the statute.

The State argues that law enforcement did not violate Iowa Code §729.6(3)(a) and (b) based on the exception found in (c). (State's Br. at 68–71). The exception reads as follows:

> c. The following exceptions apply to the prohibitions in paragraphs "a" and "b":
>
> * * *
>
> (2) To identify an individual in the course of a criminal investigation by a law enforcement agency.

The State's interpretation of the exception—that it allows police to surreptitiously collect and analyze any person's DNA it wants without a warrant and without reference to probable cause (or even reasonable suspicion)—is strained to say the least. First, it would be anomalous for the legislature to pass a statute

protecting citizens' right to privacy in their genetic material while simultaneously granting police unfettered discretion to invade that privacy. Indeed, sanctioning law enforcement's conduct in this case would be tantamount to making every Iowan's DNA accessible to the government, a result which would contravene the obvious intent of the statute.[1] Second, the exception does not authorize police to surreptitiously collect a person's DNA without a warrant. Rather, the exception is silent on whether a warrant is required. Third, the privacy of genetic information provided for in Iowa Code §729.6(3)(a) and (b) is secured by requiring informed consent of an individual. Although knowledge on the part of an individual that a genetic sample has been obtained from them and/or will be tested is implicit in the requirement of informed consent, it is not spelled out categorically. The exception in Iowa Code §729.6(3)(c)(2), therefore, at most exempts law enforcement from the requirement

[1] Under the State's interpretation of Iowa Code §729.6(3), police in this case would have been free to covertly collect and analyze the genetic material of the many individuals who they approached for DNA samples—many of whom were not even targets of the investigation—even if those individuals withheld consent to provide a sample.

of obtaining informed consent; however, it does not permit police to surreptitiously collect a person's private genetic information without that person's knowledge.

Even if law enforcement did not commit a trespass by violating Iowa Code §729.6(3)(a) and (b), it still violated article I, section 8 by obtaining and testing Defendant's genetic material without a warrant. The difficulty for the State posed by Iowa Code §729.6(3) is it shows that society recognizes as reasonable a person's expectation of privacy in their genetic material, even genetic material left on items discarded in public. The State completely fails to explain how, in light of Iowa Code §729.6(3), Defendant's expectation of privacy in the genetic material he left on the straw was not legitimate.

Moreover, that expectation of privacy cannot be overcome by legislative fiat. As noted by Justice Gorsuch in *Carpenter*, "Legislatures cannot pass laws declaring your house or papers to be your property except to the extent the police wish to search them without cause." *Carpenter*, 138 S. Ct. at 2270–71. This Court, too, has held that although the legislature is at liberty to expand the

protections of the Iowa Constitution by statute, it "may not restrict the protections given by the constitution[.]" *State v. Dudley*, 766 N.W.2d 606, 618 n.3 (Iowa 2009). Thus, where Defendant had a legitimate expectation of privacy in his genetic material that he left on the straw, that expectation cannot be overcome by the exception set forth in Iowa Code §729.6(3)(c). Law enforcement acted unreasonably when it surreptitiously obtained and tested Defendant's DNA without a warrant, and reversal of the district court order to the contrary is required.

III. The trial court's refusal to instruct the jury on the law related to Michael Allison's motive to testify against Defendant constitutes a prejudicial abuse of discretion.

Defendant requests that the Court find for Defendant on this issue for the reasons explained in Defendant's brief.

IV. The evidence was insufficient to support Defendant's guilt beyond a reasonable doubt.

Defendant requests that the Court find for Defendant on this issue for the reasons explained in Defendant's brief.

CONCLUSION

For the reasons stated herein and in Defendant's brief, the warrantless collection and analysis of Defendant's genetic material without a warrant violated both the Fourth Amendment and article I, section 8 of the Iowa Constitution. The evidence not subject to exclusion is insufficient to convict Defendant of first-degree murder. For that reason, Defendant respectfully requests that this Court should the trial court's ruling on Defendant's motion to suppress, vacate the judgment of conviction, and, because the evidence not subject to exclusion is insufficient to convict him of murder, remand the cause for entry of an order dismissing the charge.

In the alternative, for the reasons stated herein and in Defendant's brief, the evidence is insufficient to support Defendant's conviction beyond a reasonable doubt. Defendant therefore respectfully requests that this Court vacate the judgement of conviction and remand for entry of an order dismissing the charge.

In the alternative, for the reasons stated herein and in Defendant's brief, the trial court committed reversible error where it refused Defendant's proposed instruction on Allison's potential plea agreement. Defendant therefore respectfully requests that this Court vacate the judgment of conviction and remand for a new trial.

Defendant respectfully requests all other relief deemed just and appropriate.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This Reply Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 6,492 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This Proof Brief complies with the typeface requirements of Iowa. R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Century, Font size 14.

Respectfully submitted,

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