IN THE SUPREME COURT OF IOWA

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| STATE OF IOWA,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>TRAVIS RAYMOND WAYNE WEST,<br><br>Defendant-Appellant. | ) | S.CT. NO.17-0784 |

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE ROBERT J. BLINK, JUDGE

# APPELLANT'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED OCTOBER 10, 2018

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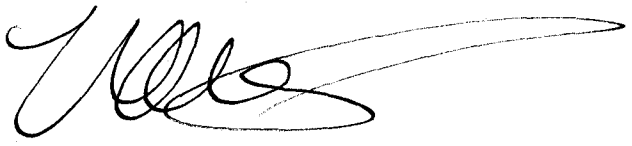
## CERTIFICATE OF SERVICE

On October 26, 2018, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Travis Raymond Wayne West, 1724 Merle Huff Ave., Norwalk, IA 50211.

APPELLATE DEFENDER'S OFFICE



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## QUESTIONS PRESENTED FOR REVIEW

**I. Did the trial court err in failing to merge West's convictions for involuntary manslaughter and the predicate public offense of delivery of a controlled substance? Is there a clear indication of legislative intent to impose multiple punishments?**

**II. At West's trial for involuntary manslaughter and delivery of a controlled substance, did the trial court err in admitting evidence that (1.) West was present at the victim's previous drug overdose, (2.) he supplied drugs to the victim in the past, and (3.) he had been in contact with his drug dealer around the time of the victim's death? Did the prejudicial effect of this evidence substantially outweigh its probative value? Alternatively, was trial counsel ineffective to the extent error on this evidentiary challenge was not preserved?**

**III. Does the evidence support a finding that West supplied the drugs used in the victim's fatal overdose? Is there sufficient evidence to sustain his convictions for involuntary manslaughter and delivery of a controlled substance?**

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## STATEMENT IN SUPPORT OF FURTHER REVIEW

West asserts that the two-step analysis in State v. Halliburton, 539 N.W.2d 339, 344 (Iowa 1995)(holding that if crimes meet the legal-elements test, we then must determine whether the legislature intended multiple punishments) regarding merger of offenses should be reexamined and overruled. West urges this Court to revise its approach to the double-punishment issue and instead adopt Justice Carter's concurrence in State v. Daniels, 588 N.W.2d 682, 685-686 (Iowa 1998) (arguing that by enacting Iowa Code section 701.9, the legislature adopted the Blockburger included-offense rule as a legislative prohibition against cumulative punishment which encompasses *all* included-offenses satisfying that test).

To the extent the two-step analysis in Halliburton remains viable, West argues that the Court of Appeals improperly applied the test in his case. The Court's finding that his conviction for delivery of a controlled substance did not merge with his conviction for involuntary manslaughter is contrary to its decision in State v. York, No. 08-1490, 2009 WL 4115310, at

*3 (Iowa Ct. App. November 25, 2009)(determining the offenses of involuntary manslaughter – by the commission of the public offense of child endangerment – and child endangerment causing bodily injury were greater and lesser-included offenses for purposes of Double Jeopardy analysis). In both cases, the Court of Appeals was confronted with the issue of whether involuntary manslaughter and the predicate public offense were greater and lesser-included offenses, yet it reached entirely different conclusions in each case. The application of the flawed Halliburton test yields inconsistent and confusing results, as evidenced by the conflict in these decisions. The present case therefore provides this Court with an opportunity to clarify the law on merger, particularly as it relates to the crimes of involuntary manslaughter and the predicate public offense.

## ARGUMENT

**I. The trial court erred in failing to merge West's convictions for involuntary manslaughter and the predicate public offense of delivery of a controlled substance. There is no clear indication of legislative intent to impose multiple punishments.**

**Discussion**: *Relevant Legal Principles.* The Double Jeopardy Clause of the federal constitution protects against "multiple punishments for the same offense."[1] Brown v. Ohio, 432 U.S. 161, 165, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187 (1977). See also U.S. Const. Amend. V ("No person shall... be subject for the same offence to be twice put in jeopardy of life or limb...."). The touchstone of the federal Double Jeopardy clause is legislative intent. See State v. Aguiar-Corona, 508 N.W.2d 698, 701 (Iowa 1993)("[T]he question of what punishments are

[1] The Double Jeopardy Clause of the federal constitution applies to the states through the Due Process Clause of the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 794, 89 S.Ct. 2056, 2062, 23 L.Ed.2d 707, 717 (1969).

Unlike the federal constitutional provision, the Double Jeopardy Clause of the Iowa Constitution prohibits only successive prosecutions after a prior acquittal and does not include the federal clause's prohibition against cumulative punishment for the same offense. State v. Lindell, 828 N.W.2d 1, 4 (Iowa 2013). See also Iowa Const. Art. I, § 12 ("No person shall after acquittal, be tried for the same offence.").

constitutionally permissible is no different from the question of what punishments the legislature intended to be imposed."). The Double Jeopardy prohibition against cumulative punishment "does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." State v. Perez, 563 N.W.2d 625, 627 (Iowa 1997) (quoting Missouri v. Hunter, 459 U.S. 359, 366, 103 S.Ct. 673, 678, 74 L.Ed.2d 535, 542 (1983)). Thus, "legislatures are not constrained by the Double Jeopardy Clause from defining crimes and fixing punishments." Perez, 563 N.W.2d at 627. Rather, the provision "operates as a check on the courts, for 'once the legislature has acted courts may not impose more than one punishment for the same offense.'" Id. (quoting Brown, 432 U.S. at 165, 97 S.Ct. at 2225, 53 L.Ed.2d at 193–94).

If the legislature has made clear, on the face of the statutes at issue, whether cumulative punishment is intended for multiple offenses, then courts need go no further than the face of the statute. See Whalen v. United States, 445 U.S. 684, 693,

100 S. Ct. 1432, 1438, 63 L. Ed. 2d 715 (1980)(statute explicitly proscribed cumulative punishment); Hunter, 459 U.S. at 368-69, 103 S. Ct. at 679, 74 L. Ed. 2d 535 (statute explicitly authorized cumulative punishment). If the statutes at issue are not clear on their face as to whether cumulative punishment for both offenses is intended to be authorized, however, then courts must resort to tools of statutory construction in discerning such legislative intent. See Hunter, 459 U.S. at 368, 103 S. Ct. at 679, 74 L. Ed. 2d 535; State v. Gallup, 500 N.W.2d 437, 443 (Iowa 1993).

One important such tool of statutory construction is the elements or impossibility test set forth in Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932). Aguiar-Corona, 508 N.W.2d at 703 (The Blockburger test is a "rule of statutory construction" that is applied "to discern legislative intent."). If two offenses charged under separate statutory provisions meet the Blockburger elements test, then they are considered the 'same offense' for Double Jeopardy purposes, and it is presumed the legislature did not

intend cumulative punishment for both offenses. State v. Schmitz, 610 N.W.2d 514, 515-516 (Iowa 2000); Perez, 563 N.W.2d at 628. "Courts are obliged to indulge [in the Blockburger] presumption... 'in the absence of a clear indication of contrary legislative intent.'" Perez, 563 N.W.2d at 628 (quoting Hunter, 459 U.S. at 366, 103 S.Ct. at 678, 74 L.Ed.2d at 542). Because the Blockburger presumption is merely a tool of statutory construction rather than a constitutional mandate, however, it *can* be overcome if such a contrary legislative intent is clearly shown. Hunter, 459 U.S. at 368, 103 S. Ct. at 679, 74 L. Ed. 2d 535; Gallup, 500 N.W.2d at 443; Garrett v. United States, 471 U.S. 773, 779, 105 S. Ct. 2407, 2412, 85 L. Ed. 2d 764 (1985).

Importantly, Blockburger, does not foreclose the possibility that a legislature may, by express statutory pronouncement, specify the circumstances in which it intends to preclude or allow multiple punishment so that courts need not resort to tools of statutory construction in discerning legislative intent on the issue. See e.g., Whalen, 445 U.S. at

693, 100 S. Ct. at 1438, 63 L. Ed. 2d 715; Hunter, 459 U.S. at 368-69, 103 S. Ct. at 679, 74 L. Ed. 2d 535. "That is what our legislature has done by enacting [the] section 701.9" merger statute. State v. Daniels, 588 N.W.2d 682, 685 (Iowa 1998) (Carter, J., concurring specially). That statute provides that, if a person is found guilty of "a public offense which is necessarily included in another public offense of which the person is convicted," then "the court shall enter judgment of guilty of the greater offense only." Iowa Code § 701.9 (2015). In determining whether one offense is "necessarily included" in another within the meaning of section 701.9, Iowa courts employ the same Blockburger legal-elements test that is employed in determining whether two offenses are the 'same' in the Double Jeopardy context. See Halliburton, 539 N.W.2d at 344; State v. Bullock, 638 N.W.2d 728, 731 (Iowa 2002).

Cumulative punishment claims, whether raised under the section 701.9 merger statute or under the federal Double Jeopardy Clause, are analyzed similarly with the ultimate goal of preventing a court from imposing a greater punishment than

the legislature intended. State v. Halliburton, 539 N.W.2d 339, 344 (Iowa 1995). The touchstone of both the merger doctrine and the Double Jeopardy Clause is thus legislative intent.

The Blockburger elements test and other rules of statutory construction are employed to discern legislative intent on the issue of cumulative punishment *where such intent is not clear on the face of the statutes at issue.* Missouri v. Hunter, 459 U.S. 359, 368, 103 S. Ct. 673, 679, 74 L. Ed. 2d 535 (1983); State v. Gallup, 500 N.W.2d 437, 443 (Iowa 1993). If, however, the legislature's intent *is* clear from the face of the statutes, then courts must give effect to that clearly expressed intent rather than resorting to the Blockburger and other rules of statutory construction. See Thompson v. Kaczinski, 774 N.W.2d 829, 832 (Iowa 2009)("When a statute or rule is plain and its meaning is clear, the rules of statutory construction do not permit courts to search for meaning beyond its express terms."); State v. Perez, 563 N.W.2d 625, 628 (Iowa 1997)(Only when the statute is ambiguous may courts "resort to principles

of statutory construction" including Blockburger analysis). See also Hunter, 459 U.S. at 368-69, 103 S. Ct. at 679, 74 L. Ed. 2d 535 (Where "the Missouri Legislature has made its intent crystal clear" by "specifically authoriz[ing] cumulative punishment under two statutes,... a court's task of statutory construction is at an end and" cumulative punishment must be permitted "regardless of whether those two statutes proscribe the 'same' conduct under Blockburger."); Whalen v. United States, 445 U.S. 684, 693, 100 S. Ct. 1432, 1438, 63 L. Ed. 2d 715 (1980)(where Congress enacted statute codifying the Blockburger included offense test, cumulative sentences for included offenses are prohibited "unless elsewhere specially authorized by Congress," and Court will not disregard express language of statute merely because certain arguments may support consecutive sentencing).

Blockburger thus does not foreclose the possibility that a legislative body may, by statutory enactment, make explicit its intention as to when multiple punishments are or are not authorized, thereby eliminating the need for courts to resort to

tools of statutory construction. This is precisely what the Iowa legislature did in enacting Iowa's merger statute. See Iowa Code § 701.9 (2015). This provision effectively codifies the Blockburger legal elements test, providing that, where this test is satisfied, cumulative punishment for both the public offense and the included offense is prohibited, without the need to further examine legislative intent. State v. Daniels, 588 N.W.2d 682, 685 (Iowa 1998)(Carter, J., concurring specially).

Indeed, the Iowa Supreme Court has on occasion relied on notions of differing purposes served by statutes defining greater and lesser-included offenses in concluding that cumulative punishment was intended to be authorized despite section 701.9's express statement that such offenses must merge. See e.g., Halliburton, 539 N.W.2d at 344; State v. Hickman, 576 N.W.2d 364, 369 (Iowa 1998); State v. Reed, 618 N.W.2d 327, 336 (Iowa 2000). However, this Court should now revisit that issue and adopt the analysis by former Justice Carter in his special concurrence to the Iowa Supreme Court's decision in State v. Daniels, 588 N.W.2d 682 (Iowa 1998).

Justice Carter suggested "the court's approach to the double-punishment issue needs to be revised. Daniels, 588 N.W.2d at 685 (Carter, J., concurring specially). He commented that "[u]nfortunately, some of the language used by this court in applying the constitutional law to statutory claims under [Iowa Code] section 701.9 has been inaccurate and confusing. Foremost in the confusion is a misguided two-step analysis described [in Halliburton]." Id. Justice Carter observed: "The two-step analysis that this court has been applying improperly allows included offenses under the Blockburger test to be separately punished based on this Court's intuitive conclusions concerning a presumed legislative intent. This is an unwarranted judicial abrogation of the clear directive contained in [Iowa Code] section 701.9." Id. at 685-86 (footnote omitted); see also State v. Lambert, 612 N.W.2d 810, 816-17 (Iowa 2000)(Carter, J., concurring specially).

Iowa Code section 701.9 expressly states the legislature's intent that, where one offense is necessarily included in the

other, the offenses must merge. It is a general statutory provision, and general statutes can, of course, be limited by a more specific provision contained elsewhere in the code. Burton v. Univ. of Iowa Hospitals & Clinics, 566 N.W.2d 182, 189 (Iowa 1997)("if the conflict between a general and specific provision is irreconcilable, the special provision prevails as an exception to the general provision."); Iowa Code § 4.7 (2015) (similarly stating). Nothing in the language of Iowa Code section 707.5 (defining involuntary manslaughter) or section 124.401(1)(c)(1)(defining delivery of a controlled substance) gives any indication that the legislature intended the merger requirement to not apply to those particular offenses.[2] Neither does section 701.9 carve out an exception permitting courts to refuse to apply the express merger requirement where they find the substantive criminal statutes serve somewhat differing purposes.

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[2] It is interesting to note that the involuntary manslaughter statute expressly provides that cumulative punishment is prohibited under certain circumstances. The statute specifies that involuntary manslaughter is a lesser-included offense of murder (both first and second degree) and voluntary manslaughter. See Iowa Code § 707.5(2) (2015).

In Whalen, the United States Supreme Court held that a District of Columbia statute prohibiting consecutive sentencing for multiple offenses unless each offense "requires proof of a fact which the other does not" amounted to a codification of the Blockburger rule of statutory construction such that, where the legal elements test is satisfied, "cumulative sentences are not permitted, unless *elsewhere specially authorized by Congress.*" Whalen, 445 U.S. at 693, 100 S. Ct. at 1438, 63 L. Ed. 2d 715 (emphasis added). The Court there rejected the Government's invitation to read an exception into the plain language of the statute, stating:

> Congress is clearly free to fashion exceptions to the rule it chose to enact in § 23-112. A court, just as clearly, is not. Accordingly, notwithstanding the arguments advanced by the Government in favor of imposing consecutive sentences for [these two offenses], we do not speculate about whether Congress, had it considered the matter, might have agreed. It is sufficient for present purposes to observe that a congressional intention to change the general rule of § 23-112 for the circumstances here presented nowhere clearly appears. It would seriously offend the principle of the separation of governmental powers embodied in the Double Jeopardy Clause of the Fifth Amendment if this

> Court were to fashion a contrary rule with no more to go on than this case provides.

Whalen, 445 U.S. at 695, 100 S. Ct. at 1439, 63 L. Ed. 2d 715. The Court also noted that its refusal to read an exception into the statute was consistent with the rule of lenity, which provides "that the Court will not interpret a... criminal statute so as to increase the penalty... when such an interpretation can be based on no more than a guess as to what Congress intended." Id., 445 U.S. at 695, 100 S. Ct. at 1439, 63 L. Ed. 2d 715 (quoting Ladner v. United States, 358 U.S. 169, 178, 79 S.Ct. 209, 214, 3 L.Ed.2d 199 (1958)).

The same analysis applies here. In the absence of a clear legislative intent to the contrary, the express merger provision of Iowa Code section 701.9 must not be disregarded by the courts based on intuitive judgments on the differing purposes of the substantive criminal statutes at issue. Daniels, 588 N.W.2d at 685 (Carter, J., concurring specially); see also Whalen, 445 U.S. at 695, 100 S. Ct. at 1439, 63 L. Ed. 2d 715. This is particularly true in light of the fact that the cumulative

punishment aspect of the Federal Double Jeopardy Clause is intended to act as a constraint on the courts, preventing courts from acting in a manner contrary to the legislature's intent. See Whalen, 445 U.S. at 695, 100 S. Ct. at 1439, 63 L. Ed. 2d 715.

*Application of the Relevant Legal Principles to the Present Case.* Under the legal-elements test, the delivery of a controlled substance conviction clearly merges with the involuntary manslaughter (by commission of the public offense of delivery of a controlled substance) conviction. The elements of involuntary manslaughter as presented to the jury are necessarily identical to the elements of delivery of a controlled substance with the exception that the State must also prove that West committed delivery of a controlled substance recklessly, and unintentionally caused the death of the victim. (Instruction 18 – Involuntary Manslaughter; Instruction 22 – Delivery of a Controlled Substance) (App. pp. 15, 17). Thus, it is impossible to commit the greater offense of involuntary manslaughter by commission of delivery of a controlled

substance without also committing the lesser offense of delivery of a controlled substance. Moreover, it makes no difference that the lesser-included offense here carries a higher penalty than the greater offense. Gallup, 500 N.W.2d at 442; see Iowa Code §§ 124.401(1)(c)(1), 707.5(1)(a), 902.9(1)(d), 902.9(1)(e) (2015). Should this Court decide to reexamine its two-step analysis in Halliburton and adopt Justice Carter's concurrence in Daniels, there is no need to search further for legislative intent once the legal-elements test under Blockburger has been satisfied.

In the event this Court retains and reaffirms the Halliburton test, West argues that there is nevertheless no clear legislative intent for cumulative punishments for the offenses of involuntary manslaughter and the predicate public offense of delivery of a controlled substance. In State v. York, No. 08-1490, 2009 WL 4115310, at *3 (Iowa Ct. App. November 25, 2009), our court of appeals determined the offenses of involuntary manslaughter – by commission of the public offense of child endangerment – and child endangerment causing

bodily injury were greater and lesser-included offenses for purposes of double jeopardy analysis. After finding no clear indication of legislative intent against the merger of those two offenses, the Court of Appeals did not presume the legislative intended cumulative punishments. Id. at *5. Following the rationale in York, this Court should likewise find that the convictions for involuntary manslaughter and delivery of a controlled substance merge.

The Court of Appeals improperly applied the two-step analysis in Halliburton and incorrectly found that that the case was not governed by York. State v. West, No. 17-0784, 2018 WL 4922981, at *4 (Iowa Ct. App. October 10, 2018). The Court distinguished York based upon a differential punishment scheme. Id. Both crimes in York were Class "D" felonies whereas here the offenses are a Class "C" felony (delivery of a controlled substance) and a Class "D" felony (involuntary manslaughter). York, No. 08-1490, 2009 WL 4115310, at *1. Yet, there is nothing on the face of the involuntary manslaughter statute that precludes merger whenever the

underlying public offense carries a higher penalty than the involuntary manslaughter. See Iowa Code § 707.5 (2015). Had the legislature intended cumulative punishment in such a situation, it could have explicitly said so in the involuntary manslaughter statute or elsewhere in the Iowa Code. There is thus no need to look further and compare the penalties of offenses to make intuitive judgments regarding a presumed legislative intent.

For the foregoing reasons, West's conviction for delivery of a controlled substance merges with his conviction for involuntary manslaughter. Because there is no clear indication that the legislature intended cumulative punishments for involuntary manslaughter and the predicate public offense of delivery of a controlled substance, his case should be reversed and remanded for resentencing.

**II. At West's trial for involuntary manslaughter and delivery of a controlled substance, the trial court erred in admitting evidence that (1.) West was present at the victim's previous drug overdose, (2.) he supplied drugs to the victim in the past, and (3.) he had been in contact with his drug dealer around the time of the victim's death. The prejudicial effect of this evidence substantially outweighed its probative value. Alternatively, trial counsel was ineffective to the extent error on this evidentiary challenge was not preserved.**

**Discussion:** *Relevant Legal Principles.* In State v. Taylor, 689 N.W.2d 116 (Iowa 2004), this Court noted the factors to consider in balancing probative force against the danger of unfair prejudice:

> [T]he court should consider the need for the evidence in light of the issues and the other evidence available to the prosecution, whether there is clear proof the defendant committed the prior bad acts, the strength or weakness of the evidence on the relevant issue, and the degree to which the fact finder will be prompted to decide the case on an improper basis.

State v. Taylor, 689 N.W.2d 116, 124 (Iowa 2004). If the danger of the evidence's prejudicial effect substantially outweighs its probative value, the evidence must be excluded. See State v. Henderson, 696 N.W.2d 5, 12 (Iowa 2005)(holding

district court abused its discretion in admitting prejudicial prior-bad-acts evidence).

*West's Presence at the Victim's Prior Overdose.* The Court of Appeals determined that West's act of taking the victim to the hospital following a prior overdose could be construed as a "prior good act" rather than a prior bad act. State v. West, No. 17-0784, 2018 WL 4922981, at *2 (Iowa Ct. App. October 10, 2018). However, the State offered this evidence not to portray West as altruistic but rather to suggest his presence at the victim's two overdoses was highly suspicious and therefore more than just a coincidence. In fact, the State made this precise argument during its closing and asserted that this evidence supplied the necessary circumstantial evidence to establish West was culpable in the victim's death. (Trial Vol. 3 Tr. p. 11, L. 18-p. L. 21).

There was other available evidence that was probative on the element of recklessness for purposes of the involuntary manslaughter charge. During his police interview, West admitted that he was a drug addict and was also aware of the

victim's extensive drug abuse history. (State's Exhibit 24 – West Interview). See State v. Hoon, No. 11-0459, 2012 WL 836698, at *4 (Iowa Ct. App. Mar. 14, 2012)(considering defendant's knowledge of victim's "substance abuse problems" in finding "substantial evidence of" recklessness in the "delivery of methadone"); State v. Block, No. 99-1242, 2000 WL 1587760, at *3 (Iowa Ct. App. Oct. 25, 2000)(finding sufficient evidence of recklessness based in part on the defendant's knowledge of the drugs' effects on the victim). As the State observed on appeal, there was no romantic relationship between the two of them, and "[h]is knowledge of her use of drugs with him and others suggest[ed] that their relationship was tied to drug use" State's Brief p. 17. In addition, West claimed that the victim appeared to be already under the influence of drugs when he saw her. (State's Exhibit 24 – West Interview). Therefore, the State's need for the evidence of West's presence at the victim's prior overdose did not outstrip its prejudicial impact.

*West's Prior Delivery of Drugs to the Victim.* Evidence that West supplied the victim with heroin in the past was unfairly

prejudicial, particularly given that the prior acts involved the same criminal conduct for which West was being tried. Evidence of a defendant's drug-related activity is also "inherently prejudicial." State v. Parker, 747 N.W.2d 196, 208-09 (Iowa 2008).; see also United States v. Ong, 541 F.2d 331, 339–40 (2d Cir.1976)(stating "there are few subjects more potentially inflammatory than narcotics"); State v. Liggins, 524 N.W.2d 181, 188–89 (Iowa 1994)(finding admission of evidence of cocaine delivery inherently prejudicial because "[i]t appeal[s] to the jury's instinct to punish drug dealers"). Furthermore, as noted above, there was other available evidence on the issue of recklessness, therefore the prejudicial impact of the evidence substantially outweighed any probative value it may have had.

*West's Contacts with His Drug Dealer.* Evidence of the frequency of West's phone contacts with his drug dealer around the time of the victim's death was not probative of delivery. The State presented only the phone records showing those phone contacts and no other evidence as to the substance of those phone conversations. There was otherwise no showing

that West purchased any drugs, let alone heroin, from his dealer at that time. Thus, any inference that West actually supplied the victim with the heroin used in her fatal overdose was unreasonable and wildly speculative.

On the question of prejudice, the analysis of the admission of the evidence of West's role as a drug supplier is equally applicable to the evidence of his contacts with his drug dealer. Even if this evidence was not bad-acts evidence, it nevertheless should have been excluded on grounds of unfair prejudice. See Iowa R. Evid. 5.403.

For the reasons stated above, the district court abused its discretion in admitting the challenged evidence. West's convictions for involuntary manslaughter and delivery of a controlled substance must therefore be vacated and his case remanded for a new trial.

**III. The evidence does not support a finding that West supplied the drugs used in the victim's fatal overdose. There is insufficient evidence to sustain his convictions for involuntary manslaughter and delivery of a controlled substance.**

**Discussion:** West incorporates by reference the arguments made in his initial brief.

## CONCLUSION

For the reasons articulated in the initial brief and the application for further review, he respectfully requests that this Court vacate his convictions for involuntary manslaughter and delivery of a controlled substance and remand his case for (1.) dismissal of the charges, (2.) a new trial, or (3.) resentencing.

Alternatively, he requests that his ineffective-assistance-of-counsel claims be preserved for possible postconviction relief proceedings.

## ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was $4.63, and that amount has been paid in full by the Office of the Appellate Defender.

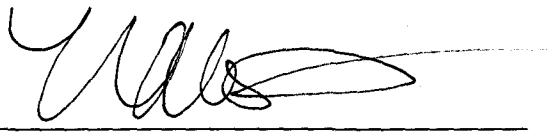
MARK C. SMITH
State Appellate Defender

NAN JENNISCH
Assistant Appellate Defender

**CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR FURTHER REVIEWS**

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

[X] this application has been prepared in a proportionally spaced typeface using Bookman Old Style, font 14 point and contains 4,304 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).



Dated: 10/24/18

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**IN THE COURT OF APPEALS OF IOWA**

No. 17-0784
Filed October 10, 2018

**STATE OF IOWA,**
Plaintiff-Appellee,

**vs.**

**TRAVIS RAYMOND WAYNE WEST,**
Defendant-Appellant.

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Appeal from the Iowa District Court for Polk County, Robert J. Blink, Judge.

The defendant appeals his convictions for involuntary manslaughter and delivery of a controlled substance. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, and Darrel L. Mullins, Assistant Attorney General, for appellee.

Heard by Vaitheswaran, P.J., and Doyle and Mullins, JJ.

**VAITHESWARAN, Presiding Judge.**

Travis West and his brother visited a friend at her West Des Moines apartment. Early in the morning, they found the friend unresponsive in the bathroom. West called 911. The woman was transported to the hospital, where she died the same morning. Autopsy results confirmed the presence of lethal amounts of heroin in her system.

The State charged West with involuntary manslaughter and delivery of a controlled substance. A jury found him guilty as charged.

On appeal, West argues (1) the evidence was insufficient to support the findings of guilt, (2) the district court erred in admitting certain "bad acts" evidence, and (3) the district court erred by failing to merge West's convictions at sentencing.

## *I. Sufficiency of the Evidence*

The jury was instructed that the State would have to prove the following elements of involuntary manslaughter:

> 1. On or about June 5, 2015, the defendant recklessly committed the crime of delivery of a controlled substance.
> 2. When the defendant committed the crime, the defendant unintentionally caused the death of [a woman].

The jury also was instructed the State would have to prove the following elements of delivery of a controlled substance:

> 1. On or about June 5, 2015, the defendant delivered a controlled substance.
> 2. The defendant knew that the substance delivered was heroin.

West argues "the evidence does not support a finding that he supplied the heroin used in the victim's fatal drug overdose." A reasonable juror could have found otherwise.

West agreed to be interviewed by West Des Moines police and a recording of the interview was admitted into evidence. During the interview, West admitted he supplied heroin to the woman on one prior occasion. He also admitted taking her to the hospital the previous summer after she overdosed on heroin. Although he categorically denied supplying the heroin that resulted in her death, his phone records disclosed early morning calls to his heroin supplier as well as post-911 calls to him.[1] The jury reasonably could have credited the records and his admission to supplying heroin in the past, over his vehement denial. *See State v. DeWitt*, 811 N.W.2d 460, 476 (Iowa 2012) ("[C]redibility determinations are an essential function of the fact finder."). Substantial evidence supports a finding that West supplied the heroin that resulted in the woman's death. *See id.* at 477 (setting forth the standard of review).

## *II. Admissibility of Evidence*

Before trial, West filed a motion in limine seeking to exclude "[a]ny reference to prior convictions or bad acts" as well as "[e]vidence regarding cell phone records, or any reference to the number and times of phone calls that [he] had made to a person the State believes is [his] source of heroin." Following a hearing, the district court denied the motion. At the beginning of trial, the court confirmed an intent to abide by the earlier ruling.

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[1] West argues the phone records constituted inadmissible bad acts evidence, a contention we address below. Even if the evidence were deemed inadmissible, we would be obliged to consider it in evaluating the sufficiency of the evidence to support the jury's finding of guilt. *See State v. Dullard*, 668 N.W.2d 585, 597 (Iowa 2003) ("In determining whether retrial is permissible all the evidence admitted during the trial, including erroneously admitted evidence, must be considered.").

West now challenges the admission of (1) evidence relating to his presence "at the victim's previous heroin overdose," (2) "evidence that he supplied the victim with drugs in the past," and (3) "evidence that he had been in contact with his drug dealer around the time of the victim's death." In his view, this "prior-bad-acts evidence" was unduly prejudicial.[2] *See* Iowa Rs. Evid. 5.403, 5.404(b).

A court considering evidence of prior bad acts must determine "whether the evidence of other crimes or bad acts is relevant to a legitimate factual issue in dispute." *State v. Mitchell*, 633 N.W.2d 295, 298 (Iowa 2001); Iowa R. Evid. 5.401. Next, the court must determine "if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." *Mitchell*, 633 N.W.2d at 298; *see* Iowa R. Evid. 5.403. In making this evaluation, the court is to consider

> (1) the need for the proffered evidence "in view of the issues and other available evidence," (2) whether there is clear proof it occurred, (3) the "strength or weakness of the prior-acts evidence in supporting the issue sought to be prove[d]," and (4) the degree to which the evidence would improperly influence the jury.

*State v. Einfeldt*, 914 N.W.2d 773, 784 (Iowa 2018) (citations omitted); *see also State v. Putman*, 848 N.W.2d 1, 8-9, n.2 (Iowa 2014) (stating we apply a "three-step analysis" and explaining confusion regarding whether the "clear proof" requirement is a third step). We review the district court's ruling for an abuse of discretion. *State v. Helmers*, 753 N.W.2d 565, 567, 569 (Iowa 2008).

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[2] West alternatively raises the issue under an ineffective-assistance-of-counsel rubric. We need not use that framework because West adequately preserved error by obtaining a final ruling on the motion in limine. *See State v. Tangie*, 616 N.W.2d 564, 569 (Iowa 2000) ("[W]here a motion in limine is resolved in such a way it is beyond question whether or not the challenged evidence will be admitted during trial, there is no reason to voice objection at such time during trial. In such a situation, the decision on the motion has the effect of a ruling.").

The evidence of West's presence at the scene of the prior overdose was highly relevant to the recklessness element of the involuntary manslaughter charge. *See State v. Hoon*, No. 11-0459, 2012 WL 836698, at *4 (Iowa Ct. App. Mar. 14, 2012) (considering defendant's knowledge of victim's "substance abuse problems" in finding "substantial evidence of" recklessness in the "delivery of methadodone"); *State v. Block*, No. 99-1242, 2000 WL 1587760, at *3 (Iowa Ct. App. Oct. 25, 2000) (finding sufficient evidence of recklessness based in part on the defendant's knowledge of the drugs' effects on the victim); *cf. State v. Miller*, 874 N.W.2d 659, 664–65 (Iowa Ct. App. 2015) (stating "[t]he mere delivery of heroin, without more, does not necessarily establish a sufficiently material increase in the probability of the proscribed harm" and "is inconsistent with the culpability aspect of recklessness"). West's recorded admission provided "clear proof." Although West's presence at the scene of the prior overdose was prejudicial,[3] the evidence was unlikely to trigger "overmastering hostility" towards West because it was "of a nature similar to that in the underlying charge." *State v. Reyes*, 744 N.W.2d 95, 100 (Iowa 2008). Additionally, West's act of taking the woman to the hospital following the prior overdose could be construed as a prior good act rather than a prior bad act. We conclude the district court did not abuse its discretion in admitting the evidence.

We turn to West's challenge to the admission of his statement that he previously supplied heroin to the woman. West likely waived this challenge. *See*

[3] In *State v. Liggins*, 524 N.W2d 181, 188-89 (Iowa 1994), the Iowa Supreme Court stated "[t]he admission of evidence of cocaine delivery and distribution is inherently prejudicial" because it appeals "to the jury's instinct to punish drug dealers."

*State v. Scheffert*, 910 N.W.2d 577, 583 (Iowa 2018) ("It is well-settled law that if a party fails to object to the admission of evidence, the party waives any ground for complaint, and the party cannot raise any error concerning its admission for the first time on appeal."). In his motion in limine, West did not seek to exclude evidence that he supplied heroin to the woman but only evidence of the *amount* of heroin he previously supplied. At the hearing on the motion, the prosecutor asked for clarification as to whether West was also challenging the act of supplying the heroin. Defense counsel responded, "I have no trouble with that. My client addresses that issue in his interview, which will be introduced as evidence. He does not speak to quantity." The court followed up with, "So your only concern . . . is that the State not produce some evidence as to specific quantities. Is that your concern?" Counsel responded, "Yes, Your Honor." In short, the defense essentially conceded that evidence of West's past act of supplying heroin was admissible. We have serious doubts as to whether West preserved error but we bypass our error-preservation concerns and proceed to the merits. *See State v. Taylor*, 596 N.W.2d 55, 56 (Iowa 1999).

Our analysis of the admission of evidence relating to West's presence at the scene of the prior overdose is equally applicable to the admission of evidence that he supplied heroin in the past. Although West's role as supplier could be construed as more prejudicial than his mere presence, the State's need for the evidence to establish recklessness far outstripped its prejudicial impact. We discern no abuse of discretion in the district court's ruling.

We are left with the cell phone records. We agree with the State that these records were not evidence of prior bad acts but evidence of the crimes with which

West was charged. *See State v. Frerichs*, No. 04-0665, 2005 WL 1630016, at *2 (Iowa Ct. App. July 13, 2005) ("While Frerichs on appeal characterizes the Spirit Lake evidence as evidence of 'other crimes' or 'prior bad acts,' we believe it is more appropriately considered as substantive evidence of the instant charge of possession of methamphetamine with intent to deliver."). The records were probative of delivery. Although West argues the phone numbers alone, without transcripts of the conversations, rendered the evidence unduly prejudicial, the numbers alone spoke volumes. As the district court stated:

> [T]here is circumstantial evidence that there were conversations, or *a conversation, between a known* heroin purchaser and a known heroin dealer and shortly thereafter the victim overdosed, and then there were further contacts between the heroin supplier and the defendant . . . . [I]nferentially, phone contact between a drug buyer and a drug seller raises a reasonable inference that the discussion was not about purchasing a Tesla automobile. It was about drug dealing. The jury can believe that or not believe that, but I see that there is a reasonable inference in that respect . . . . I understand the prejudicial effect just as I understand the prejudicial effect of references to prior drug interactions between the defendant and the victim, but I don't agree that it lacks relevance or that the relevance is overweighed by the prejudice.

We discern no abuse of discretion in the court's admission of the phone records.

### *III. Merger*

West contends the district court erred in failing to merge his convictions for involuntary manslaughter and delivery of a controlled substance.

Iowa Code section 701.9 (2015) governs the analysis:

> No person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted. If the jury returns a verdict of guilty of more than one offense and such a verdict conflicts with this section, the court shall enter judgment of guilty of the greater of the offenses only.

To determine whether a public offense is "necessarily included in another public offense," we apply the legal-elements test. *See Krogmann v. State*, 914 N.W.2d 293, 325 (Iowa 2018). The legal-elements test is one indicator of legislative intent. *See State v. Ceretti*, 871 N.W.2d 88, 92 (Iowa 2015). If the crimes meet the legal-elements test, we then must determine "whether the legislature intended multiple punishments for both offenses." *State v. Halliburton*, 539 N.W.2d 339, 344 (Iowa 1995) (examining merger issues under Double Jeopardy Clause).

West argues, "[I]t is impossible to commit the greater offense of involuntary manslaughter by commission of delivery of a controlled substance without also committing the lesser offense of delivery of a controlled substance." The State responds with an argument based on the jury instructions and the type of drug delivered to the woman. We believe the argument impermissibly draws on the facts of the case. *See Krogmann*, 914 N.W.2d at 295 (stating the legal-elements test is "purely a review of the legal elements and does not consider the facts of a particular case"). The State also asserts, "Only by allowing conviction and sentence for both crimes can the legislature's . . . intent prevail that both [crimes] have effect." We agree with the State's second argument.

Involuntary manslaughter by commission of a public offense is a class "D" felony. *Iowa Code* § 707.5(1)(*a*). Delivery of one hundred grams or less of a mixture or substance containing a detectable amount of heroin is a class "C" felony. *Id.* § 124.401(1)(c)(1). The differential punishment scheme reflects a legislative intent to impose multiple punishments for a public offense and for involuntary manslaughter predicated on the public offense. As the Iowa Supreme

Court stated in applying the merger doctrine under similar circumstances, "Having authorized additional conviction, surely the legislature also intended that additional punishment could be imposed." *State v. Gallup*, 500 N.W.2d 437, 443 (Iowa 1993).

West focuses on the following statement in *Gallup*: "[I]t makes no difference that the lesser included offense here carries a higher penalty than the greater offense." *Id.* at 442. That statement was made in the context of the court's application of the legal-elements test. As noted, the legal-elements test is only the first step in the merger analysis. *Halliburton*, 539 N.W.2d at 344. Even if the test is satisfied, courts are obligated to examine the legislative scheme. *Id.*

This court did just that in *State v. York*, No. 08-1490, 2009 WL 4115310, at *4 (Iowa Ct. App. Nov. 25, 2009). Although we concluded a conviction for child endangerment causing bodily injury merged with a conviction for involuntary manslaughter, we did so only after examining "whether the legislature 'clearly indicated' multiple punishments for both crimes." *Id.* at *3.

It is true that we found no clear indication of legislative intent to impose multiple punishments. *Id.* at *5. But, both crimes were class "D" feloines.,[4] whereas we are faced with a class "C" and a class "D" felony. In our view, this distinction makes a difference.[5]

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[4] In *York*, the court cited Iowa Code section 726.6(5), which addresses the "serious injury" alternative to the crime. 2009 WL 4115310, at *3-4. Section 726.6(6) addresses the "bodily injury" alternative. The defendant in *York* was tried on the bodily-injury alternative.

[5] We recognize the crimes at issue in *Halliburton* were both class "D" felonies, yet the court declined to merge the convictions in light of the different purposes behind the two statutes. 539 N.W.2d at 344-45. In *York*, the court found no clear indication of legislative intent in the legislature's "generic reference" to "a necessary predicate offense." 2009 WL 4115310, at *4-5. Although the same generic reference is present here, we also are faced with a differential punishment scheme.

We conclude the conviction for delivery of a controlled substance did not merge with the conviction for involuntary manslaughter. We affirm West's judgment and sentence for both.

**AFFIRMED.**

Mullins, J. concurs; Doyle, J., concurs specially.

**DOYLE, Judge** (concurring specially).

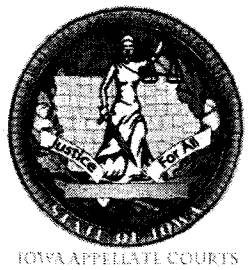
I concur but feel compelled to comment on the merger issue. My sentiments mirror those of District Court Judge Robert Blink, who remarked at West's sentencing that:

> I am also deeply troubled by a statutory scheme that exposes you to a ten-year prison sentence for delivering heroin but a five-year prison sentence for the fact that your actions killed someone. To me, that does not make sense. That is not well-reasoned. But, here again, that is the choice of the legislature, not mine.

Additionally, although I am hard-pressed to say the majority has improperly applied the two-step *Halliburton* test, I question the propriety of the test. We are bound by supreme court precedent, so we must look to that court to revisit the issue. *See State v. Hastings*, 466 N.W.2d 697, 700 (Iowa Ct. App. 1990).

Under *Halliburton*, "[e]ven though a crime may meet the so-called *Blockburger* [*v. United States*, 284 U.S. 229 (1932)] test for lesser-included offenses, it may still be separately punished if legislative intent for multiple punishments is otherwise indicated." *State v. Bullock*, 638 N.W.2d 728, 732 (Iowa 2002) (citing *State v. Halliburton*, 539 N.W.2d 339, 344 (Iowa 1995)). The two-step analysis set forth in *Halliburton* requires "we first decide whether the crimes meet the legal elements test for lesser included offenses. If they do, we then study whether the legislature intended multiple punishments for both offenses." 539 N.W.2d at 344 (citations omitted). The analysis is not without its critics. Justice Carter suggested "the court's approach to the double-punishment issue needs to be revised." *State v. Daniels*, 588 N.W.2d 682, 685 (Iowa 1998) (Carter, J., concurring specially). He commented that "[u]nfortunately, some of the language used by this court in applying the constitutional law to statutory claims under [Iowa

Code] section 701.9 has been inaccurate and confusing. Foremost in the confusion is a misguided two-step analysis described [in *Halliburton*]." *Id.* Justice Carter observed: "The two-step analysis that this court has been applying improperly allows included offenses under the *Blockburger* test to be separately punished based on this court's intuitive conclusions concerning a presumed legislative intent. This is an unwarranted judicial abrogation of the clear directive contained in [Iowa Code] section 701.9." *Id.* at 685-86 (footnote omitted); *see also State v. Lambert*, 612 N.W.2d 810, 816-17 (Iowa 2000) (Carter, J., concurring specially). I agree with Justice Carter's assessment that the *Halliburton* two-step analysis is misguided. But the issue will have to wait for another day. *See State v. Stewart*, 858 N.W.2d 17, 23 (Iowa 2015) ("We leave this issue for another day.").

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