

## **DRAKE LEGAL CLINIC CRIMINAL DEFENSE PROGRAM**

# **CRIMINAL LAW NEWSLETTER**

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Student Editor Jill Alesch

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## SECTION 1 LEGISLATION

### SECTION 2—UNITED STATES SUPREME COURT CASE LAW

#### SECTION 2.1 FOURTH AMENDMENT

**Illinois v. Lidster**, 124 S. Ct. 885 (2004).

Robert Lidster was convicted of driving under the influence of alcohol. He challenged his conviction on the grounds that the evidence against him was obtained due to a highway checkpoint that violated the Fourth Amendment.<sup>1</sup> The United States Supreme Court upheld the respondent's conviction and found the stop was constitutional under the Fourth Amendment.<sup>2</sup> The Court found that the checkpoint was not designed to arrest vehicle occupants, but rather, to ask members of the public for help in gathering information about a previous hit and run accident.<sup>3</sup> As a result, the Court held that a presumptive rule of unconstitutionality was not required.<sup>4</sup> Rather, the Court found that the reasonableness of the stop would be judged on the basis of the individual circumstances.<sup>5</sup> The Court found that the stop was reasonable because the public concern was grave because a crime had resulted in the death of an individual.<sup>6</sup> In addition, the Court found the stop advanced the public concern because it took place one week after the accident, on the same highway and at approximately the same time of day.<sup>7</sup> Finally, the stop interfered minimally with the liberty encompassed by the Fourth Amendment.<sup>8</sup> As a result, the Court concluded the stop was constitutional.<sup>9</sup>

**Groh v. Ramirez**, 124 S. Ct. 1284 (2004)

Petitioner sued law enforcement officials alleging his Fourth Amendment rights were violated when a warrant that was executed at the petitioner's home failed to indicate the "persons or things to be seized."<sup>10</sup> The United States Supreme Court held that the warrant was invalid because the warrant did not provide a description of the evidence

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<sup>1</sup> *Illinois v. Lidster*, 124 S. Ct. 885, 888 (2004).

<sup>2</sup> *Id.* at 891.

<sup>3</sup> *Id.* at 888-89.

<sup>4</sup> *Id.* at 890.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 891.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Groh v. Ramirez*, 124 S. Ct. 1284, 1288-89 (2004).

sought to be obtained.<sup>11</sup> The court noted that simply because the application described the things to be seized, the Fourth Amendment required particularity in the warrant itself.<sup>12</sup> Ultimately, the Court concluded that “[b]ecause petitioner did not have in his possession a warrant particularly describing the things he intended to seize; proceeding with the search was clearly “unreasonable” under the Fourth Amendment.”<sup>13</sup> The petitioner asserted that if the warrant was invalid, he was entitled to qualified immunity.<sup>14</sup> However, the Court held that due to the fact that the particularity requirement is spelled out in the text of the Constitution, “no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid.”<sup>15</sup> In addition, the petitioner prepared the warrant himself.<sup>16</sup> Thus, the Court held that he could not argue that he relied on the assurances of the Magistrate that the warrant was sufficient.<sup>17</sup> “No reasonable officer could claim to be unaware of the basic rule, well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional.”<sup>18</sup> Thus, the Court upheld the decision of the appellate court to not grant summary judgment with respect to the petitioner.<sup>19</sup>

**United States v. Flores-Montano**, 124 S. Ct. 1582 (2004).

Customs officials seized marijuana from defendant’s gas tank at an international border.<sup>20</sup> A customs inspector had inspected the vehicle and asked the defendant to leave the vehicle.<sup>21</sup> The vehicle was taken to a secondary inspection station, where a second customs inspector inspected the tank by tapping it, noting that the tank sounded solid.<sup>22</sup> This inspector requested a mechanic to come to the station and remove the tank, which he did.<sup>23</sup> After the gas tank was removed and the top of the tank removed, the inspector opened the tank and found the marijuana.<sup>24</sup> The whole process took 15 to 25 minutes.<sup>25</sup> Defendant filed a motion to suppress, which was successful because the district court relied upon *United States v. Molina-Tarazon*, which held that removal of the tank requires reasonable suspicion in order to be consistent with the Fourth Amendment.<sup>26</sup> The Court of Appeals affirmed.<sup>27</sup>

According to the Court, in *Molina-Tarazon* relied upon language in *United States v. Montoya de Hernandez*, in which the Court used the word “routine” as a descriptive

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<sup>11</sup> *Id.* at 1289.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 1293.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982)).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 1294.

<sup>20</sup> *United States v. Flores-Montano*, 124 S. Ct. 1582, 1584 (2004).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 1585 (citing *United States v. Molina-Tarazon*, 279 F.3d 709, 717 (9th Cir. 2002)).

<sup>27</sup> *Id.*

term in boarder searches.<sup>28</sup> The Court determined that “complex balancing tests to determine what is a ‘routine’ search of a vehicle, as opposed to a more ‘intrusive’ search of a person, have no place in border searches of vehicles.”<sup>29</sup> The Court stated, “[t]he government’s interest in preventing entry of unwanted persons and effects is at its zenith at the international border.”<sup>30</sup> The law that allowed the search in this case, 19 U.S.C. § 1581(a), reflects the “‘impressive historical pedigree’ of the Government’s power and interest.”<sup>31</sup> The interest in protection of the borders is illustrated by evidence that smugglers frequently try to penetrate the borders with contraband secreted in the fuel tank.<sup>32</sup>

Defendant asserted that he had a privacy interest in his fuel tank and that the suspicionless disassembly of his tank is an invasion of his privacy.<sup>33</sup> However, on numerous occasions, the Court has “noted that the expectation of privacy is less at the border than it is in the interior.”<sup>34</sup> According to the Court, “[i]t is difficult to imagine how a search of a gas tank, which should be solely a repository for fuel, could be more of an invasion of privacy than the search of the automobile’s passenger compartment.”<sup>35</sup> In addition, the defendant asserted that the Fourth Amendment protects property and that disassembly and reassembly of the tank is a deprivation of his property interest because this may damage the vehicle.<sup>36</sup> The Court noted the defendant has not asserted that this process has caused serious damage to or destruction of property.<sup>37</sup> Thus, while the Court pointed out that a motorist’s possessory interest was not insignificant in cases where the gas tank of vehicle is removed, “it is nevertheless justified by the Government’s paramount interest in protecting the border.”<sup>38</sup> Thus, the Court held that the government’s “authority to conduct suspicionless inspections at the border includes the authority to remove, disassemble, and reassemble a vehicle’s fuel tank.”<sup>39</sup>

## SECTION 2.2 SIXTH AMENDMENT

**Baldwin v. Reese**, 124 S. Ct. 1347 (2004)

Michael Reese was convicted of kidnapping and attempted sodomy.<sup>40</sup> After he appealed through the state court system, he brought collateral relief proceedings which the lower courts denied.<sup>41</sup> Reese then filed a petition for discretionary review in the state supreme court which was denied.<sup>42</sup> Following the denial, Reese sought a writ of habeas

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 1586.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 1587.

<sup>39</sup> *Id.*

<sup>40</sup> *Baldwin v. Reese*, 124 S. Ct. 1347, 1349 (2004).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 1349-50

corpus, alleging that he received ineffective assistance of counsel.<sup>43</sup> The district court held Reese did not fairly present his ineffective assistance claim to the state courts because in his brief he did not indicate he was alleging a violation of federal law.<sup>44</sup> The Ninth Circuit reversed on the grounds that if the state supreme court had read the lower court's opinion, they would have been able to determine Reese was alleging a violation of federal law.<sup>45</sup> The United States Supreme Court granted certiorari and reversed the Ninth Circuit's holding.<sup>46</sup> The Supreme Court held that a state appellate judge was not required to read the lower court opinion.<sup>47</sup> As a result, Reese did not "fairly present" his federal ineffective assistance of counsel claim because a claim is not fairly presented if "the court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as the lower court opinion in the case, that does so."<sup>48</sup>

**Fellers v. United States**, 124 S. Ct. 1019 (2004).

Petitioner appealed his conviction on the grounds that the admission of certain statements he made at the jailhouse violated his Sixth Amendment right to counsel because they should have been suppressed as fruits of a prior failure to issue the petitioner his *Miranda* warnings.<sup>49</sup> The United States Supreme Court held that the protections of the Sixth Amendment are violated "when there [is] used against him at his trial evidence of his own incriminating words, which federal agents ... deliberately elicited from him after he had been indicted and in the absence of his counsel."<sup>50</sup> The Eighth Circuit had previously determined that because the petitioner was not "interrogated," his claim that the statements he made at the jailhouse was foreclosed.<sup>51</sup> The Court held that this was error and that the petitioner's Sixth Amendment rights were violated because the officers deliberately elicited information from the petitioner.<sup>52</sup> The Court found that based on the erroneous conclusion that the petitioner's Sixth Amendment rights were not violated; the court of appeals incorrectly conducted the Fifth Amendment fruits analysis.<sup>53</sup> The Eighth Circuit relied on *Oregon v. Elstad*, 470 U.S. 298 (1985) which held that the admissibility of statements made at a jailhouse turns on whether the statements were "knowingly and voluntarily made."<sup>54</sup> Thus, the court of appeals did not address whether the petitioner's jailhouse statements should have been suppressed under the Sixth Amendment on the grounds that they were fruits of prior questioning conducted in contravention to the deliberate elicitation standard.<sup>55</sup> The Court, in reversing the decision of the Eighth Circuit stated, "We have not had occasion to decide whether the rationale of *Elstad* applies when a suspect makes incriminating

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<sup>43</sup> *Id.* at 1350.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 1351.

<sup>49</sup> *Fellers v. United States*, 124 S. Ct. 1019, 1021-22 (2004).

<sup>50</sup> *Id.* at 1022 (quoting *Massiah v. United States*, 377 U.S. 201 (1964)).

<sup>51</sup> *Id.* at 1023.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* (quoting *Oregon v. Elstad*, 470 U.S. 298, 309 (1985)).

<sup>55</sup> *Id.*

statements after a knowing and voluntary waiver of his right to counsel notwithstanding earlier police questioning in violation of Sixth Amendment standards.”<sup>56</sup> Thus, the Court remanded the case back to the appellate court.<sup>57</sup>

**Iowa v. Tovar**, 124 S. Ct. 1379 (2004).

This case presented the issue of to what extent a trial judge, before accepting a guilty plea from a defendant not represented by counsel, must elaborate on the right to representation.<sup>58</sup> The Iowa Supreme Court held that beyond affording a defendant the opportunity to consult with counsel before entering a plea and to be assisted by counsel at the hearing, the trial court must “(1) advise the defendant that ‘waiving the assistance of counsel in deciding whether to plead guilty [entails] the risk that a viable defense will be overlooked’; and (2) ‘admonis[h]’ the defendant ‘that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty.’”<sup>59</sup> The Iowa court concluded these warnings were “essential” to a knowing and intelligent waiver of the Sixth Amendment right to counsel.<sup>60</sup>

The United States Supreme Court held that neither warning was mandated by the Sixth Amendment and reversed the decision of the Iowa Supreme Court.<sup>61</sup> The Court pointed out that the Sixth Amendment secures to a defendant facing incarceration the right to counsel at all critical stages, including a plea hearing.<sup>62</sup> A defendant can forgo representation; however, this choice must be “knowing, voluntary, and intelligent.”<sup>63</sup> The information a defendant must have to make an intelligent decision depends on a number of case-specific factors: education or sophistication, complex or easily grasped nature of the charge, and the stage of the proceeding.<sup>64</sup> Thus, the Court determined the Sixth Amendment does not compel the admonitions required by the Iowa Supreme Court because the law “ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances.”<sup>65</sup> And, even if the defendant lacked full and complete appreciation of all of the consequences following from his waiver, the state may prevail if it shows that the information provided to the defendant satisfied the constitutional minimum.<sup>66</sup> According to the Court, the Iowa Supreme Court, by prescribing scripted admonitions and holding them necessary in every guilty plea, proceeding overlooked the Court’s observation that the information a defendant must have to waive counsel intelligently will depend on the particular facts and circumstances in each case.<sup>67</sup> Furthermore, it is the defendant’s burden to prove that he did not

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Iowa v. Tovar*, 124 S. Ct. 1379, 1383 (2004).

<sup>59</sup> *Id.* (quoting *State v. Tovar*, 656 N.W.2d 112, 121 (Iowa 2003)).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 1390.

<sup>62</sup> *Id.* at 1387.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 1389 (quoting *United States v. Ruiz*, 536 U.S. 622, 629 (2002)).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 1389-90.

intelligently waive his right.<sup>68</sup> Given the facts and circumstances of this case, the Court concluded that it was far from clear that these additional warnings would have enlightened the defendant's decision to seek counsel, considering the fact that the defendant never articulated with precision the additional information counsel could have provided and that he had not asserted he was unaware of his right to be counseled prior to and at arraignment.<sup>69</sup> In this case, which the Court concluded was straightforward, the admonitions would have confused or mislead a defendant more than they would have informed him, for example the defendant may have believed that a meritorious defense existed or that he could plead to a lesser charge when in fact neither would be realistic.<sup>70</sup> If a defendant delays his plea in reliance on these admonitions, the prompt disposition of the case would be impeded; furthermore, the resources of the state or the defendant may be wasted.<sup>71</sup> Thus, under the Court's analysis, the states by statute may adopt guidelines for acceptance of uncounseled pleas; however, the Constitution does not require the admonitions mandated by the Iowa Supreme Court.<sup>72</sup>

**Crawford v. Washington**, 124 S. Ct. 1354 (2004).

Defendant was tried for assault and attempted murder.<sup>73</sup> At trial, the state sought to introduce a recorded statement of defendant's wife made during a police interrogation as evidence that the stabbing was not in self-defense.<sup>74</sup> The wife did not testify at trial because of the state's marital privilege.<sup>75</sup> Defendant argued that admitting this evidence violated his Sixth Amendment right to be "confronted with the witnesses against him."<sup>76</sup> The trial court admitted the statement under *Ohio v. Roberts*, which stated that the right does not bar admission of an unavailable witness's statement against a defendant if the statement bears "adequate 'indicia of reliability,'" which is met when the evidence either falls under a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness."<sup>77</sup> The trial court admitted the statement under the latter ground and cited documented reasons of why the statement was trustworthy.<sup>78</sup> The defendant was convicted of assault.<sup>79</sup> The state court of appeals reversed, however, the state supreme court reinstated the conviction, determining that the statement was reliable in that it was nearly identical to the defendant's own statement to the police, considering the fact that both were ambiguous as to whether the victim had drawn a weapon before petitioner had assaulted him.<sup>80</sup>

The Court held that the state's use of the wife's statement violated the Confrontation Clause because, where testimonial statements are at issue, the only

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<sup>68</sup> *Id.* at 1390.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Crawford v. Washington*, 124 S. Ct. 1354, 1357 (2004).

<sup>74</sup> *Id.* at 1358.

<sup>75</sup> *Id.* at 1357.

<sup>76</sup> *Id.* at 1358.

<sup>77</sup> *Id.* (quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 1358-59.

inducium of reliability sufficient to satisfy constitutional demands is confrontation.<sup>81</sup> However, when nontestimonial hearsay is at issue, the Court determined that the States' may have more flexibility in the development of their hearsay law.<sup>82</sup> However, when testimonial evidence is at issue, the Constitution demands that the declarant be unavailable and that there was a prior opportunity to cross-examine in order for the hearsay to be admitted.<sup>83</sup> The Court did not define "testimonial, however, the Court did state the term at a minimum includes prior testimony at "a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations"<sup>84</sup> The Court reversed the decision of the Washington Supreme Court because the trial court admitted the wife's testimonial statement against the defendant despite the fact that the defendant was never given an opportunity to cross-examine her.<sup>85</sup>

Justice Rehnquist's dissent declared that the Court's decision to overrule *Roberts* is not backed sufficiently by persuasive reasoning to overrule long-established precedent, thereby creating uncertainty in future criminal trials.<sup>86</sup>

## SECTION 2.3 FOURTEENTH AMENDMENT

**Illinois v. Fisher**, 124 S. Ct. 1200 (2004).

Respondent was charged with possession of cocaine in October of 1988 but failed to appear in court in July 1989.<sup>87</sup> Fisher remained a fugitive for the next ten years but was later apprehended in September of 1999 on other charges.<sup>88</sup> The State reinstated respondent's possession charge from 1988.<sup>89</sup> In accordance with established procedures, however, the police had destroyed the cocaine taken from the respondent after his initial arrest for possession.<sup>90</sup> The respondent filed for a dismissal of the possession charge based on the fact that the evidence was destroyed.<sup>91</sup> The trial court denied the motion and respondent was convicted.<sup>92</sup> On appeal, the state appellate court reversed on due process grounds.<sup>93</sup>

The United States Supreme Court reversed the decision of the state appellate court.<sup>94</sup> The Court noted that when the State failed to disclose exculpatory evidence a due process violation occurs regardless of the good or bad faith of the prosecution.<sup>95</sup> However, the Court noted that under *Arizona v. Youngblood*, a different result is required when the State fails to preserve evidentiary material "of which no more can be said than that it could have been subjected to tests, the results of which might have

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<sup>81</sup> *Id.* at 1374.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* (Rehnquist, J., dissenting).

<sup>87</sup> *Illinois v. Fisher*, 124 S. Ct. 1200, 1201 (2004).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 1203.

<sup>95</sup> *Id.* at 1202 (citing *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Agurs*, 427 U.S. 97 (1976)).

exonerated the defendant.”<sup>96</sup> In those types of cases, a due process violation does not occur by the failure to preserve the potentially useful evidence ““unless a criminal defendant can show bad faith on the part of the police.””<sup>97</sup> The Court held that the evidence seized by the police from Fisher was potentially useful evidence, not the material exculpatory evidence addressed in *Brady*.<sup>98</sup> Because Fisher failed to demonstrate any type of bad faith, he failed to establish a due process violation.<sup>99</sup>

**Banks v. Dretke**, 124 S. Ct. 1256 (2004).

Defendant Banks was convicted of murder and sentenced to death.<sup>100</sup> Prior to trial, the state told defendant’s attorney that there would not be a need to litigate discovery issues, stating that ““we will, without the necessity of motions[,] provide you with all discovery to which you are entitled.””<sup>101</sup> Despite representing this, the state withheld evidence that would have allowed the defendant to discredit two essential prosecution witnesses.<sup>102</sup> The state did not disclose that one of the witnesses was a paid police informant.<sup>103</sup> Furthermore, the state did not disclose a pretrial transcript revealing that another witness’s trial testimony had been intensely coached by prosecutors and police officers.<sup>104</sup> In addition, the prosecution did not raise a red flag when the informant testified that he had never given the police any statement and had not talked to any officer about the case until a few days before trial; both of these statements were untrue.<sup>105</sup> Instead of correcting these statements, the prosecutor told the jury that the informant had been open and honest during the trial and that his testimony was of the utmost significance.<sup>106</sup> Similarly, the prosecutor allowed the other witness to convey that his testimony was entirely unrehearsed which was also untrue.<sup>107</sup>

Through direct appeal and state collateral review proceedings, the state kept secret the informant’s link to police and allowed their false testimony to stand uncorrected.<sup>108</sup> Through discovery and an evidentiary hearing during a federal habeas corpus hearing, the suppressed evidence finally surfaced.<sup>109</sup> The District Court granted defendant relief from the death penalty but was reversed.<sup>110</sup> The Fifth Circuit Court of Appeals held that defendant had documented his claims of misconduct too late; therefore, he did not qualify for habeas relief.<sup>111</sup> The Supreme Court reversed.<sup>112</sup>

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<sup>96</sup> *Id.* (quoting *Arizona v. Youngblood*, 488 U.S. 1051, 1057 (1988)).

<sup>97</sup> *Id.* (quoting *Arizona v. Youngblood*, 488 U.S. at 1058).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 1202-03.

<sup>100</sup> *Banks v. Dretke*, 124 S. Ct. 1256, 1263 (2004).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

After finding that the defendant has exhausted the remedies available in state courts to pursue federal habeas corpus relief, the Court reiterated the standards put forth in *Brady v. Maryland*.<sup>113</sup> That case held that “the suppression by the prosecution of evidence favorable to an accused person upon request violates due process where the evidence is material to either guilt or to punishment.”<sup>114</sup> There are three components of a *Brady* claim: 1) the evidence must be favorable to the accused, either because of its exculpatory character or its impeachment value; 2) the evidence must have been suppressed by the state; and 3) prejudice must have resulted.<sup>115</sup> Corresponding to the second *Brady* component, a petitioner must show “cause” by presenting evidence that the reason for his failure to develop facts in state court proceedings was due to the state’s suppression of the evidence.<sup>116</sup> Coinciding with the third component, prejudice exists when the evidence is material.<sup>117</sup>

As to the first component, the Court concluded that the suppressed evidence—the witness’s paid informant status—qualified as evidence advantageous to defendant.<sup>118</sup>

As to the second component, the Court likened the case to *Strickler v. Greene*.<sup>119</sup> In that case, the Court found that defendant had shown cause because 1) the prosecutor withheld exculpatory evidence, 2) defendant reasonably relied on the prosecution’s open file policy, and 3) the state confirmed defendant’s reliance on the openness of the file by asserting during habeas proceedings that defendant had already received everything known to the government.<sup>120</sup> Similarly, in this case, the Court determined the state knew of and kept back the informant’s arrangement with an officer.<sup>121</sup> Second, the state asserted that it would disclose all *Brady* material.<sup>122</sup> Third, in his habeas application, defendant claimed that the witness was a paid police informant and that defendant’s arrest was a set-up.<sup>123</sup> However, the state denied this assertion, once again creating the appearance that the defendant could rely on the prosecution’s representation that if had engaged in full disclosure.<sup>124</sup> Because the state persisted in hiding the informant’s status and misleadingly represented that it had complied with *Brady*, defendant had cause for failing to investigate.<sup>125</sup>

As to the third component, evidence must be material for *Brady* purposes or else suppression does not give rise to sufficient prejudice to overcome a procedural default.<sup>126</sup> Evidence is material when “the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.”<sup>127</sup> Because defendant had no criminal record, the informant’s testimony about defendant’s

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<sup>113</sup> *Id.* at 1271-72.

<sup>114</sup> *Id.* at 1272 (quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963)).

<sup>115</sup> *Id.* (citing *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 1272-73 (citing *Strickler v. Greene*, 527 U.S. at 276).

<sup>120</sup> *Id.* at 1273.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 1276.

<sup>127</sup> *Id.* (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)).

propensity to commit violent crimes was crucial to the prosecution.<sup>128</sup> The difference between prejudice in *Strickler* and in this case is that in this case the informant's testimony was the centerpiece of defendant's penalty phase; on the other hand, in *Strickler*, the testimony that the witness gave was mainly cumulative and there was considerable physical evidence linking defendant to the crime.<sup>129</sup> The Court determined Banks did not receive a fair trial at least in respect to the penalty phase due to the jury's ignorance of the informant's role in the investigation.<sup>130</sup>

The Court also determined the defendant should have been granted a certificate of appealability.<sup>131</sup> The Court stated that in order to obtain a certificate a defendant must "'demonstrat[e] that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'"<sup>132</sup> The Court determined Banks's case fit this description and that a certification should have been issued.<sup>133</sup>

Justice Thomas dissented on the grounds that nondisclosure of informant status was prejudicial.<sup>134</sup> In other words, there was no reasonable probability that the jury would have altered its finding.<sup>135</sup>

## SECTION 3—IOWA CASE LAW

### SECTION 3.1 FOURTH AMENDMENT

**State v. Lewis**, 675 N.W.2d 516 (Iowa 2004).

The issue raised in this case was whether the search of defendant's property and seizure of evidence violated the Fourth Amendment.<sup>136</sup> The police department received a letter from a property owner regarding his concern for illegal activities in his neighborhood, specifically loitering and trespassing on his rental properties, which are located in a high crime area.<sup>137</sup> The letter authorized the police to arrest anyone who is illegally on the property that defendant managed and owned.<sup>138</sup> An officer was on patrol and observed several persons in a fenced in backyard and on the enclosed porch located inside the fence at the rear of the property.<sup>139</sup> The backyard and the porch were visible from the road.<sup>140</sup> A gated fence completely enclosed the backyard.<sup>141</sup> The officer did not

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<sup>128</sup> *Id.* at 1277.

<sup>129</sup> *Id.* at 1278.

<sup>130</sup> *Id.* at 1279.

<sup>131</sup> *Id.* at 1280.

<sup>132</sup> *Id.* (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 1281 (Thomas, J., dissenting).

<sup>135</sup> *Id.* (Thomas, J., dissenting).

<sup>136</sup> *State v. Lewis*, 675 N.W.2d 516, 519 (Iowa 2004).

<sup>137</sup> *Id.* at 519-20.

<sup>138</sup> *Id.* at 520.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

see the property owner on the property.<sup>142</sup> The officer knew that the department had a no trespass letter on file regarding this property, so the officer decided to investigate.<sup>143</sup> As he pulled up into the driveway, the officer noticed two persons standing inside the gate of the fenced in backyard start to walk rapidly towards the enclosed porch where there was a large group of people.<sup>144</sup> The officer yelled, ““Stop, police.””<sup>145</sup> The individuals proceeded to the porch.<sup>146</sup> As the attempted to enter the porch, police again yelled at these individuals, entered the fenced in backyard, and ran to the porch door, where the officer could smell the odor of recently smoked marijuana.<sup>147</sup> The officer ordered everyone off the porch and felt it was necessary to pat down each individual on the porch.<sup>148</sup> Two persons remained on the porch—defendant and his girlfriend.<sup>149</sup> Officers entered the porch to check for weapons.<sup>150</sup> When defendant stood, officers saw a bag of marijuana between defendant’s feet.<sup>151</sup> An officer searched the rest of the porch and found several bags of marijuana and a gun.<sup>152</sup> Defendant was arrested and convicted of possession of marijuana.<sup>153</sup>

The court has adopted a two step process to determine whether a Fourth Amendment violation has occurred.<sup>154</sup> First, the court determines whether the individual had a legitimate expectation of privacy in the location searched.<sup>155</sup> If an expectation exists, the court then considers whether the state “unreasonably invaded that protected interest.”<sup>156</sup> The protection provided by the Fourth extends to the curtilage, the area associated with intimate activities of the home.<sup>157</sup> To determine the extent of the curtilage, the court looked at 1) the proximity of the area in question to the home, 2) whether the area is included within an enclosure surrounding the home, 3) the nature of the uses that the area is put, and 4) steps taken to protect the area from observation by people passing by.<sup>158</sup> The court determined that the driveway was not within the curtilage because it is common for solicitors, drivers, and other persons to enter driveways of private residences.<sup>159</sup> Moreover, the observation of persons in defendant’s fenced in backyard and enclosed porch did not violate the Fourth Amendment because there is no legitimate expectation of privacy when officers can view an activity occurring in the curtilage from a public area.<sup>160</sup>

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 521.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 522.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 523.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

However, the court reached a different result with respect to the police entering the fenced in backyard and the enclosed porch.<sup>161</sup> At the time of entry, defendant was using these areas for a private gathering.<sup>162</sup> Although steps were not taken to protect the area from observation, the court stated that “it is clear that the area was intimately associated with domestic life and the privacies of [defendant’s] home.”<sup>163</sup> Therefore, the Court concluded the fenced in backyard and the porch were within the curtilage.<sup>164</sup>

Next, the court examined the reasonableness of the warrantless entry into the fenced in backyard.<sup>165</sup> The state argued that the two individuals’ conduct of walking quickly to the enclosed porch constituted reasonable suspicion under *Terry v. Ohio*, 392 U.S. 1 (1968).<sup>166</sup> The court found that this suspicion is not in and of itself enough to allow officers to enter the curtilage.<sup>167</sup> The officers needed probable cause and exigent circumstances to enter the curtilage without a warrant.<sup>168</sup> When the officers arrived at defendant’s home, they did not have probable cause to believe that a crime had been committed.<sup>169</sup> The state claimed that when officers entered the backyard they were in hot pursuit of persons committing the crime of interference with official acts.<sup>170</sup> However, the court reiterated that the officers did not have probable cause in the first place to invoke this exception to the warrant requirement.<sup>171</sup> Therefore, since the evidence resulted from the illegal entry into the fenced in backyard, the court held the evidence should have been suppressed.<sup>172</sup>

Justice Cady dissented because the police went to the premises to conduct an investigation.<sup>173</sup> Therefore, the officers’ conduct must be adjudged by the standard governing such activity, not by the standard applied when the police enter premises to conduct a search.<sup>174</sup> Justice Cady determined the police were in an area they were entitled to be when they smelled the marijuana.<sup>175</sup> At this point, the entry ceased to be a police investigation.<sup>176</sup> However, at this time, Justice Cady concluded the police had developed probable cause and the subsequent conduct was not in violation of the Fourth Amendment.<sup>177</sup>

**State v. Tague**, 676 N.W.2d 197 (Iowa 2004).

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<sup>161</sup> *Id.* at 523-24.

<sup>162</sup> *Id.* at 523.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 523-24.

<sup>165</sup> *Id.* at 524.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 525.

<sup>168</sup> *Id.* (citing *State v. Pickett*, 573 N.W.2d 245, 247 (Iowa 1997)).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 526.

<sup>172</sup> *Id.* at 526-27.

<sup>173</sup> *Id.* (Cady, J., dissenting).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 529 (Cady, J., dissenting).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

The state appealed from a district court decision sustaining the defendant's motion to suppress.<sup>178</sup> The issue on appeal was "whether there was probable cause or reasonable suspicion to legally stop [the defendant's] vehicle and detain him under the Fourth Amendment . . . ."<sup>179</sup> Generally, when an officer observes a violation of traffic laws, the officer has probable cause to pull the vehicle over.<sup>180</sup> Probable cause exists if "the totality of the circumstances as viewed by a reasonable and prudent person would lead that person to believe that a crime has been or is being committed and that the arrestee committed or is committing it."<sup>181</sup>

On appeal, the state argued that the officer had probable cause to make the stop because defendant violated Iowa Code §§ 321.297 and 321.306.<sup>182</sup> Section 321.297 prohibits a driver from driving his or her vehicle left of the center unless an exception exists.<sup>183</sup> Using the DOT's Manual on Uniform Traffic Control Devices, the court concluded that the line defendant's vehicle crossed was an edge line marking, not a center line marking.<sup>184</sup> The median was the center line.<sup>185</sup> Since defendant did not drive left of the center line, his momentary crossing of the edge line did not give the officer probable cause to make the stop.<sup>186</sup>

Section 321.306 states that a driver must drive his or her vehicle as much as possible in a single lane and that the driver cannot move from that lane to another or to the shoulder unless such a move can be made safely.<sup>187</sup> A violation does not occur unless the driver changes lanes before the driver determines that such movement could be made safely.<sup>188</sup> The court determined that the state failed to prove that there was an objective basis to believe that defendant's movement was done without first ascertaining that he could make such a movement safely.<sup>189</sup> Defendant's vehicle did not weave; defendant was not violating speeding laws; and he was not driving the vehicle in an erratic manner. Furthermore, there was no other traffic on the road when he crossed the edge line.<sup>190</sup> Therefore, the court concluded that defendant's movement did not give police probable cause to stop.<sup>191</sup>

The state also argued that the police had reasonable suspicion to make the stop based on the circumstances of defendant's driving, which suggested that defendant was either intoxicated or fatigued.<sup>192</sup> To make a stop based on reasonable suspicion, the state must show that the stopping officer had specific and articulable facts to believe that criminal activity was afoot.<sup>193</sup> To justify the stop on the basis the defendant may have

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<sup>178</sup> State v. Tague, 676 N.W.2d 197, 200 (Iowa 2004).

<sup>179</sup> *Id.* at 201.

<sup>180</sup> *Id.* (citing State v. Mitchell, 498 N.W.2d 691, 693 (Iowa 1993)).

<sup>181</sup> *Id.* (quoting State v. Bumpus, 459 N.W.2d 619, 624 (Iowa 1990)).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 202.

<sup>184</sup> *Id.* at 202-03.

<sup>185</sup> *Id.* at 203.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 203-04.

<sup>190</sup> *Id.* a 203.

<sup>191</sup> *Id.* at 204.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* (citing State v. Heminover, 619 N.W.2d 353, 357 (Iowa 2000)).

been fatigued, the state must rely on the community caretaking function of the police, which is applicable in cases where the police stop vehicles in the interest of public safety.<sup>194</sup> The court found that defendant's left tires barely crossed the edge line once for a very brief period of time and that the officer did not observe defendant driving erratically or see the vehicle weave.<sup>195</sup> Defendant's driving did not amount to the weaving or erratic speeds observed by officers in *State v. Tompkins*, 507 N.W.2d 736 (Iowa Ct. App. 1993) and *State v. Otto*, 566 N.W.2d 509 (Iowa 1997).<sup>196</sup> In viewing the totality of the circumstances, the court concluded that any vehicle could briefly cross an edge line without giving rise to the suspicion of fatigue or intoxication.<sup>197</sup> Thus, because the officer lacked probable cause or reasonable suspicion to stop the defendant's vehicle, the court concluded all evidence derived from the illegal stop was inadmissible.<sup>198</sup> The court did not address the defendant's federal constitution claim because the stop violated the defendant's rights guaranteed by article I, section 8 of the Iowa Constitution.<sup>199</sup>

## SECTION 3.2 SIXTH AMENDMENT

**State v. Tejada**, 677 N.W.2d 744 (Iowa 2004).

Edward Tejada hit a man in the head with a baseball bat and was convicted of willful injury.<sup>200</sup> On appeal, Tejada asserted that the district court denied his right to counsel because it failed to inquire into his allegations of a breakdown in the relationship with his attorney.<sup>201</sup> The Iowa Supreme Court held that the district court should have determined whether "there was 'a complete breakdown in communication between the attorney and the defendant' to the extent Tejada's Sixth Amendment right to counsel was violated."<sup>202</sup> The court noted that when a defendant requests and receives court-appointed counsel, counsel cannot be removed absent sufficient cause.<sup>203</sup> "Sufficient cause includes a conflict of interest, irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant."<sup>204</sup> The court determined that although courts do not need to conduct a hearing every time a defendant indicates dissatisfaction with his attorney, in Tejada's case he alleged the relationship had deteriorated so far that he was withholding evidence from his counsel.<sup>205</sup> Because the district court received a "colorable complaint," the Iowa Supreme Court held that the district court should have inquired into whether a total breakdown in communication had occurred between Tejada and his attorney.<sup>206</sup> However, because the record was

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<sup>194</sup> *Id.* (citing *State v. Mitchell*, 498 N.W.2d 691, 693-94 (Iowa 1993)).

<sup>195</sup> *Id.* at 205.

<sup>196</sup> *Id.* at 204-05.

<sup>197</sup> *Id.* at 205-06.

<sup>198</sup> *Id.* at 206.

<sup>199</sup> *Id.*

<sup>200</sup> *State v. Tejada*, 677 N.W.2d 744, 747 (Iowa 2004).

<sup>201</sup> *Id.* at 748.

<sup>202</sup> *Id.* at 751-52 (quoting *State v. Lopez*, 633 N.W.2d 774, 779 (Iowa 2001)).

<sup>203</sup> *Id.* at 749.

<sup>204</sup> *Id.* at 749-50 (quoting *State v. Lopez*, 633 N.W.2d at 779).

<sup>205</sup> *Id.* at 751.

<sup>206</sup> *Id.* at 751-52.

inadequate to decide the issue on direct appeal, the court preserved the error for postconviction relief.<sup>207</sup>

Tejada also alleged the district court erred in refusing to let his ex-girlfriend testify that she heard someone else admit he had committed the crime.<sup>208</sup> The district court excluded this evidence as hearsay.<sup>209</sup> Tejada alleged that the district court should have allowed the testimony in as an excited utterance.<sup>210</sup> The Iowa Supreme Court held that the statement was not made in response to a startling event because it was made thirty minutes after the event and was in response to a direct question.<sup>211</sup> Thus, the court held the statement was made as a “product of reflection or deliberation.”<sup>212</sup>

Tejada also advanced an ineffective assistance of counsel claim.<sup>213</sup> Tejada alleged that his attorney did not object to a jury instruction on admissions and that his counsel was ineffective because none of his admissions were presented at trial and the reading of the instruction may have led jurors to believe Tejada had made an admission.<sup>214</sup> The Iowa Supreme Court held that Tejada did not suffer prejudice because the “submission of [the] superfluous jury instruction did not raise an issue which ‘[gave] rise to a reasonable probability the outcome would have been different had counsel not erred.’”<sup>215</sup> The court determined Tejada’s claims about the instructions effect on the jury were speculative and without merit.<sup>216</sup> In addition, the prosecution presented “overwhelming evidence” indicating Tejada’s guilt.<sup>217</sup> As a result, the Iowa Supreme Court rejected Tejada’s ineffective assistance of counsel claim.<sup>218</sup>

**Fullenwider v. State**, 674 N.W.2d 73 (Iowa 2004).

Defendant was convicted of possession with intent to deliver controlled substances, possession of a firearm as a felon, failure to affix tax stamps, and enhancement of his penalty for possession of a firearm while possessing controlled substances.<sup>219</sup> On appeal, the defendant argued he received ineffective assistance of counsel because 1) the lawyer failed to perform an essential duty in representing the defendant and 2) prejudice resulted.<sup>220</sup>

First, the defendant argues his attorney was ineffective in failing to make a record on the trial court’s refusal to approve a plea agreement on the second day of trial.<sup>221</sup> Specifically, the defendant argued the attorney should have introduced evidence that the court’s decision was “based on a firm policy in that district that plea agreements must be presented during the week prior to trial”; and the court’s ruling was invalid under *State v.*

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<sup>207</sup> *Id.* at 752-53.

<sup>208</sup> *Id.* at 753.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 754.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 755 (quoting *State v. Spies*, 672 N.W.2d 792, 799 (Iowa 2003)).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Fullenwider v. State*, 674 N.W.2d 73, 74 (Iowa 2004).

<sup>220</sup> *Id.* at 75-76.

<sup>221</sup> *Id.* at 76.

*Hager*, 630 N.W.2d 828, 835-36 (Iowa 2001).<sup>222</sup> The court concluded that trial counsel did not breach his duty when he failed to anticipate *Hager*, which was not decided until after defendant’s trial and was not “reasonably predictable.”<sup>223</sup>

In addition, the defendant challenged the sufficiency of the evidence with respect to the gun and the controlled substance.<sup>224</sup> The defendant’s trial counsel raised a motion of acquittal based on insufficiency of the evidence.<sup>225</sup> On appeal, the defendant’s appellate counsel challenged only the sufficiency of the gun but not of the controlled substance.<sup>226</sup> The court agreed the state failed to show the necessary control over the premises to establish possession.<sup>227</sup> Under the relaxed rule of *State v. Simpson* regarding when possession has been established, the state failed to establish control of the premises as required by *Simpson*, where possession is established “if contraband is found where the defendant had a right to control the premises or in a place which is accessible to the defendant and is subject to his dominion and control—or joint dominion and control with another.”<sup>228</sup> When officers had apartment under surveillance, they observed defendant on only a few occasions going into the building and that the apartment where the drugs were found was one of many that the defendant visited.<sup>229</sup> The apartment was occupied by the lessee and her daughter.<sup>230</sup> Thus, the court concluded “[t]here was no indicia of any control of the premises on the part of Fullenwider.”<sup>231</sup> Furthermore, mere knowledge of presence of contraband, as evidenced by defendant’s cell phone being placed near the contraband, was insufficient to show possession under *Simpson*.<sup>232</sup> As a result, the court vacated the decision of the court of appeals and reversed the judgment of the district court.<sup>233</sup>

Justice Cady dissented for the reasons outlined in his dissent in *State v. Bash*, 670 N.W.2d 135, 139-41 (Iowa 2003) (Cady, J., dissenting).<sup>234</sup>

**State v. Meron**, 675 N.W.2d 537 (Iowa 2004).

Defendant was arrested for shoplifting and was charged with theft in the third degree.<sup>235</sup> While the action was still pending, she was arrested again for shoplifting and was charged with theft in the third degree and possession of a controlled substance.<sup>236</sup> Defendant appeared in court with her attorney for a dispositional hearing on two probation revocation proceedings arising from prior convictions.<sup>237</sup> Defendant also

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<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 77.

<sup>227</sup> *Id.* at 78.

<sup>228</sup> *Id.* (citing *State v. Simpson*, 528 N.W.2d 627, 631 (Iowa 1995)).

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* (Cady, J., dissenting).

<sup>235</sup> *State v. Meron*, 675 N.W.2d 537, 539 (Iowa 2004).

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

requested to plead guilty to the theft and controlled substance charges.<sup>238</sup> After the court was informed that defendant had not prepared written pleas of guilty, the court engaged in an exchange, in which the court inquired whether defendant understood the nature of the charge, the minimum and maximum penalties, whether she talked to her attorney about her constitutional rights that she would be waiving by pleading guilty, asked defendant if she understood that there would be no trial, explained the maximum sentences she faced, and whether she admitted to the facts underlying the charges.<sup>239</sup> The defendant also asked to waive time for sentencing and indicated she understood she was waiving her right to file a motion in arrest of judgment.<sup>240</sup> However, the defendant was not informed by the court of the purpose of the motion or the consequences of failing to file the motion.<sup>241</sup> The court accepted the pleas and sentenced the defendant.<sup>242</sup> On appeal, the defendant claimed that her pleas were not voluntarily and intelligently made because the court failed to cover all the requirements of Iowa Rule of Criminal Procedure 2.8(2)(b) before accepting her guilty pleas.<sup>243</sup> The Iowa Supreme Court determined that the in-court colloquy did not substantially comply with rule 2.8(2)(b).<sup>244</sup> The court determined a number of requirements were ignored, including the fact that nothing was said to defendant that conveyed the concept that she could compel witnesses to attend trial or that she could not be forced to be a witness against herself.<sup>245</sup> Furthermore, the general confirmation made by the court that defendant's attorney discussed her trial rights with her was not sufficient to satisfy the rule.<sup>246</sup>

The state claimed that the defendant waived the necessity for the court to explain all the requirements of the Rule when she agreed to abbreviate the proceedings.<sup>247</sup> Prior to 1980, rule 2.8(2)(b) was interpreted to require a district court to engage in an in-court colloquy with the defendant addressing all the requirements of the rule.<sup>248</sup> However, in *State v. Kirchoff*, 452 N.W.2d 801 (Iowa 1980), the court held that the requirement of a court to conduct an in-court colloquy could be satisfied by supplementing the in-court colloquy with a written plea.<sup>249</sup> The holding of *Kirchoff* was later codified in rule 2.8(2)(b).<sup>250</sup> The court determined however, that while the rule embraces the use of written waivers, neither *Kirchoff* nor the rule itself “diminishes the importance and necessity of the court’s role to ensure each plea is voluntary, intelligent, and supported by facts.”<sup>251</sup> *Kirchoff* allowed a court to waive the necessity of an in-court colloquy upon examination of a written plea.<sup>252</sup> However, it did not allow the defendant to waive the

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<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 540.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 542.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 542-43.

<sup>248</sup> *Id.* at 543.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

means for the court to determine that the plea is voluntarily and intelligently entered.<sup>253</sup> Thus, the waiver language of the rule only means that an in-court colloquy can be waived and a written plea can serve as substantial compliance with the rule.<sup>254</sup> The court also rejected the state's contention that because defendant agreed to an abbreviated proceeding, the substantial compliance was relaxed.<sup>255</sup> The court found that such an approach would "eviscerate the rule[] and essentially transform the process of entering guilty pleas into a rubber stamp."<sup>256</sup> Thus, the court concluded the requirements of the rule had not been satisfied and vacated the decision of the court of appeals and reversed and remanded the district court judgment.<sup>257</sup>

### SECTION 3.3 ALCOHOL-RELATED OFFENSES

**State v. Green**, 2004 WL 737080 (Iowa Apr. 7, 2004)

Jerel Howard Green was charged with operating a motor vehicle while intoxicated.<sup>258</sup> The defendant filed a motion to suppress the results of his blood test.<sup>259</sup> The district granted the motion because her person who had withdrawn Green's blood was a phlebotomist.<sup>260</sup> The district concluded that a phlebotomist was not "one of the individuals approved by the Code of Iowa to take a blood sample for the purpose of determining alcohol concentration."<sup>261</sup>

Iowa Code § 321J.11 permits "[o]nly a licensed physician, licensed physician assistant, . . . medical technologist, or registered nurse" to withdraw a blood sample."<sup>262</sup> The district court determined that a phlebotomist was not a medical technologist because phlebotomists only receive three weeks of training, whereas a medical technologist must obtain a bachelor's degree.<sup>263</sup> However, the Iowa Supreme Court held there was not enough evidence in the record to make this determination.<sup>264</sup> As a result, the court reversed the district court's order suppressing the evidence and remanded for further proceedings.<sup>265</sup>

The defendant also alleged that the deputy improperly invoked implied consent when Green gave his waiver to have his blood withdrawn.<sup>266</sup> Because the district court did not address the issue, the Iowa Supreme Court declined as well and remanded the issue for further consideration.<sup>267</sup>

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<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 544.

<sup>257</sup> *Id.*

<sup>258</sup> *State v. Green*, 2004 WL 737080, at \*1 (Iowa Apr. 7, 2004).

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at \*3 (quoting IOWA CODE § 321J.11 (2003)).

<sup>263</sup> *Id.* at \*4.

<sup>264</sup> *Id.* at \*4-5.

<sup>265</sup> *Id.* at \*5.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

## SECTION 3.4 ETHICAL ISSUES

**Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Williams**, 675 N.W.2d 530 (Iowa 2004).

Attorney Valli Jo Williams pled guilty to one count of interstate transportation of stolen property and one count of wire fraud.<sup>268</sup> Williams's conduct violated DR 1-102(A)(1) (stating "[a] lawyer shall . . . not violate disciplinary rule"); DR 1-102(A)(3) (stating "[a] lawyer shall not . . . engage in illegal conduct involving moral turpitude"); DR 1-102(A)(4) (stating "[a] lawyer shall not . . . engage in conduct involving dishonesty, fraud, deceit, or other misrepresentation); and DR 1-102(A)(6) (stating "[a] lawyer shall not . . . engage in any other conduct that adversely reflects on the fitness to practice law").<sup>269</sup> The Iowa Supreme Court held that "[i]n light of the grave criminal actions for which Williams pled guilty and served time in federal prison, it is axiomatic that her license to practice law in Iowa be revoked."<sup>270</sup>

**Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Lett**, 674 N.W.2d 139 (Iowa 2004).

The Grievance Commission found that defendant had stolen client funds, neglected duties to her clients, lied to her clients to cover up her misdeeds, failed to promptly return client property upon withdrawal from cases, disregarded court orders, and failed to cooperate with the investigation of the Board and recommended that her license to practice law be revoked.<sup>271</sup> In light of these factual findings, the court agreed with the commission that the Board had proved by convincing preponderance of the evidence that Lett violated the following disciplinary rules: DR 1-102(A)(3), 1-102(A)(4), and 1-102(B)(3) when she stole fund entrusted to her by her clients; DR 1-102(A)(4), 9-102(B)(3), and 9-102(B)(4) when she did not return retainers after abandoning their cases; DR 9-102(B)(3) when she failed to provide accountings to clients; DR 6-102(A)(3) and 7-101(A) when she neglected client matters; DR 1-102(A)(5) when she failed to appear for court proceedings; DR 2-110(A)(2) when she failed to promptly return papers and property to clients; DR 7-106(A) and 1-102(A)(5) for disregarding court orders; and DR 1-102(A)(5) and 1-102(A)(6) when she failed to cooperate with the Board's investigation.<sup>272</sup> According to the court, defendant's actions clearly warranted revocation because although she was not convicted of having stolen client funds she received a deferred judgment after a plea of guilty and the fact that she only received a deferred judgment "is, in itself, irrelevant to our analysis in an attorney disciplinary proceeding."<sup>273</sup> Furthermore, defendant repeatedly violated other provisions of the Code of Professional Responsibility.<sup>274</sup> The court concluded that allowing Lett to

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<sup>268</sup> Iowa Supreme Court Bd. Of Prof'l Ethics & Conduct v. Williams, 675 N.W.2d 530, 532 (Iowa 2004).

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 533.

<sup>271</sup> Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Lett, 674 N.W.2d 139, 141-42 (Iowa 2004).

<sup>272</sup> *Id.* at 143-44.

<sup>273</sup> *Id.* at 144-45.

<sup>274</sup> *Id.* at 145.

practice law again would risk harm to both the public and the legal profession.<sup>275</sup> As a result, the court revoked the Stacie L. Lett’s license.<sup>276</sup>

## SECTION 3.5 EVIDENCE

**State v. Sullivan**, 679 N.W.2d 19 (Iowa 2004).

Andrew Sullivan appealed his conviction of possession of marijuana with intent to deliver following the recovery of marijuana from a freezer in an apartment where the defendant and several others lived.<sup>277</sup> The defendant contended the trial court abused its discretion by admitting evidence that the defendant in the past had possessed crack cocaine.<sup>278</sup> The Iowa Supreme Court held that bad acts evidence is admissible only if relevant and material to a legitimate issue in the case other than a general propensity to commit wrongful acts, and clear proof exists that the individual against whom the evidence is offered committed the act or crime.<sup>279</sup> If evidence of bad acts is relevant and material to some legitimate issue in dispute, it is prima facie admissible.<sup>280</sup> However, even if relevant to a legitimate factual issue in dispute, it is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant.<sup>281</sup>

Overruling *State v. McDaniel*, 512 N.W.2d 305 (Iowa 1994), the court held that “unless the prosecutor can articulate a valid, noncharacter theory of admissibility for admission of the bad-acts evidence, such evidence should not be admitted.”<sup>282</sup> The Court held that the evidence “unconnected to the charge for which Sullivan was being charged without articulating a valid, noncharacter theory of logical relevance to support an ultimate inference of intent to deliver” coupled with the passage of three years since the prior act “cast[] doubt on the weight of [the] evidence.”<sup>283</sup> As a result, the Court found that the trial court abused its discretion by admitting evidence of the prior bad act.<sup>284</sup> The Court further held that because the record did not affirmatively establish a lack of prejudice, admission of the prior bad act was prejudicial.<sup>285</sup> As a result, the trial court’s error was not harmless.<sup>286</sup> Absent the evidence of Sullivan’s prior bad act, the Court concluded that there was a likelihood that the jury would have concluded that the marijuana found in the freezer was for personal use, not for delivery.<sup>287</sup> Therefore, remand for a new trial was proper.<sup>288</sup>

**State v. Werts**, 677 N.W.2d 734 (Iowa 2004).

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<sup>275</sup> *Id.* at 146.

<sup>276</sup> *Id.*

<sup>277</sup> *State v. Sullivan*, 679 N.W.2d 19, 21 (Iowa 2004).

<sup>278</sup> *Id.* at 23.

<sup>279</sup> *Id.* at 25 (citing *State v. Roth*, 403 N.W.2d 762, 765 (Iowa 1987)).

<sup>280</sup> *Id.* (citing *State v. Mitchell*, 633 N.W.2d 295, 298 (Iowa 2001)).

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* at 28.

<sup>283</sup> *Id.* at 29.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 30.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.* at 30-31.

<sup>288</sup> *Id.* at 31.

Defendant appealed from a conviction of first degree murder in regard to the death of a child that was in her care.<sup>289</sup> Defendant operated a day care facility out of her home and provided regular care to Ben Vorwerk, the victim.<sup>290</sup> The defendant called 911 after Ben had stopped breathing.<sup>291</sup> She told police and paramedics that he had choked on some food.<sup>292</sup> Upon arrival to the hospital, doctors noticed abnormal hemorrhaging in the back of his eyes and bruises on his forehead, chin, and shoulder.<sup>293</sup> The next day the victim was declared brain dead.<sup>294</sup> During the autopsy, it was discovered that there was no evidence of choking, and the medical examiner concluded that he had died of a blunt force trauma to the head.<sup>295</sup> A consulting physician agreed that he had been hit in the head a few minutes before paramedics arrived.<sup>296</sup> The defense at trial produced an expert who testified that the injury came from a massive head trauma that had occurred several hours or even days before the paramedics arrived.<sup>297</sup>

The Iowa Court of Appeals reversed the conviction based on its conclusion that prior bad acts should not have been introduced at the trial.<sup>298</sup> Reversal resulted from cross examination of the defendant concerning a conversation defendant and victim's parents had at the hospital, in which the defendant said that she would never hurt the child.<sup>299</sup> In rebuttal, the state called a neighbor for impeachment purposes only, who testified that she saw the defendant pick up the child and slam him down on his bottom.<sup>300</sup> It was prejudicial error to admit this testimony because the defendant had "not testified that she had never hurt Ben, but rather that she had told his parents 'that [she] would never hurt Ben.'"<sup>301</sup> The court of appeals concluded that this statement did not pertain to what defendant told victim's parents and, therefore, did not contradict what the defendant testified to.<sup>302</sup>

The Iowa Supreme Court agreed the testimony was improperly admitted.<sup>303</sup> The court based its conclusion on the fact that the impeachment evidence had all the attributes of a set-up.<sup>304</sup> "In cross-examining defendant, the prosecutor asked a question that, on its face, was bound to elicit a response favorable to defendant so that he could use otherwise inadmissible evidence to impeach the self-serving response."<sup>305</sup> This type of bootstrapping is in clear violation of *State v. Turecek*, 456 N.W.2d 219 (Iowa 1990).<sup>306</sup> In response, the state argued that the evidence would have been admissible anyway for

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<sup>289</sup> *State v. Werts*, 677 N.W.2d 734, 735 (Iowa 2004).

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at 735-36.

<sup>296</sup> *Id.* at 736.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.* at 736.

<sup>302</sup> *Id.* at 736-37.

<sup>303</sup> *Id.* at 737.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

another purpose—to show malice.<sup>307</sup> However, the court pointed out that the admissibility of bad acts evidence, even if relevant, is subject to balancing probative value with its prejudicial effect.<sup>308</sup> Since the trial court did not make this determination, the Iowa Supreme Court did the balancing, and concluded that the prejudicial effect of this evidence outweighed its probative value.<sup>309</sup>

Defendant also argued that the prosecutor engaged in improper questioning of the defense’s expert and improper commenting.<sup>310</sup> During the cross of defense’s expert, the prosecutor asked questions about conferences in which the expert has been a speaker, including ones for defense organizations.<sup>311</sup> Then, the prosecutor demeaned the expert by stating that he had only formed his conclusions concerning the head trauma after giving a presentation ““in front of all the defense lawyers here in the State of Iowa.””<sup>312</sup> After this, the prosecutor asked if the expert was routinely hired by the defense in cases where children have been abused.<sup>313</sup> The court has recognized that unfairly questioning a witness to make him look bad in front of the jury is not proper and is in violation of the ABA Standards for Criminal Justice.<sup>314</sup> Thus, the prosecutor’s line of questioning was ““an improper effort to demean the witness.””<sup>315</sup>

The prosecutor, during cross of the defendant, also insinuated that the defendant had not gone to the child’s hospital to see him, had not gone to his funeral, and had not gone to the gravesite.<sup>316</sup> Furthermore, the prosecutor also insinuated that defendant had ““knocked the life out of Ben and that’s why [she] was afraid [she] was going to be arrested”” and that she had ““robbed Jeff and Laura [the parents] of their only son.””<sup>317</sup> The court stated this was also improper because it was designed to play upon the passions of the jury.<sup>318</sup>

Finally, during closing arguments, the prosecutor held a baby book in front of the jury and stated that Ben’s book would never be filled and proceeded to tear pages out of it while describing child activities that Ben would never be able to do.<sup>319</sup> The court determined this was ““an improper attempt to appeal to the passion and prejudice of the jury and should be condemned.””<sup>320</sup>

**State v. Douglas**, 675 N.W.2d 567 (Iowa 2004).

The defendant was convicted of conspiracy to manufacture meth based on the testimony of an accomplice, the testimony of an alleged accomplice, and defendant’s out-of-court confession.<sup>321</sup> On appeal, the issues were whether the trial court improperly

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<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> *Id.* at 737-38.

<sup>310</sup> *Id.* at 738.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>314</sup> *Id.* at 738-39.

<sup>315</sup> *Id.*

<sup>316</sup> *Id.* at 739.

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *State v. Douglas*, 675 N.W.2d 567, 569 (Iowa 2004).

allowed the jury to determine whether a witness was an accomplice rather than instructing the jury that she was an accomplice as a matter of law and whether the court erroneously instructed the jury that defendant's confession could be used to corroborate the testimony of another accomplice and that this accomplice's testimony could be used to corroborate the defendant's confession.<sup>322</sup>

The Iowa Supreme Court determined it was not error for the trial court to instruct the jury to decide whether or not a witness was an accomplice.<sup>323</sup> "When the facts and circumstances are undisputed and permit only one inference, whether a witness is an accomplice is a question of law for the court."<sup>324</sup> However, in cases where the facts are disputed and give rise to differing inferences, the question of whether a witness is an accomplice is for the jury.<sup>325</sup> The court determined that in the defendant's case, the facts and circumstances were disputed and thus, different inferences could have been drawn from the evidence.<sup>326</sup> As a result, the trial court did not err.<sup>327</sup>

The court also held that the testimony of an accomplice and a confession from a defendant constitute proper corroboration.<sup>328</sup> Although the court recognized that one accomplice may not corroborate the testimony of another accomplice due to the fact that accomplices might lie to diminish their own responsibility, the court determined the same dangers were not present in the case of a confession by the defendant.<sup>329</sup> Thus, the court held the trial court properly submitted the issue of whether a witness was an accomplice to the jury and that the court properly instructed the jury that the accomplice testimony could be corroborated by the defendant's confession.<sup>330</sup>

## SECTION 3.6 JURISDICTION

**State v. Mallett**, 2004 WL 736868 (Iowa 2004).

Tony Mallett was charged with burglary and possession of a controlled substance.<sup>331</sup> The county attorney amended the trial information by adding a charge of second-degree robbery as a habitual criminal.<sup>332</sup> Mallett was arraigned on the original charges, but he was never arraigned on the new charge.<sup>333</sup> Mallett was convicted and sentenced for second-degree robbery as a habitual offender after a jury trial.<sup>334</sup> Mallett appealed.<sup>335</sup> While the appeal was pending, Mallett filed a motion for a new trial on the grounds of newly discovered evidence.<sup>336</sup> Mallett indicated that he had just discovered he

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<sup>322</sup> *Id.*

<sup>323</sup> *Id.* at 571.

<sup>324</sup> *Id.* (citing *State v. Harris*, 589 N.W.2d 239, 241 (Iowa 1999)).

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> *Id.* at 572.

<sup>329</sup> *Id.*

<sup>330</sup><sup>330</sup> *Id.* at 53.

<sup>331</sup> *State v. Mallett*, 677 N.W.2d 775, 776 (Iowa 2004).

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

was never arraigned on the second-degree robbery charge.<sup>337</sup> The district court denied the motion and Mallett appealed.<sup>338</sup> The state moved to dismiss the appeal.<sup>339</sup>

The Iowa Supreme Court dismissed the appeal holding that the district court did not have jurisdiction to rule on the motion.<sup>340</sup> The court noted that in general, the filing of an appeal divests the court of jurisdiction.<sup>341</sup> However, a district court does retain limited jurisdiction over issues that are merely collateral to the issues presented on appeal.<sup>342</sup> Because Mallett's motion for a new trial was not merely collateral, the Iowa Supreme Court vacated the district court's order on the grounds that the court did not have jurisdiction to enter a ruling.<sup>343</sup>

## SECTION 3.7 SEX OFFENSES

**State v. Petersen**, 678 N.W.2d 611 (Iowa 2004).

Kris Peterson was charged with assault with the intent to commit sexual abuse.<sup>344</sup> Peterson filed a motion to dismiss, but before the hearing on the motion was held, the state filed the trial information.<sup>345</sup> The district court held a hearing on Petersen's motion and dismissed the charges for a lack of probable cause.<sup>346</sup> The district court also dismissed the trial information.<sup>347</sup> The state appealed the order.<sup>348</sup>

The Iowa Supreme Court held the district court should not have dismissed the trial information.<sup>349</sup> The court pointed out the different functions of a complaint and the trial information.<sup>350</sup> The complaint, the court reasoned, "is necessary for the court to issue an arrest warrant for a defendant."<sup>351</sup> A hearing is then necessary to determine if it is legal to detain the defendant before the state files the trial information.<sup>352</sup> If the hearing indicates that there is not probable cause to detain the defendant, the court dismisses the complaint.<sup>353</sup> However, "[t]he filing of the trial information is necessary to charge a defendant with an indictable offense."<sup>354</sup> After the trial information is submitted, a preliminary hearing is not required.<sup>355</sup> "A violation at the complaint stage of the proceeding does not affect the merits of the charge, but only affects the legality of the

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<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

<sup>340</sup> *Id.* at 777.

<sup>341</sup> *Id.* at 776-77 (citing *State v. Jose*, 636 N.W.2d 38, 46 (Iowa 2001); *Shedlock v. Iowa Dist. Ct.*, 534 N.W.2d 656, 658 (Iowa 1985)).

<sup>342</sup> *Id.* at 777.

<sup>343</sup> *Id.*

<sup>344</sup> *State v. Petersen*, 678 N.W.2d 61, 611 (Iowa 2004).

<sup>345</sup> *Id.*

<sup>346</sup> *Id.* at 611-12.

<sup>347</sup> *Id.* at 612.

<sup>348</sup> *Id.* at 613.

<sup>349</sup> *Id.* at 614.

<sup>350</sup> *Id.* at 613.

<sup>351</sup> *Id.* (citing IOWA CODE § 804.1 (2001); *State v. Henderson*, 286 N.W.2d 173, 176 (Iowa 1978)).

<sup>352</sup> *Id.*

<sup>353</sup> *Id.*

<sup>354</sup> *Id.* (citing IOWA R. CRIM. P. 2.5(1)).

<sup>355</sup> *Id.*

detention of the accused to answer the charge prior to the filing of the information.”<sup>356</sup> Thus, after the district court approved the trial information, the determination was made that there was probable cause to detain the defendant and proceed with trial.<sup>357</sup> The court held that “[a]t that point in the proceedings, any defect in the affidavit was moot and not grounds for dismissal of the trial information as a defect in the institution of the prosecution of the action.”<sup>358</sup>

**State v. Baker**, 679 N.W.2d 7 (Iowa 2004).

Mark Roberson Baker was convicted of third-degree sexual abuse and four counts of providing alcohol to minor.<sup>359</sup> He appealed his convictions on the grounds that the district court erred in denying his evidence that the victim had previously made a false claim of a sexual encounter with a neighbor.<sup>360</sup>

The Iowa Supreme Court held that false claims of prior sexual conduct did not fall within the gamut of Iowa’s rape-shield law.<sup>361</sup> The court reasoned that a false allegation of sexual conduct is not sexual behavior.<sup>362</sup> Thus, such false allegations fall outside the letter and spirit of the rape-shield law.<sup>363</sup> The court then addressed whether the unfair prejudice of the proffered evidence outweighed the probative value.<sup>364</sup> The Iowa Supreme Court had previously discussed this issue in *State v. Alvey*, 458 N.W.2d 850 (Iowa 1990).<sup>365</sup> The court clarified *Alvey* in two respects.<sup>366</sup> First, *Alvey* indicated “that ‘doubt of the truth of the proffered testimony’ would *reduce* its probative value . . . .”<sup>367</sup> The court determined this statement was incorrect because the more doubtful a witness’s story is, the more probative it is on the point of untruthfulness.<sup>368</sup>

The second point of *Alvey* the court clarified was what interests should be considered when weighing the prejudice versus the probative value.<sup>369</sup> The court determined that a witness’s embarrassment was not the kind of unfair prejudice that will outweigh the probative value of “clearly relevant evidence.”<sup>370</sup> As a result, the court reversed the charge of sexual abuse and remanded for a new trial.<sup>371</sup>

## SECTION 3.8 RESTITUTION

**State v. Paxton**, 674 N.W.2d 106 (Iowa 2004).

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<sup>356</sup> *Id.* at 614 (citing *State v. Dowell*, 297 N.W.2d 93, 97 (Iowa 1980)).

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

<sup>359</sup> *State v. Baker*, 679 N.W.2d 7, 8 (Iowa 2004).

<sup>360</sup> *Id.*

<sup>361</sup> *Id.* at 10.

<sup>362</sup> *Id.*

<sup>363</sup> *Id.*

<sup>364</sup> *Id.* at 11.

<sup>365</sup> *Id.*

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<sup>367</sup> *Id.* (quoting *State v. Alvey*, 458 N.W.2d 850 (Iowa 1990)).

<sup>368</sup> *Id.*

<sup>369</sup> *Id.*

<sup>370</sup> *Id.* at 12.

<sup>371</sup> *Id.*

Defendant was convicted of theft he committed in his capacity as a stockbroker and challenged a ruling increasing the amount of restitution he was required to pay the victim.<sup>372</sup> Defendant argued that the court erred in failing to factor into the calculation of the victim's damages money paid by the defendant's former employer through an arbitration payment.<sup>373</sup> The Court held that the district court erred in failing to factor into its calculation of the victim's damages the sum paid by the defendant's former employer and that defendant should be credited for the arbitration payment.<sup>374</sup>

## SECTION 3.9 THEFT

**State v. Morris**, 677 N.W.2d 787 (Iowa 2004) (per curiam).

Willis Elbert Morris was convicted of second-degree theft as a habitual offender following his theft of a motor vehicle.<sup>375</sup> He was also charged with the lesser-included offense of operating a motor vehicle without the owner's consent.<sup>376</sup> The Iowa Court of Appeals reversed his conviction, holding that the state offered insufficient evidence that Morris intended to permanently deprive the owner of possession of the motor vehicle.<sup>377</sup> The Iowa Supreme Court affirmed and remanded.<sup>378</sup>

About thirty minutes after the owner of a vehicle reported its theft, the police located the vehicle, being driven by the defendant.<sup>379</sup> When the police pursued, the defendant abandoned the vehicle.<sup>380</sup> Relying on *State v. Schminkey*, 597 N.W.2d 785 (Iowa 1999), the court of appeals held that the defendant's taking of the vehicle without consent did not infer that he intended to permanently deprive the owner of the vehicle.<sup>381</sup> A plurality of the Iowa Supreme Court agreed.<sup>382</sup> Because police recovered the vehicle a short time after its taking, and because the defendant's abandoning the vehicle "was an act that would ordinarily assure [the vehicle's return] to its owner," the Iowa Supreme Court held that insufficient evidence existed to demonstrate the defendant intended to permanently deprive the owner of his property.<sup>383</sup> As a result, the Court affirmed the decision of the Iowa Court of Appeals concluding that the evidence was insufficient and remanding.<sup>384</sup> However, the supreme court ordered a more specific remand.<sup>385</sup> The jury did not reach a verdict on the lesser-included offense because the jury ultimately convicted the defendant on the greater offense.<sup>386</sup> The court concluded this indicated the jury necessarily found all the elements of the lesser-included offense established.<sup>387</sup>

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<sup>372</sup> *State v. Paxton*, 674 N.W.2d 106, 107 (Iowa 2004).

<sup>373</sup> *Id.* at 108.

<sup>374</sup> *Id.* at 111.

<sup>375</sup> *State v. Morris*, 677 N.W.2d 787, 788 (Iowa 2004).

<sup>376</sup> *Id.*

<sup>377</sup> *Id.*

<sup>378</sup> *Id.*

<sup>379</sup> *Id.*

<sup>380</sup> *Id.*

<sup>381</sup> *Id.*

<sup>382</sup> *Id.*

<sup>383</sup> *Id.*

<sup>384</sup> *Id.*

<sup>385</sup> *Id.*

<sup>386</sup> *Id.*

<sup>387</sup> *Id.*

Thus, on the court ordered the entering of an amendment of conviction with respect to the lesser-included offense.<sup>388</sup>

Justice Carter, concurring, reiterated his discomfort with *Schminkey* because it failed to recognize the strength of the inference that arises from the taking of an automobile without the owner's consent because a person who takes another's vehicle is best served if the vehicle is not returned, to avoid his identification.<sup>389</sup> However, even with that presumption, Justice Carter concluded that the totality of the evidence did not sustain a conviction of second-degree theft.<sup>390</sup> As a result, he concurred in the reversal and remand.<sup>391</sup>

Justices Larson, Cady and Streit dissented.<sup>392</sup>

**State v. Williams**, 674 N.W.2d 69 (Iowa 2004).

Defendant appealed his conviction of first degree theft, claiming that the court erred in failing to grant his motion for acquittal and in failing to instruct the jury that theft by deception requires specific intent to deceive.<sup>393</sup> The Iowa Court of Appeals affirmed the conviction.<sup>394</sup>

Defendant, in the process of negotiating the purchase of a car at a dealership, produced a letter written on the letterhead of a local law firm advising that he was about to receive a large personal injury settlement.<sup>395</sup> Defendant also filled out a credit application form in which he provided false information concerning his place of his residence and his place of work.<sup>396</sup> The dealer agreed to sell to defendant the car with a down payment.<sup>397</sup> Defendant was able to drive the car until he could secure the necessary cash.<sup>398</sup> The dealer later found out that the letter was fabricated and that the defendant had provided false information on the application.<sup>399</sup>

The defendant argued the state presented insufficient evidence to support a finding that he intended to deceive the dealership at the time of the transaction.<sup>400</sup> Iowa Code § 714.1 states that a theft is committed if a person “[o]btains the labor or services of another, or a transfer of possession, control, or ownership of the property of another, by deception.”<sup>401</sup> Under §§ 702.9(1), and (5), the definition of deception includes knowingly “[c]reating or confirming another’s belief or impression as to the existence or nonexistence of a fact or condition which is false and which the actor does not believe to be true” or “[p]romising payment, the delivery of goods, or other performance which the actor does not intend to perform or knows the actor will not be able to perform. Failure to perform, standing alone, is not evidence that the actor did not intend to

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<sup>388</sup> *Id.* at 789.

<sup>389</sup> *Id.* (Carter, J., concurring).

<sup>390</sup> *Id.* (Carter, J., concurring).

<sup>391</sup> *Id.* (Carter, J., concurring).

<sup>392</sup> *Id.* at 789-92 (Larson, J., dissenting).

<sup>393</sup> *State v. Williams*, 674 N.W.2d 69, 70 (Iowa 2004).

<sup>394</sup> *Id.*

<sup>395</sup> *Id.*

<sup>396</sup> *Id.*

<sup>397</sup> *Id.*

<sup>398</sup> *Id.*

<sup>399</sup> *Id.*

<sup>400</sup> *Id.* at 71.

<sup>401</sup> *Id.* (quoting IOWA CODE § 714.1 (2001)).

perform.”<sup>402</sup> In this case, the jury was “free to find from the evidence that Williams knowingly deceived the dealership by presenting a bogus letter.”<sup>403</sup> Furthermore, it could have found that there was further deception when the defendant gave information that he was employed when he was not.<sup>404</sup> Defendant imparted this information to obtain a vehicle.<sup>405</sup> The court concluded that obtaining possession of the car in this way violated these statutory provisions.<sup>406</sup>

Defendant also argued that an element of theft by deception is a specific intent on the part of the actor to deceive.<sup>407</sup> The court instructed the jury as follows:

“The State must prove all of the following elements . . .:

1. On or about the 6<sup>th</sup> day of June, 2001, the defendant did present statements and documents to Community Motors.
2. The defendant deceived Community Motors in one or more of the following ways:
  - a. Creating or confirming another’s belief or impression as to the existence or non-existence of a fact or condition which is false and which the actor does not believe to be true;
  - b. Promising payment, which the actor does not intend to perform or knows the actor will not be able to perform. Failure to perform, standing alone, is not evidence that the actor did not intend to perform.
3. The defendant obtained transfer of possession or control from Community Motors.

“*Deception*” consists of *knowingly* doing any of the following:

1. Creating or confirming another’s belief or impression as to the existence or nonexistence of a factor or condition which is false and which the actor does not believe to be true.

. . .

5. Promising payment, the delivery of goods, or other performance which the actor does not intend to perform or knows the actor will not be able to perform. Failure to perform, standing alone, is not evidence that the actor does not intend to perform.”<sup>408</sup>

The court determined that preferably, the instruction should have been proceeded by the word “knowingly” at subparagraphs (a) and (b) of paragraph 2.<sup>409</sup> However, the court found this failure did not constitute reversible error because in considering subparagraph (b) of paragraph 2 of the instruction “it appears impossible for the act of promising payment that the actor does not intend to perform to be accomplished in other than a knowing manner.”<sup>410</sup> In this case, there was no room for the jury to conclude that

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<sup>402</sup> *Id.* (quoting IOWA CODE §§ 702.9(1), (5)).

<sup>403</sup> *Id.*

<sup>404</sup> *Id.*

<sup>405</sup> *Id.*

<sup>406</sup> *Id.* at 71-72.

<sup>407</sup> *Id.* at 72.

<sup>408</sup> *Id.* (citing IOWA CODE § 702.9).

<sup>409</sup> *Id.*

<sup>410</sup> *Id.*

the type of deception described in this instruction could occur unknowingly and the court affirmed the conviction.<sup>411</sup>

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<sup>411</sup> *Id.* at 72-73.