IN THE SUPREME COURT FOR THE STATE OF IOWA
NO. 23-1928

LEE COUNTY NO. PCLA006528

Benjamin Trane,
Applicant-Appellee/Cross-Appellant,

v.

State of Iowa,
Respondent-Appellant/Cross-Appellee

APPEAL FROM THE IOWA DISTRICT COURT
FOR LEE COUNTY (SOUTH),
HONORABLE MICHAEL SCHILLING

APPLICANT/APPELLANT'S BRIEF AND REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

Trane's present appeal presents substantial questions of legal principles, particularly the scope and duty of legal counsel to advise clients during representation. Iowa R. App. Pro. 6.1101(2)(f). The State's presumed cross-appeal regarding Lee County (South)'s habitual policy towards jury instructions likewise "presents fundamental and urgent issues of broad public importance" which must be addressed before they result in prejudice to other defendants. Iowa R. App. Pro. 6.1101(2)(c).

CASE STATEMENT

Applicant Trane appeals the District Court's ruling that his Trial Counsel was not deficient for failing to sever his Child Endangerment and Sex Abuse charges. Trane reserves his right to reply to State's Cross-Appeal regarding the District Court's correct assessment that he was prejudiced by the improper jury instructions entered in this case.

CASE PROCEEDINGS

Appellant Trane filed the underlying PCR action on October 28, 2019. This application was stayed during the course of Trane's intervening appeals until after briefing and oral argument, the District Court found on October 24, 2023, that Trane's original Trial Counsel had been ineffective for failing to object to a defective jury instruction regarding Trane's Child Endangerment Count. Both Trane and the State appealed.

FACTS

This Court acquainted with the history of Mr. Trane's legal proceedings. For reference, Mr. Trane repeats his prior narrative here, starting with the Iowa Supreme Court's recitation of facts:

> In the fall of 2002, Benjamin Trane and his wife moved from Utah to Iowa with hopes of establishing a private, therapeutic boarding school for troubled teens. Their efforts paid off, and Midwest Academy opened its doors in June 2003 in Keokuk. Eventually, Trane became the sole owner of the school. Midwest Academy offered programming unique from that of other private, military, or residential schools, rendering it appealing to parents of teens with a variety of behavioral and disciplinary struggles. Midwest Academy purported to offer a combination of character-building, therapeutic, and educational programming, although it operated outside

the purview of the Iowa Board of Education and its licensing requirements.

Midwest Academy functioned under a rules-and-consequences-based levels system, providing structure for its cognitive behavioral therapy program. There were six levels that students could ascend (or descend) through as part of the program. All students began at Level 1, the most restrictive level. Examples of restrictions at Level 1 included not being permitted to use condiments with food, not being allowed to look in a mirror or out of windows, and being allowed to speak with students at higher levels only at specified times. Students could earn greater freedom through a points-based reward system while working up through the program. For example, Level 2 came with the ability to get second helpings at mealtime, Level 3 offered the ability to speak with family members by telephone, and Level 4 permitted off-campus trips.

A number of students, however, were unable to progress past Level 1, and their inability to do so sometimes resulted in harsh consequences. Relevant to the child endangerment charge was the use of Out-of-School Suspension (OSS) rooms. OSS rooms were designed for a single student to occupy for up to twenty-four hours at a time, with constant supervision. The OSS rooms were employed as a "last ditch effort" to curb undesirable behaviors; for instance, constant distractions in the classroom or physical attacks on an instructor would land a student in OSS . . .

In March 2015, the Iowa Department of Human Services (DHS) received a hotline tip that students were being held at Midwest Academy in isolation to the detriment of their health. Accordingly, DHS opened an inquiry. The Federal Bureau of Investigation (FBI), having already received

similar information, contacted DHS to coordinate investigations into the alleged abuse at Midwest Academy.

Meanwhile, in December 2015, the Iowa Division of Criminal Investigation (DCI) was asked to look into a possible sexual abuse case at Midwest Academy involving K.S., a seventeen-year-old female student. At Midwest Academy, each student was assigned a "family representative." Trane, the owner, was also the family representative for four students, including K.S. As K.S.'s family representative, Trane controlled what level K.S. was on, whether K.S. could call home, and whether K.S. could go on outings.

Like other students at Midwest Academy, K.S. had undergone a troubled childhood before entering the school. She had been adopted by her aunt and uncle when she was eight years old. (Her adoptive mother was the sister of her biological father.) Before that, K.S. had lived in foster care and with her grandparents. In January 2015, after K.S. ran away from her adoptive home, K.S.'s adoptive parents arranged for her to be sent to Midwest Academy.

In late 2015, K.S. disclosed to a night-time staff member named Cheyenne Jerred that Trane had been sexually abusing her, and Jerred reported the allegations to DHS. K.S.'s disclosure to Jerred apparently came the day after Trane delivered to K.S. the ill-received news that she would not be permitted to travel off campus with anyone for Thanksgiving. The allegations were later investigated by DCI.

Over the course of several interviews with DCI, K.S. disclosed the following incidents of sexual contact with Trane . . . Trane unbuttoned K.S.'s uniform pants and put his finger into her vagina while she visited his home with other students . . .

> Shortly after DHS was notified, K.S. was removed from Midwest Academy. Trane consistently denied having any sexual contact with K.S. None of the incidents were directly corroborated by any witnesses other than K.S . . .
>
> On January 28, 2016, law enforcement executed a search warrant at Midwest Academy, interviewed every student enrolled, shut down the facility, and sent all of the children home. Two further searches were performed on February 1 and February 11, generating a vast amount of paper and electronic evidence that was subsequently digitized. Digitization of the evidence was completed over a year later in April 2017. The files amounted to between five and six terabytes of data.
>
> On September 18, 2017 [nearly two years later] Trane was charged by trial information in the Iowa District Court for Lee (South) County with one count of sexual abuse in the third degree in violation of Iowa Code sections 709.1 and 709.4(1)(*a*) (2015); one count of sexual exploitation by a counselor or therapist in violation of Iowa Code sections 709.15(1), 709.15(2)(*a*)(1), and 709.15(4)(*a*); and one count of child endangerment in violation of Iowa Code sections 726.6(1)(*a*) and 726.6(7). Trane pled not guilty and asserted his right to a speedy trial, which was then set for December 12.
>
> [T]he discovery materials were voluminous. Moreover, the discovery contained the identifying information of hundreds of persons that would have been unwieldy to redact. As a result, the parties entered a nondisclosure discovery agreement on October 27.
>
> On November 16, Trane, who was represented by appointed counsel,[1] moved for approval of a $200–$250

[1] Trane's original trial counsel, who was court appointed, was Lisa Schaefer. Trane retained the undersigned after his criminal trial to

> purchase expense of an external hard drive on which the State could provide a copy of these voluminous discovery materials. In his motion, Trane asserted the State would only provide discovery on a newly purchased hard drive. The trial court granted Trane's motion, and he obtained this discovery on November 28—fourteen days before trial and on the first day of depositions.
>
> . . .
>
> At trial, K.S. and B.V. (but not A.H.) testified for the State. Additionally, the State offered expert testimony from Dr. Anna Salter, a forensic psychologist. During her testimony, Dr. Salter spoke of a "double standard" between how the public responded to the "Boston Strong" phenomenon following the Boston Marathon bombing and how the public responds generally to survivors of sexual abuse who do not complain about the abuse and continue to interact with their abusers. Less directly, Dr. Salter referred to the then-ongoing and high-profile case of the physician-trainer who had sexually abused many athletes on the United States Women's Olympic Gymnastics Team. Dr. Salter also testified that sexual abuse allegations are false "roughly 2 to 8 percent" of the time. Trane did not object to this testimony.
>
> Both Trane and Trane's wife testified for the defense. The State and the defense called other witnesses as well, including former students and staff.

State v. Trane [Trane I], 934 N.W.2d 447, 450–55 (Iowa 2019). The State failed to call two witnesses, K.M. and M.G., despite arranging

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represent him during sentencing and a new trial motion on May 10, 2018. Where stated in this briefing, 'trial counsel' refers to Ms. Schaefer.

for them to be present for the trial so that trial counsel could cross-examine them. Trial counsel, despite being in possession of the depositions of those two individuals which showed they had favorable testimony to offer, neither attempted to introduce those depositions nor challenged the State's misconduct on thwarting its agreement with Trane.

> On December 22, 2017, the jury returned its verdicts. On count I, which involved K.S., it found Trane guilty of the lesser included offense of assault with intent to commit sexual abuse, rather than the charged offense of sexual abuse. On count II, also involving K.S., the jury found Trane guilty of a pattern, practice, or scheme to engage in sexual exploitation by a counselor or therapist. Finally, on count III, involving B.V. "and/or" A.H., the jury found Trane guilty of child endangerment.
>
> Before the imposition of sentence, Trane retained new counsel who filed a motion for a new trial. This motion asserted the trial court erred in denying Trane the opportunity to present proof of K.S.'s false allegations of prior sexual abuse by her adoptive and foster parents. Further, the motion sought to raise ineffective assistance of trial counsel in various forms, including trial counsel's failure to make a more timely rule 5.412 motion, failure to move for severance of counts I and II from count III, failure to object to improper vouching by Dr. Salter, and failure to object to the "and/or" jury instruction regarding child endangerment. The State resisted the motion and, in the course of its resistance, also objected to consideration of any ineffective-assistance-of-counsel arguments at the motion-for-new-trial phase.

> On May 1[0], 2018, the case came on for sentencing. The district court overruled Trane's motion for a new trial. It then sentenced Trane consecutively to two years on the assault with intent to commit sexual abuse charge; five years on the pattern, practice, or scheme to engage in sexual exploitation by a counselor or therapist charge; and two years on the child endangerment charge. *See* Iowa Code § 902.9(1)(*e*); *id.* § 903.1(2). Trane timely appealed

Trane I, 934 N.W.2d at 453–55. The Iowa Supreme Court in *Trane I* likewise declined to rule on Trane's ineffective assistance of counsel claims as being unripe. *Id.* at 465. The Iowa Supreme Court did ultimately remand Trane's case to the trial court with orders to hold a 5.412 hearing regarding K.S.'s prior claims of sexual abuse. *Id.* at 466.

This 5.412 hearing was held on April 23, 2021. The Trial Court denied Trane's arguments, and Trane again appealed on August 31, 2021. The Supreme Court again took Trane's case and denied his appeal on January 6, 2023. *State v. Trane* [Trane II], No. 21-1211, 2023 WL 115267, at *6 (Iowa Jan. 6, 2023), *reh'g denied* (Feb. 8, 2023). The Supreme Court denied the rehearing although it was clearly demonstrated a proper objection had been made to the introduction of physical evidence. Mr. Trane has since filed and

argued a Motion for Summary Adjudication with this Court, which was denied on May 17, 2023.

After this Motion, arguments were heard on July 31, 2023. On October 24, 2023, the District Court entered an order granting Trane partial relief in the form of a new trial on Count III (child endangerment) (D0133, Order Granting in Part and Denying in Part Application for Post Convcition Relief, (10/24/2023)). Trane Appealed the District Court's denial on all other grounds on November 22, 2023, and the State Cross-Appealed regarding Trane's grant of new trial on the same day.

STANDARD OF REVIEW

Iowa has long applied the *Strickland v. Washington* standard to decide a defendant's claim he was denied effective assistance of counsel:

> The right to assistance of counsel, under the Sixth Amendment to the United States Constitution and article I, section 10 of the Iowa Constitution, guarantees "effective" assistance of counsel. Effective assistance of counsel "means conscientious, meaningful representation." The ultimate test for determining whether a defendant has been denied effective assistance of counsel is whether, considering the entire record and all of the circumstances, the attorney's performance was within the range of normal competency.

> A presumption exists that counsel is competent and that counsel's conduct falls within the wide range of reasonable professional assistance. Defendant must overcome this presumption and has the burden of establishing ineffective assistance. To meet this burden, defendant must prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted therefrom.

State v. Hepperle, 530 N.W.2d 735, 739 (Iowa 1995) (federal and state case citations omitted); *see Strickland v. Washington*, 466 U.S. 668, 689-90 (1984).

The prejudice element is satisfied if a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Ondayog*, 722 N.W.2d 778, 784 (Iowa 2006) (citing *Strickland*, 466 U.S. at 694). Under the federal standard, a reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* (citing *Strickland*, 466 U.S. at 694).

ARGUMENT

I. Trane's individual Criminal Counts could and should have been severed, prejudicing him.

Trial Counsel failed to move to server Trane's wholly unrelated criminal charges. As noted by this Court previously, "[o]rdinarily one might have expected a motion for severance in a case like this." *Trane*

I, 934 N.W.2d at 465. Severance of criminal counts is counseled where those counts are not "two or more transactions or occurrences constituting parts of a common scheme or plan." *State v. Oetken*, 613 N.W.2d 679, 688 (Iowa 2000) (citing Iowa R. Crim. P. 6(1)). Such was the case here.

Uniquely, this Court already noted the heart of this issue: in *Trane I*, the Iowa Supreme Court concluded that "[t]he sexual abuse and sexual exploitation charges involved a different kind of misconduct, carried out in a different way, against a different victim than the child endangerment charge." 934 N.W.2d at 465. Of the Counts facing Trane, there was no relation between the two charges; worse, the only utility that could be had in prosecuting them together would be to generate bias against Trane. *State v. Elston*, 735 N.W.2d 196, 199 (Iowa 2007) (Noting prejudice from joinder should outweigh the State's interest in judicial economy). Again, this Court has pondered this prejudice in part, noting that there was a "risk that all three verdicts could have been affected" by the rulings regarding Trane's "sex-related counts." *Trane I*, 934 N.W.2d at 466. Such attempts would have been ripe for objection under Iowa Rules of

Evidence 5.403 and 5.404; indeed, they would have been screened out by any competent Motion in Limine.

To refresh the Court, in Trane's initial jury trial, the jury was subjected to an intense testimonial by Trane's alleged sex abuse victim who provided graphic and extensive descriptions of the sex acts she claims occurred between her and the Applicant, which had no bearing whatsoever on the State's other charges against Trane. This exposure to evidence which would never have been allowed during a separate trial on Count III, which dealt with the unrelated child abuse charges.

Likewise, presentation of evidence of unrelated allegations of child abuse, against different victims, with different motives and methods, painted an unduly prejudicial picture of Trane which influenced the jury to more harshly view him in the light of the otherwise unsupported testimony evidence of K.S. *Trane I*, 934 N.W.2d at 452 ("None of the incidents were directly corroborated by any witnesses other than K.S."). The State was effectively given a free hand to present irrelevant evidence to damage the jury's perception of Trane and render them more likely to presume guilt on the basis

of unfair prejudice. Iowa R. Civ. P. 5.403; Iowa R. Civ. P. 5.404(b)(1). Such evidence would never have been allowed into a trial solely on Counts I and II; indeed, that is the very purpose of a motion to sever counts.

The jury sat through days of testimony about the alleged deprivation and mistreatment of other children in the ultimate care of Trane. This error was, as noted, a compounding one—effectively, the testimony for each of the separate Counts acted as inadmissible bad acts evidence for the other counts. *Id.*; *State v. Matlock*, 715 N.W.2d 1, 6 (Iowa 2006) (noting that where the "actual need for the evidence in light of the issues" determines admissibility). In prosecution for the Child Endangerment charge, the jury heard unrelated evidence about Trane's alleged sexual misconduct; in the prosecution of Trane for that sexual misconduct, the jury heard evidence of his mistreatment of children. *Matlock*, 715 N.W.2d at 6 (noting that admission of such prejudicial evidence is a reversible error). Both Counts, while unrelated in motive, method, and identity of the specific victim, had only one element in common: they dealt with minors. This element alone specifically "inflame[d] the passions

of the jury" by implicating Trane as a child abuser in general. *State v. Pitts*, 800 N.W.2d 755 (Iowa Ct. App. 2011); Iowa R. Evid. 5.403 (noting that even relevant matters may be excluded for "unfair prejudice"). It would have been an abuse of discretion for the District Court to have denied a Motion to Sever these Counts. Failure to sever these counts adversely impacted Trane's ability to defend himself against either set of claims, resulting in prejudice which undermines the confidence of the outcome. *Ondayog*, 722 N.W.2d at 784 (citing *Strickland*, 466 U.S. at 694).

II. Trial Counsel's errors were her own, not Trane's.

Having established that a Motion to Sever should have been made and that failing to do so prejudiced Trane, that leaves the question of whose fault it is. The State made no real effort in Trane's PCR hearing to assert that the failure to sever Counts was on its face a reasonable one; rather, it attempted to assert that the reason for this demonstrable error was the Applicant himself. This assertion fails.

In support of his claim that Trial Counsel was ineffective for failing to sever the Counts facing Trane, Trane provided copious evidence including billing records, copies of Trial Counsel's

memorandums and correspondence, and supporting testimony. Trial Counsel, in turn, provided only unsupported and self-serving testimony that in addition to being in conflict with all of the other evidence, is not convincing on its face.

A. Trial counsel's barebones assertions are unconvincing.

Trial Counsel provided absolutely no hard evidence whatsoever to support her assertion that she ever had a conversation about the possibility of severing counts with Trane. Rather, the entirety of the evidence provided consisted of Trial Counsel's affidavit and testimony during her deposition. This affidavit itself is particularly unconvincing, prefaced as it is by Trial Counsel's assertion that "I do not recall many specifics about by [sic] representation of Mr. Trane as it has been over five year[s] ago." (D0161, Ex. A. Schafer Affidavit at 1 (12/3/2023)). Oddly, the only sharp specifics recalled by Trial Counsel were those exculpating her from ineffective assistance. (*Id.* at 1–2) (asserting full recollection of a conversation specifically about severing counts and blaming failure on Trane).

Trial Counsel's deposition testimony suffers from a similar defect. (D0158, 5/4/2023 Deposition of Lisa Schaefer at 8:10-12, (12/3/2023)) ("To be honest with you, I have not looked at anything

involving Mr. Trane since I withdrew from the case."); (*Id.* at 9:2-7) (confirming Trial Counsel had not reviewed any material prior to deposition); (*Id.* at 23:9) (stating that her recollection of actions was "very hazy")). When asked, Trial Counsel affirmed that she did not recall the content of her attorney notes or work product created at the time of representing Trane. (*Id.* at 9:20-25; 10:1-2; 12:15-20) ("to the best of my knowledge, it would have been my notes, any research I might have done. But, yeah, all of that would have stayed as work product. And, again, I don't have any of that, so I can't tell you what's in them."). Despite that, Trial Counsel agreed that when she had "significant conversations about matters related to the case, [she] documented it either by email or [she] documented it by [her] time record." (*Id.* at 16:11-16).

Amazingly, despite being unable to recall specifics about her representation and despite having not thoroughly reviewed her work materials, Trial Counsel was able to concisely recall her alleged conversation with Trane, claiming that she had explained the process for severance in detail during her first meetings with him, and that Trane had refused this option. According to Trial Counsel, this

discussion occurred at some point "during the first couple of meetings". (*Id.* at 29:18-19). Trial Counsel was likewise compelled to admit that there is absolutely no record of this purported exchange anywhere in her billing records, emails, or notes, asserting instead that this was "because, again, it was very early and he said he wasn't interested." (*Id.* at 31:25; 32:1).

This is despite the fact that Trial Counsel did in fact document the bond reduction and furlough requests that were also made in this 'very early' stage of representation in her attorney work product and billing records. Of course, these bond reduction and furlough requests and motions also occurred during these same initial meetings. (*Id.* at 30:20-25; 31:1-7). Somehow, those matters made it into Trial Counsel's billing records and notes, but her alleged discussions with Trane about severance evaded memorization. Indeed, Trial Counsel documented everything—including research, memos, and communications with opposing counsel—except for the discussions which would exonerate her from a claim that she failed to investigate or communicate severance with the client. This gap includes any record of research on or drafting of motions regarding

severance. (*Id.* at 32:2-17; D0145, Lisa Schaefer Claims Data (12/3/2023)).

The absence of any trace of a discussion on severance in and amongst the records for the precise period in which Trial Counsel happened to recall the discussion is notable. It is much more likely that the issue of severance was ignored and overlooked by trial counsel, who failed in her role as advocate to advise Trane on the matter at all. "[I]neffective assistance is more likely to be established when the alleged actions or inactions of counsel are attributed to a lack of diligence as opposed to the exercise of judgment". *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). Strategic trial decisions are specifically "examined in light of all the circumstances to ascertain whether the actions were a product of tactics or inattention to the responsibilities of an attorney." *Id.* at 143. Where these decisions are made "after a thorough investigation of law and facts relevant to plausible options" they "are virtually unchallengeable." *Id.* When this thorough investigation is lacking, however, strategic decisions must be based on a "reasonable professional judgment" supporting the lack of investigation. *Id.*

Such is the case here, where there is not a jot of evidence actually showing that Trial Counsel considered, let alone discussed, severance in this issue. This leaves the State with only the bold and unsupported statements of Trial Counsel as the entirety of the evidence attempting to shift the blame from Trial Counsel to Trane.

B. The District Court conflated the record regarding Trane's speedy trial request with Trial Counsel's failure to advise him of alterative options.

In the face of Trial Counsel's unsupported and contradictory assertions, the District Court conflated Trane's speedy trial request with his alleged refusal to sever counts. In its Order, the District Court concluded that because Trane insisted on a speedy trial and rebuffed his Trial Counsel's request to waive this right, he must likewise have (1) actually have been informed of the possibility of severing Counts despite the complete lack of evidence, and (2) made an informed decision on the entirely unrelated matter of rejecting severance. (DCD0133, Order Granting in Part and Denying in Part Application for Post-convction Relief at 5 (10/24/2023)). The District Court then proceeded to discuss Trane's decision not to waive speedy trial for another page before concluding that Trial Counsel's "statement to the court at the pretrial conference tends to corroborate

her testimony about discussing severance with Trane and his response to the discussion." (*Id.* at 6-7). This statement, that "despite my advice, [Trane] is maintaining his demand of speedy trial" fails as the sole cited support for the District Court's conclusion for two reasons. First, it on its face has nothing to do with a motion to sever. This lack of connection should draw the concern of this Court on its own.

Second, the evidence just as effectively supports Trane's assertion that he was never given any option *but* to charge ahead with all counts. The District Court's reasoning is a quintessential example of the logical fallacy of assuming the conclusion. Absent from the District Court's interpretation of events is the recognition that Trane's insistence was just as easily explained as the product of his lack of knowledge, rather than proof of his counsel's claims. If Trane was never informed that he had any other options than to charge ahead with trial, why would he not wish to resolve the matter swiftly?

It was well established in Trial Counsel's billing and records that of the concerns facing Trane, the ability to get home to his family was paramount. (D0159, 5/4/2023 Deposition of Lisa Schaefer at

32:2-17 (12/3/2023); D0142, Claims Data by Lisa Schaefer (12/3/2023)). It is inconceivable that if Trial Counsel had actually advised Trane severance was possible and that "in our district we generally will handle the more serious case first" and that after the sex offense charges, there would be a "second round of cases, the child endangerment's increased eligibility for bail after dismissal of the sex offense wouldn't have come up. (D0159, 5/4/2023 Deposition of Lisa Schaefer at 30:2-11 (12/3/2023)).

Trane was originally charged with two felony charges—Sexual Abuse in the Third Degree and Sexual Exploitation by a Counselor—and the accompanying Misdemeanor charge of Child Endangerment. (D0094, Brief in Support of Post-Convction Relief at 3–4 (6/12/2023)). It would have been extremely difficult for the State to retain Trane in custody on a single aggravated Misdemeanor count after his acquittal on those felony offenses. Iowa Code § 811.1 (summarizing Iowa's bail rules). In order for Trial Counsel's recollection to be true, she must have both had a conversation with Trane about severance and failed to document it, while also somehow avoiding discussing the same bond and release issues she claims

Trane was so fixated upon. The needle's eye though which Trial Counsel's recollection of events must pass is simply too narrow to be credited. This is of course all speculation based on the word of Trial Counsel—just like the entirety of the State's argument. The hard record, including the total lack of documentation of any sort of discussion, research, or drafting regarding severance, all favor Trane's recollection.

C. Trane's statements were improperly disregarded by the District Court as 'self-serving'.

The Court improperly applied *Kirchner v. State* in denying Trane's severance claims. 756 N.W.2d 202 (Iowa 2008). The error was twofold: first, it incorrectly concluded that Trane's statements were self-serving. Second, Trane submitted much more than "his . . . own subjective, self-serving testimony" to establish trial counsel's errors. *Dempsey v. State*, 860 N.W.2d 860, 869 (Iowa 2015).

Trane's statements were not self-serving. The District Court came to this conclusion without reasoned analysis. *Krichner* and others outlined the scope of and provided examples for what qualifies as "self-serving" testimony, into whose company Trane's statements do not belong. In *Krichner*, the defendant refused continuous,

repeated, and documented attempts to bring him to bear on a plea offer. 756 N.W.2d at 203. These included draft letters, and direct statements by the defendant to the Court that "I am not taking any plea offer". *Id.* Accompanying these direct statements, Kirchner demonstrated symptoms of a major mental illness, including accusing his attorney, the county attorney, and judge of being "in cahoots" to convict him by plea bargaining. *Id.* at 203, 207. In short, Kirchner's later claim that he would have taken a plea was verifiably untrue based on his directly contradictory, recorded statements concerning the plea itself. *Id.*

In Trane's case, his statements are only 'self-serving' insofar as they would reasonably benefit him—that is, they are evidence in his favor. Such is the case of literally all testimony an applicant would reasonably offer, true or not. If testimony is 'self-serving' simply because it supports an applicant's claims, then there is no point in an applicant ever testifying in his own PCR matter. It would be disastrous to read *Kirchner* as effectively denying an applicant the right to testify in his own case.

Rather, such testimony only becomes 'self-serving' if it is *not* accompanied by "some credible, nonconclusory evidence that he would have [taken a different action] had he been properly advised". *Langdeaux v. State*, 817 N.W.2d 31 (Iowa Ct. App. 2012). If such supporting evidence is in hand, then the reviewing court may not simply do away with the applicant's statements. Thankfully for Trane, and unlike the State's assertions, his statements are supported by all of the credible, nonconclusory evidence in this case.

D. All evidence supports Trane's assertions regarding a Motion to Sever

The State rested its claims on Trane's desire for early resolution of his case. While the District Court misapplied *Kirchner* to disregard Trane's testimony, that does not make *Kirchner* inapplicable to this matter generally. *Kirchner* provides the Court with an effective framework for evaluating Trane's decision making. *Kirchner*, 756 N.W.2d at 206 ("We now turn to the question of whether Kirchner is entitled to relief under the applicable subjective standard"). Under this standard, the Court must put itself into the shoes of the Defendant, and with the information available to the defendant at the

time in issue, determine whether Counsel's errors prejudiced him. *Id.* (citing *Engelen v. United States*, 68 F.3d 238, 241 (8th Cir.1995)).

As noted *supra*, it is extraordinary unlikely that Trane had been informed of the legal procedure of severing criminal counts. *See* Section II.A, *supra* (noting total absence of record on issue despite thorough documentation). It is also evident from the State's own claims that one of Trane's overriding desires as a client was to be with his family as soon as practicable. D0159, 5/4/2023 Deposition of Lisa Schaefer at 30:12-14; 32:9-13 (12/3/2023)). This means that Trane was left wholly ignorant of a very common criminal procedure which would have drastically reduced his exposure to the sorts of risks he had directly identified as being serious concerns for him. Given his repeatedly stated desire to be with his family as soon as possible, it was incumbent upon Trial Counsel to investigate how to accomplish this goal with the minimal risk to Trane. *Ledezma*, 626 N.W.2d at 142; Iowa R. Pro. Con. 32:1.4(a)(2) (requiring an attorney to "reasonably consult with the client about the means by which the client's objectives are to be accomplished"). This did not occur, unless it happened to be the single and sole thing that Trane presented to

Trial Counsel which she failed to document. More likely by far, Trial Counsel failed to properly investigate the matter, and left her client in a position where prejudicial and immaterial evidence would come before his jury.

Even *assuming* for the purpose of argument that Trane was *ever* informed that severance was possible, he was left ignorant of the vastly increased likelihood that he would be 'home by Christmas' on reasonable bond if Counts I and II were defeated. According to Trial Counsel's suspiciously detailed recollection, she informed Trane:

> generally the courts will address the more--if we were to sever it and the Court would--do the motion to sever and the Court were to sever it, that in our district we generally will handle the more serious case first, and then once that is done, then when we have an entirely new jury panel, which in this case would have been after the first of the year, then we would address the second round of cases, the child endangerment.

(D0159, 5/4/2023 Deposition of Lisa Schaefer at 30:3-11 (12/3/2023)). In the face of this limited explanation, Trial Counsel asserted that Trane:

> was very clear and emphatic from the very beginning he wanted this done. He wanted it done quickly. He intended to be home by Christmas, and anything that was going to delay the process, he really wasn't interested in.

(*Id.* 31:12-16). It would be unrealistic to believe Trial Counsel was not dialed in to Trane's desire to be home, as she also stated:

> If I remember correctly, at the very first meeting he wanted out of jail, and he wanted out of jail quickly, and so a lot of our initial focus was getting the trial information reviewed, getting the arraignment done, and getting the bond review.

(*Id.* at 30:25; 31:1-4). With this single-minded focus on bonding out to see his family, advice about how severance and trial on those charges which were keeping him in jail would have helped achieve this outcome could not have failed to persuade Trane to endorse a plan for severance.

Either Trial Counsel never had a conversation with Trane about severance, or if she did, she failed to correctly advise him of the impact it would have had on his eligibility for bail, which he had made exceedingly clear to her was an overriding goal. With virtually all of the State's evidence (that is, the raw claims of Trial Counsel) claiming and supporting this as Trane's state of mind at the time, it is practically uncontested that had he been properly and fully apprised of all the effects of severance, he would have embraced the chance wholeheartedly. *Diaz v. State*, 896 N.W.2d 723, 728 (Iowa 2017)

(noting duty in criminal representation to advise clients of those matters which are "of great, even overwhelming, importance to them."). The State cannot both blame Trane for seeking the quickest way home to his family, and then claim that he wouldn't have leapt at a severance which would have increased his chances of doing so.

CONCLUSION

There is no way out for the State. No party to this appeal actually denies that failure to sever Trane's case into two separate trials was prejudicial to him. Even if the State does, Trane has demonstrated the prejudicial impact on his legal defense. Nor can the State maneuver out of ineffective assistance. Either Trial Counsel failed completely to advise Trane of the possibility of severance, or she did, she failed to explain the impact severance would have had on the very issues Trane so adamantly made clear to her controlled his needs in the case. No matter whom this Court chooses to believe—and it should believe Trane, whose statements are supported by the evidence—Trial counsel was ineffective for failing to sever Trane's criminal charges, resulting in reversable prejudice.

REQUEST FOR ORAL ARGUMENT

Applicant-Appellant Trane respectfully requests an opportunity for oral argument before this Court regarding these issues.

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CERTIFICATE OF COMPLIANCE AND SERVICE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) (no more than 13,000 words); excluding the parts of the brief exempted by Rule 6.903(1)(g)(1), which are the table of contents, table of authorities, statement of the issues, and certificates. This brief contains 5,898 words.

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I hereby certify that on April 19, 2024, I did serve Applicant-Appellant's Brief on Appellant by mailing one copy to:

Benjamin Trane,
APPLICANT-APPELLANT

/S/ Lori Yardley .
Dated: April 19, 2024
Lori Yardley, Paralegal