IN THE SUPREME COURT OF IOWA

No. 19-1571

JOHN HRBEK,

Appellant,

v.

STATE OF IOWA,

Appellee.

ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POTTAWATTAMIE COUNTY
HONORABLE KATHLEEN KILNOSKI, JUDGE

APPELLANT'S FINAL BRIEF

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ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

On August 28, 2020, the undersigned certifies that a true copy of the foregoing instrument was served upon the Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to:

John Hrbek #0104465
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/s/ Philip B. Mears
MEARS LAW OFFICE

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ROUTING STATEMENT

The Iowa Supreme Court should retain this case, which presents an issue of first impression. It also presents an issue of significant importance to inmate litigants throughout the state. See Rule 6.1101(2)(c)

In the last thirty years, the Iowa Supreme Court has recognized the right of inmate litigants to file their own pleadings in postconviction cases where they have court appointed council. See Leonard v. State 461 N.W.2d. 465 (Iowa 1990), Gamble v. State 723 N.W.2d. 443 (Iowa 2006), and Jones v State,731 N.W. 2d 388 (Iowa 2007)

In 2019, the Iowa legislature passed Senate File 589, the Omnibus Crime Bill. The Bill purports to eliminate the right conferred by those cases to file pleadings, even when represented by counsel.

The District Court applied that provision to bar John Hrbek from filing documents in his ongoing postconviction. He sought appellate review, which has been granted. This court has granted a stay of the District Court Order pending the outcome of this appeal.

Senate File 589 placed also limits on appellate jurisdiction. The Iowa Supreme Court addressed the retroactivity of those provisions in State v. Macke, 933 N.W. 2d 226 (Iowa 2019). The Macke case does not particularly address the questions presented in this case.

This case addresses the legality of the provision barring inmate pro se pleadings while represented by counsel.

Issues that are included in this case are (1) retroactivity of the new provision; (2) interference with the right to counsel in a post conviction; and (3) whether the statute infringes on the inherent power of the courts to regulate participants in front of the court, including both counsel and applicants in postconviction cases.

STATEMENT OF THE CASE

Nature of the Case:

This is a Discretionary Review Proceeding brought by John Hrbek, a Post Conviction Applicant, seeking review of an Order of the District Court in his post conviction dated August 25, 2019. In that order, Judge Kilnowski barred Hrbek, who was represented by counsel, from filing any further documents in his Post Conviction case. The only thing that he was permitted to file was a Motion to Relieve Counsel in order to represent himself.

Hrbek filed an Application for Discretionary Review Pro Se on September 20, 2019. On October 16, 2019, the Iowa Supreme Court granted that Application. The Court granted a Stay of the lower court order.

Course of Proceeding:

John Hrbek was convicted of two counts of first degree murder in 1981 in Pottawattamie County. The conviction was mostly affirmed on direct appeal in State v. Hrbek 336 N.W.2d 431 (Iowa 1983). There was a remand on one issue, which was then dealt with.

Hrbek filed the present post-conviction on June 30, 1987. The case proceeded with court-appointed counsel for ten years and then apparently went dormant. The subsequent history was discussed by the Iowa Court of Appeals in Hrbek v. State, 13-1619, 2015 WL 6087572 (Iowa Ct. App. 2015).

Essentially, the case had been dismissed under rule 1.944 in January 2005. This was apparently after the Pottawattamie County Clerk utilized that rule for the first time in the almost twenty years after the case had been filed.

In 2013, after finally learning about the dismissal, Hrbek filed a Motion to rescind the dismissal and reinstate the post-conviction. The District Court ruled it could not do that. Hrbek appealed. The Iowa Court of Appeals on October 14, 2015 reinstated the post conviction. Hrbek v. State, 13-1619, 2015 WL 6087572 (Iowa Ct. App. 2015).

Since 2015, the case had been active. Counsel had been appointed for Hrbek.

Throughout this time, Hrbek had been an active participant in his post-conviction. On July 11, 2019, Counsel for the State filed a document entitled "Notice Re: Pro se Filings by Applicant Currently Represented by Counsel" (App. 7). In that Notice, the Assistant County Attorney set forth newly enacted Code section 822.3B. That is the provision in the omnibus crime bill that purports to eliminate the right to file pro se documents if the person is represented by counsel.

On July 24, 2019, Hrbek filed a pro se Resistance to the suggestion that he not be allowed to file matters pro se (App. 9). On August 25, 2019, without having held a hearing, Judge Kilnoski entered an order regarding several matters about the post-conviction. The Court addressed the newly enacted Code section 822.3B. Here is what the Court said:

> The Court has also considered the State's request that the Court advise the Applicant of newly enacted Iowa Code 822.3B and restrict the Applicant from filing any pro se documents, applications, motions, and briefs while he is represented by counsel.
>
> The Court has reviewed Hrbek's resistance to the State's application
>
> The Court concludes that Applicant Hrbek should forward any documents, applications, motions, briefs, etcetera to his post-conviction counsel for counsel's review and filing. Applicant Hrbek may file a pro se motion to relieve counsel and to represent himself. (Ruling p.2, App. 25)

At that point, Hrbek filed an application for discretionary review, along with a Motion to appoint appellate counsel. He also filed a Motion to stay all deadlines, pending resolution of the issue.

The Supreme Court granted the application for discretionary review. (App. 27).

It should be noted that during this same time period, appointed counsel Clemens Erdahl died. On October 8, 2019, the Court appointed local attorney Christopher Roth to represent Hrbek in Erdahl's place.

As of August 2020, a post-conviction hearing has been scheduled for February 13, 2020. (See order dated April 4, 2019. App. 6).

It is not clear what is going on in with the post-conviction at this moment. The Supreme Court stayed the imposition of the new statute. With the stay being granted, the case should have gone forward at the district court level. Apparently, with the change in counsel, the hearing was not held.

As of the date of this filing, no hearing is scheduled.

STATEMENT OF FACTS

Discussion of facts

There are not many facts needed for this appeal. Those few facts would include the following:

1) John Hrbek is serving a life sentence for a 1981 conviction from Pottawattamie County.
2) He has a post-conviction pending that was timely filed, where as of 2019 he had appointed counsel.
3) John Hrbek has been an active participant in his post conviction. He has filed motions, briefs, and other pleadings for years.
4) He filed the necessary and appropriate paperwork to get his entire postconviction reinstated five years ago. He also filed the application for discretionary review before this Court, which resulted in this appeal.
5) A number of Hrbek's filings have been found to be meritorious. On August 21, 2019 at his pro se request, he was given a temporary restraining order with regard to the Department of Corrections and his personal copy of files. (App. 19) On August 25, 2019, he was granted permission to hire an expert witness with regard to one of the issues in the post-conviction (App. 24)

6) The legislature passed Senate File 589 in the spring of 2019. It went into effect on July 1, 2019. Provision at issue for this appeal is codified at new Section 822.3A.

Discussion of statute, Senate File 589 ('SF 589')

Senate File 589, which was called the Omnibus Crime Bill, was enacted in the Spring of 2019. There were different Divisions of the bill.

Division I contained a new Expungement Provision. Certain old misdemeanor convictions can now be expunged.

Division II contained changes to the Robbery and theft Code sections.

Division III and IV had to do with several other specific crimes.

Division V had to do with criminal proceedings. This division contained the Sections that dealt with the jurisdictional questions. Section 31 (Ineffective counsel on appeal); Section 33 (Guilty plea appeals). The retroactive application of these provisions was addressed by State v. Macke, 933 N.W.2d 226 (Iowa 2019).

Division V included other more substantive Sections. General Verdicts (Section 32); Statutes of limitations for post convictions (Section 34).

Division V also included the Sections regarding Pro Se filings.

Section 30 created a new section 814.6A. This provision prohibited Pro Se filings by criminal defendants. This section may be applicable to defendants on appeal.

Section 35 created new Section 822.3B. That section addressed Pro Se filings by postconviction Applicants who are represented by counsel.

Division VI had specifically to do with the crime of Arson.

Division VII addressed the Statute of Limitations for certain sexual offenses.

Specific portions relating to pro se filings

The specific part of the Omnibus Crime Bill pertaining to Pro Se filings in post conviction cases is Section 35. It creates a new code section 822.3A.[1] Here is that Section:

> 822.3A. Pro se filings by applicants currently represented by counsel
>
> 1. An applicant seeking relief under section 822.2 who is currently represented by counsel shall not file any pro se document, including an application, brief, reply brief, or motion, in any Iowa court. The court shall not consider, and opposing counsel shall not respond to, such pro se filings.
> 2. This section does not prohibit an applicant for postconviction relief from proceeding without the assistance of counsel.
> 3. A represented applicant for postconviction relief may file a pro se motion seeking disqualification of counsel, which a court may grant upon a showing of good cause.

The other limitation on Pro Se filings appeared in Section 30 of SF589. This section limits filings by 'defendants'. It creates a new provision, 814.6A. It provides the following:

[1] Senate File 589, section 35 says the new section is 822.3B. For some reason that presumably does not matter, that section now appears as 822.3A.

> 814.6A. Pro se filings by defendant currently represented by counsel
>
> 1. A defendant who is currently represented by counsel shall not file any pro se document, including a brief, reply brief, or motion, in any Iowa court. The court shall not consider, and opposing counsel shall not respond to, such pro se filings.
> 2. This section does not prohibit a defendant from proceeding without the assistance of counsel.
> 3. A defendant currently represented by counsel may file a pro se motion seeking disqualification of the counsel, which a court may grant upon a showing of good cause.

It is not clear whether this restriction applies to any case while on appeal. The language says "in any court." That suggests that it applies to 'defendants' on appeal.

It is unclear whether this provision would preclude a postconviction applicant from filing a brief on appeal.

ARGUMENT

Summary of argument

For the last thirty years, the Iowa Supreme Court has recognized the right of a post-conviction applicant to not only present claims to the court but also to develop those claims and have them addressed in a written ruling by the judge. This right is not diminished or given up by having counsel appear or be appointed.

The basis for this right comes both from certain sections of the post-conviction statue and also the Iowa Supreme Court’s statutory and constitutional

interpretation of the proper role for counsel in a post-conviction case. Counsel is not supposed to be a second judge. Counsel is to assist the client. To ensure the lawyer fulfills that role, the court has recognized the right for the applicant to participate in the post-conviction case by filing matters and presenting arguments pro se.

Senate file 589 purports to eliminate this right developed by the Iowa Supreme Court in the last thirty years. This effort should be rejected for a number of reasons.

First, because of the importance of the right involved, the new statute cannot be applied retroactively to existing cases. It cannot be applied to John Hrbek's case, which was filed long before Senate File 589 was passed in 2019.

Second, the statute, if applied, would be unconstitutional. It would be contrary to the inherent power of the court. This is related to the concept of separation of powers. It is offensive in two ways. First, it intrudes into the proper function of counsel in a post-conviction. Second, it intrudes onto the day-to-day functioning of the court system.

In addition, the statute interferes with the Constitutional right to counsel in a post conviction case, as well as the Right to have access to the Courts.

I

SENATE FILE 589 SHOULD NOT RESTRICT THE RIGHT OF JOHN HRBEK TO FILE PLEADINGS DIRECTLY IN A POST CONVICTION ALREADY FILED ON JULY 1, 2019, DESPITE THE FACT THAT HE HAS APPOINTED COUNSEL.

Standard of Review:

The Standard of review for questions of statutory construction should be review for error of law. State v. Randle, 603 N.W. 2d 91,92 (Iowa 1999).

To the extent that the legal argument touches on a constitutional claim, the review would be *de novo*. Lewis v. Iowa Dist. Ct. , 555 N.W.2d 216, 218 (Iowa 1996).

Preservation of Error:

Hrbek resisted the State's Notice that Hrbek not be allowed to file anything, in a resistance filed on July 24, 2019. (App. 9)

After Judge Kilnoski entered an order dated on August 25, 2019, Hrbek filed his Application for discretionary review with this court.

The issues presented should be fully preserved for appeal.

A. The right created by Leonard, Gamble, and Jones

The establishment of the right in Iowa for litigants to file pleadings in a Post Conviction case, even when represented by counsel, comes from three Iowa Supreme Court cases. They are Leonard v. State 461 N.W.2d. 465 (Iowa 1990),

Gamble v. State 723 N.W.2d. 443 (Iowa 2006), and Jones v State,731 N.W. 2d 388 (Iowa 2007)

Leonard

The Leonard case was a post conviction arising out of a prison disciplinary action at the State Penitentiary. In the 1980s, the post conviction statute authorized the appointment of counsel in post convictions challenging discipline that involved the loss of early release credits.

In March 1988, Steve Leonard was disciplined while housed at the Penitentiary at Fort Madison, apparently losing good time. He filed a pro se postconviction application in Lee County. He applied for and was granted appointed counsel. The judges at that time in Lee County directed appointed counsel to file an amended application. After about a year, post conviction counsel amended the petition for Post Conviction Relief.

In response to that filing, Leonard, who by that time had been transferred to the Anamosa prison, filed three Motions. He moved to dismiss his court appointed counsel. He moved to proceed without counsel, or 'pro se.' He also asked for a transport order so he could attend the hearing in Lee County.

The District Court in Lee County denied Leonard's Motions. The case was then heard a month later without Leonard being present. The judge dismissed the Amended Petition filed by counsel, finding it lacked merit.

Leonard appealed and the Appellate Defender's Office was appointed. One claim that was raised at that point was that Leonard was denied due process when the Court refused to let him dispense with counsel. He argued that the right to counsel included a corresponding right to dispense with counsel.

The Iowa Supreme Court started by looking at the Sixth Amendment right to counsel, which applies to the States, noting that the provision does not extend to postconviction cases. The Supreme Court quoted from the United States Supreme Court decision in Faretta v. California, 422 U.S. 806, 819–20, 95 S.Ct. 2525, 2533–34, 45 L.Ed.2d 562, 572–73 (1975) in describing what 'assistance of counsel' meant.

> The sixth amendment to the United States Constitution guarantees a criminal defendant "assistance of counsel for his defense." U.S. Const. amend. VI. Implicit in the words "assistance of counsel" is the notion that a criminal defendant has
>
> > the right to self-representation—to make one's own defense personally.... The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails. The counsel provision supplements this design. It speaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists.

> Faretta v. California, 422 U.S. 806, 819–20, 95 S.Ct. 2525, 2533–34, 45 L.Ed.2d 562, 572–73 (1975).

Leonard v. State, 461 N.W.2d 465, 468 (Iowa,1990)

The Iowa Court then looked to Section 663A.5, which provided for the appointment of legal services in a postconviction case to a person who financially qualified. The Court said this provision meant that appointment of Counsel was within the discretion of the Post Conviction Court. The Court noted that the Iowa Supreme Court had previously stated that,

> "trial judges would ordinarily be well advised to appoint counsel for most indigent postconviction [relief] applicants." We said so because we thought appointment of counsel "benefits the applicant, aids the trial court, is conducive to a fair hearing, and is certainly helpful in event of appeal."
> Leonard v. State, 461 N.W.2d 465, 467 (Iowa,1990)

The Court then held that the discretion to appoint counsel necessarily includes the discretion to deny a request to dispense with counsel. The Court then denied Leonard's claim that he had a right to essentially fire his counsel. The Court did not find an abuse of discretion in allowing counsel to continue.

However, here is what the Court the said with an all important qualifier:

> We temper our holding with one qualification. A postconviction relief applicant may file applications, briefs, resistances, motions, and all other documents the applicant deems appropriate in addition to what the applicant's counsel files. This qualification should give the applicant assurance that all matters the applicant wants raised before the District Court will be considered.
> Leonard v. State, 461 N.W.2d 465, 468 (Iowa, 1990)

Gamble

The next case was Gamble v. State 723 N.W.2d.443 (Iowa 2006).

Gamble had been convicted of Second Degree Robbery. After a direct appeal, he filed an Application for Post Conviction Relief, which was denied by the District Court. The Court of Appeals affirmed that denial. The Supreme Court granted further review.[2] The Supreme Court vacated the decision the Court of Appeals, reversed the Judgment of the District Court, and granted a new hearing on the pro se claims.

Here was the way the case had gone at the District Court level.

To start, the order of appointment in Gamble's case provided that,

> [p]ursuant to Iowa Code section 822.6, counsel shall review the application with the applicant and determine if the application contains a proper claim for relief or whether the applicant has a viable claim for such relief.
> Gamble v. State, 723 N.W.2d 443, 444 (Iowa,2006)

As directed by that Order, the appointed counsel in Gamble's case filed a report, including an Amended Application. The Attorney concluded that all of Gamble's claims but one lacked merit.

[2] The issues regarding Gamble's pro se claims were only addressed by the Iowa Supreme Court because they were raised by James Gamble *pro se*. On appeal, his appointed Counsel only raised the claims that had been raised by post-conviction counsel. Gamble was able to establish the important rights in the case because he filed a supplemental pro se brief and then filed his own Application for Further Review.

In response, Gamble filed a Pro Se Supplemental Application, waiving six of the original eleven claims but not waiving the other five. The District Court denied the Post Conviction Application and did not address any of Gamble's Pro Se claims.

On appeal, much the same occurred. Appellate counsel for Gamble raised only the claim that had been advanced by post conviction counsel. Gamble filed a Supplemental Pro Se Brief as authorized by the Appellate Rules. See Rule 6.901(2). After the Court of Appeals decision, Gamble raised his own issues in a pro se Application for Further review.

The Supreme Court granted further review.

The Court focused on the claim raised by Gamble in his pro se brief and Application for Further Review, expressing three concerns. First, there was the fact that the District Court ordered counsel to assess Gamble's claims. Second, there was the fact that the Court just adopted counsel's report. Finally, there was the failure of the District Court to rule on Gamble's pro se claims. 723 N.W. 2d at 445.

The Court granted Gamble a new hearing. He was to get a hearing without counsel being required to assess the validity of Gamble's claims. The judge was then required to make specific findings as to each of Gamble's pro se claims.

Here is what the Supreme Court said in reaching that decision.

(1) The Court noted that Section 822.6 of the postconviction statute contemplates that the claimant in a postconviction case would have "extensive pro se participation in the proceedings". Gamble at p. 445.

(2)The Supreme Court then noted that, in the Leonard case, the Supreme Court had given applicants an "assurance that all matters the applicant wants raised before the District Court will be considered." Gamble at p. 445.

(3) The Court looked at Section 822.7 of the Post Conviction Statute which provides that, "the Court should make specific findings of fact and state expressly its conclusions of law relating to each issue presented." The Court noted that detailed consideration of Pro Se claims can be burdensome. That is true, but nevertheless there is a need and therefore a requirement for individual findings.

(4) The Court observed that counsel should not be "expected to criticize or diminish their own client's case. That role should be filled if at all by counsel for the opposing party." Gamble at p. 446.

(5) The Court discussed the specific role of an attorney in any case. First, there is a difference between a lawyer and a client with regard to the ethical obligation to present grounds. The attorney cannot, "urge grounds that are lacking in legal or factual support simply because his client urges him to do so." See Rule of Civil Procedure 1.413(1). The client is not so restricted. The fact the client is not so restricted allows the client to present claims that the lawyer would not

present. Sometimes those are meritorious. Sometimes that allows the law to develop.

Jones

Jones v. State 731 N.W.2d. 388 (Iowa 2007) was decided the year after Gamble. In Jones, the Supreme Court addressed and to some extent encapsulated the rule coming out of Leonard and Gamble. After summarizing Leonard and Gamble, Justice Ternus summarized the relevant principles.

> We cull the following relevant principles from these decisions. First, a PCR applicant who is dissatisfied with his attorney's representation is permitted to raise issues pro se and file papers and pleadings pro se. *392 *Gamble,* 723 N.W.2d at 446; *Leonard,* 461 N.W.2d at 468. Second, the District Court must give the applicant an opportunity to be heard on his pro se claims and must then rule on each issue raised. *Gamble,* 723 N.W.2d at 446. Clearly, an applicant's opportunity to supplement counsel's pleadings and raise additional claims pro se would be meaningless if the applicant did not have a corresponding opportunity to be heard on the pro se claims and obtain a ruling on them.
>
> Jones v. State, 731 N.W.2d 388, 391–92 (Iowa 2007)

Applying these principles the Supreme Court returned the case to the District Court to allow Jones to present evidence on the pro se claims and to specifically make findings on all of those claims.

Instances where the right has been successful

There are cases where defendant/applicants have raised issues pro se that were successful on appeal. In State v. Gamble, the defendant filed a *pro se* Application for Further Review. He was successful in strengthening the right to file pro se pleadings and in getting his case remanded for a new hearing. 723 N.W.2d 443 (Iowa 2006).

At the moment, State v. Mathes, No. 17-1909, is pending before the Supreme Court. Mathes filed a *pro se* Application for Further Review after the attorney was late in sending her the Court of Appeals' decision and told her there was no merit for further review. The Supreme Court granted the Application for Further review and the case goes forward.

Michael Navarro Jones was able to obtain a new trial based on his *pro se* claims challenging his sexual abuse conviction. State v. Jones, No. 04-0021, 2006 WL 334046 (Iowa Ct. App. 2006); see also State v. Robinson, 859 N.W.2d 464 (Iowa 2015), 487-92 (Wiggins, J., concurring, would have also found reversible error on *pro se* issue that trial counsel was ineffective for not objecting to confinement instruction.) (Matter reversed on sufficiency of the evidence.)

Sometimes there is just bad counsel.

Unfortunately it must be recognized that sometimes appointed counsel in postconviction cases is quite ineffective. This is not something that is new in Iowa or elsewhere. See for example Lado v. State, 804 N.W.2d 248 (Iowa 2011)

What is clear is that the rate of compensation for appointed counsel in post-convictions has significantly declined in value over the last 40 years. With the enactment of the new criminal code in 1977, the rate of compensation was supposed to be the going rate in the community. At that time the rate was between $40-60 an hour.

With several years of experience this Counsel was paid $60 per hour for court-appointed cases throughout the 1980s.

In the next ten years the rate of compensation was cut to $45 an hour.

After 30 years it had finally gotten back to the $60 an hour point where it had been in the early 1980s. Just in the last year, the legislature gave court-appointed counsel a $3 an hour raise.

This low rate of compensation has happened when post-convictions in the last five years has gotten more complicated. Actual innocence for example can now be grounds for relief. See Schmidt v. State, 909 N.W.2d 778 (Iowa, 2018)

Leonard/Gamble/ Jones established a right to file papers pro se which operated as check on what counsel was doing. At a time when issues become more complex and the compensation for court-appointed counsel declined, the rights recognized in Gamble and Leonard have become even more important.

What is the basis for this right?

These three cases make clear that, in post-conviction proceedings, applicants have the right to present their claims to the court. They have a right to develop

those theories and even present evidence to support them. When presented, the Court must rule on the claims.

This does not change when counsel is appointed.

The source of this right partly comes from the postconviction statute. 822.6 contains language that the court should liberally construing pleadings. Another provision requires detailed findings of fact and conclusions of law.

Perhaps most importantly, the source of this right comes from the nature of what it means to be an attorney for an applicant in a post-conviction case.

First of all, the Court recognizes the importance of an attorney providing advice and assistance not just to the client, but also to the Court.

This could be such an all-important and powerful role that some limitations have to be recognized. These are limitations that are inherent in the proper ethical role for an attorney in a post conviction.

As was discussed in Gamble, the attorney is not to play a role of adjudicating the client's own claims. A lawyer is not supposed to criticize or diminish the client's case. That role is to be performed by opposing counsel.

The lawyer may have ethical limitations as to what claims the lawyer can present. But the lawyer, in performing the task of the lawyer, can go too far. A major protection for the client from his counsel is the right recognized in Leonard, Gamble and Jones. That is nothing less than the right to present the client's own claims in the case.

In contemplating the potential impact of SF 589, it is useful to keep these principles in mind.

B. How postconvictions would work if Section applies to Hrbek and other postconviction cases?

It is helpful to take a look at how a post conviction would operate given the background of Leonard, Gamble, and Jones, if Section 822.3A were to apply. Examining such a landscape assists in reviewing whether the statute can be permitted in light of otherwise constitutional and statutory provisions.

First of all, the new statute only applies when counsel appears. Most post convictions are filed by inmates *pro se,* raising a variety of issues. This initial pleading is not affected by the new statute.

Gamble addressed the common practice of District Courts of appointing counsel and then directing counsel to screen the initial pleadings and essentially file an Amended complaint, eliminating any claims that counsel did not think has merit. Gamble set that aside as inconsistent with the post conviction statute and the appropriate role of appointed counsel.

What happens to this portion of the Gamble decision if 822.3A prevents subsequent filings? Presumably, there is nothing in 822.3A that changes the role of counsel given the Gamble decision. Counsel may be able to recast the pleadings but should not be allowed to eliminate any claims without the client's consent.

This would be the difference between an Amended Application and an Amended and Substituted Application.

Then there is the right from Gamble and Jones to have a ruling on pro se claims. Gamble and Jones made clear that the District Court specifically had to address pro se claims. There is nothing in 822.3A that appears to change this.

So what is changed?

The initial pro se pleading is the same. The pro se claims are part of the case. Appointed counsel is not permitted to file an Amended and Substituted Application eliminating pro se claims without client consent.

The District Judges are still required to rule on those Pro Se claims.

The only thing that has really changed is that applicants with counsel are not permitted to develop their pro se claims. They presumably cannot engage in formal discovery. They are not permitted to argue those claims. They cannot file a trial brief to address claims that post conviction counsel does not want to present.

In contemplating the legality of the new statute, it is appropriate to understand how the statute changes the way the post conviction would work.

C. There is a Constitutional Right to Counsel in a postconviction.

For the longest time, the assumption was that there just was no Constitutional Right to Counsel in a Post Conviction. See Pennsylvania v. Finley, 481 U.S. 551, 555, 107 S.Ct. 1990, 1993, 95 L.Ed.2d 539 (1987).; Coleman v.

Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); See Wise v. State, 708 N.W.2d 66, 69 (Iowa 2006); Fuhrmann v. State, 433 N.W.2d 720, 722 (Iowa 1988)

Rather than relying on any federal constitutional protection, Iowa and presumably many states have developed a statutory right to counsel in post conviction proceedings. However, that right to counsel had to be 'effective,' using the standard of effective counsel primarily found in the Sixth Amendment. Patchette v State, 374 N.W. 2d 397, 398 (Iowa 1985); Lado v State, 804 N.W. 2d 248, 250 (Iowa 2011).

The Constitutional Right to Counsel seemed limited to the original criminal proceeding and then the first appeal.

This historical assumption has changed.

Three cases should be considered carefully. The first is Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). The second is Martinez v. Ryan, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed2d 272 (2012). The third is Allison v. State, 914 N.W. 2d 866 (Iowa 2018).

Coleman and Martinez were federal habeas corpus cases reviewing state court convictions under 28 USC 2254. A federal court has jurisdiction to review a conviction of a person in custody as a result of a state conviction as to federal constitutional claims. Usually, the federal court can review only claims that had

already been fully presented in state court. However, sometimes the matter was not presented in state court and would be procedurally barred in state court.

Under those circumstances, the federal court can review a defaulted constitutional claim if there was “cause” for the default for having not presented the claim.

In Coleman, the question was whether 'cause' could be established for the failure to present the claim by showing negligence or ineffectiveness of post conviction counsel.

In Coleman, the United States Supreme Court concluded that there was no Constitutional Right to Counsel in a Post Conviction proceeding. For that reason, negligence or ineffectiveness by post conviction counsel would not be 'cause'.

Martinez v. Ryan was decided 20 years later in 2012. Martinez involved a federal review of a state conviction from Arizona. Arizona had a rule, similar to that recently enacted by the Iowa legislature in the Omnibus Crime Bill, which stated claims of ineffective assistance of trial counsel cannot be presented on appeal.

The United States Supreme Court started by recognizing there was a constitutionally based right to counsel at the criminal trial and for the first appeal.

It then recognized a type of case it referred to as an 'Initial Review Collateral Proceeding'. What it meant by that phrase was that there should be a first opportunity for a criminal defendant to present a claim that his Sixth Amendment

Right to Counsel had been violated by something that had happened at Trial or on Appeal. In Arizona, the Post Conviction proceeding was the first available opportunity that a Criminal Defendant had to raise Ineffective Counsel at Trial or on Appeal.

The Supreme Court reasoned that there should be at least one opportunity to have a full record developed on Ineffective Counsel claims. Without that opportunity, the Sixth Amendment right to counsel would be illusory. Counsel was required for such an opportunity.

At that point, the United States Supreme Court could have extended the Right to Counsel to that Initial Review Collateral Proceeding. It did not do that. It avoided that conclusion because it recognized that ineffectiveness or negligence on the part of post conviction counsel would be "cause" for failing to raise something in the state court proceeding below.

Nonetheless, the United States Supreme Court reasoning in Martinez suggests that the Constitutional Right to Counsel, which is now recognized at trial and on the first appeal, really should extend to the Initial Review Collateral Proceeding.

The third case is Allison v. State, 914 N.W.2d. 866 (Iowa 2018). In that 2018 case, the Iowa Supreme Court revisited the same issue presented in the Martinez case.

Allison went to trial in 2011. He was convicted of three counts of sexual abuse in the third degree. He took his direct appeal. After that was unsuccessful, he filed a timely post conviction application. He was represented by counsel. He tried to argue that his trial counsel was ineffective. The claim was that his counsel had failed to investigate the bias of one of the jurors.

The District Court denied postconviction relief, noting that no evidence had been offered at the postconviction as to what that bias was. For that reason, there was no prejudice.

Allison appealed the post conviction denial. He argued that his post conviction counsel was ineffective by not properly investigating and presenting the claim of jury bias. The Court of Appeals denied his appeal.

Allison then filed a second post conviction, raising ineffectiveness at the first postconviction. By that point, however, he was more than three years past the end of direct appeal. The State asserted that this post conviction was barred by the three year statute of limitations. The District Court agreed and dismissed the second postconviction.

The issue on appeal became whether the second post conviction could avoid the statute of limitations defense. Justice Appel's analysis followed much of the reasoning from the Martinez case.

One difference was that Justice Appel pointed out the linguistic difference between the United States constitution and the Iowa Constitution regarding the right to counsel.

The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right to have assistance of counsel". Article I section 10 of the Iowa Constitution, however, provides that “in all criminal prosecutions and in cases involving the life or liberty of the individual, the accused shall have the right to have the assistance of counsel."

Justice Appel's decision followed the Martinez reasoning. He essentially required a Defendant to have effective counsel for the initial collateral proceeding to determine whether trial counsel was ineffective. Just like the court in Martinez, Appel did not need to go all the way to finding a Sixth Amendment or other constitutional basis for the right to counsel in a post convicting proceeding. Instead, Justice Appel found there to be a limited basis to excuse the statute of limitations if there was a timely second postconviction raising ineffectiveness at the postconviction level.

These cases are important in understanding the likely constitutional base for the right to postconviction counsel. As such, efforts to restrict the right by the legislature would be carefully scrutinized.

John Hrbek in his current post-conviction is challenging for the first time whether his trial counsel was ineffective. His right to counsel at such proceeding is

constitutionally based. The Leonard, Gamble, and Jones part of the right to counsel is constitutionally based.

D. As a matter of statutory construction new Section 822.3A should not be applied retroactively to existing postconviction cases, such as Hrbek's.

822.3A purports to eliminate the right to file pro se pleadings for anyone with a post-conviction case who is represented by counsel. The statue was passed in the spring of 2019 and went into effect by operation of law on July 1, 2019. The legislation was silent as to its retroactivity.

John Hrbek filed his post-conviction case long before July 1, 2019 and has been an active pro se filer. During all that time he has had appointed counsel. Judge Kilnoski, after receiving "Notice" of SF589, found the new prohibition applicable to his case. She entered an order prohibiting Hrbek from filing anything other than a Motion to discharge counsel as long as he was represented by counsel.

The initial question presented for this appeal is whether 822.3A applies to Hrbek's post conviction case, which was filed prior to the enactment of the statute. Is the statute to be applied retroactively to those cases?

E. General rules regarding retroactivity of legislation

The place to start the analysis of retroactivity is with two sections in Chapter 4 of the Iowa Code. That is the chapter regarding construction of statutes.

Section 4.5 says the following:

> Prospective statutes
> A statute is presumed to be prospective in its operation unless expressly made retrospective.

Appeal courts have cited this provision many times, saying statutes are presumed to apply prospectively only. State v. Harrison, 914 N.W.2d 178, 205 (Iowa 2018). Here is what the Court said in Frideres v Schiltz, 540 N.W. 2d 261, 264-65 (Iowa 1995).

> We presume that all statutes the legislature enacts are to apply prospectively; that is, they are to apply only to actions which arise after the effective date of the statute, unless the legislature expressly indicates they are to apply retroactively. *First Nat'l Bank v. Diers,* 430 N.W.2d 412, 414 (Iowa 1988); (citations omitted) In applying the statutory directive of section 4.5 to determine whether a statute shall apply solely prospectively or retrospectively, we also look to the intent of the legislature. (citations omitted)
>
> Frideres v. Schiltz, 540 N.W.2d 261, 264–65 (Iowa,1995)

There is also Section 4.13 (1)(b). That says the following:

> **4.13. General savings provision**
>
> 1. The reenactment, revision, amendment, or repeal of a statute does not affect any of the following:
> a. The prior operation of the statute or any prior action taken under the statute.
> **b. Any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred under the statute.**
> c. Any violation of the statute or penalty, forfeiture, or punishment incurred in respect to the statute, prior to the amendment or repeal.
> **d. Any investigation, proceeding, or remedy in respect of any privilege, obligation, liability, penalty, forfeiture, or**

punishment; and the investigation, proceeding, or remedy may be instituted, continued, or enforced, and the penalty, forfeiture, or punishment imposed, as if the statute had not been repealed or amended.

2. If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment, revision, or amendment of a statute, the penalty, forfeiture, or punishment if not already imposed shall be imposed according to the statute as amended.

Subsections b and d are the two important provisions.

Looking at just these code provisions, you could reason that new section 822.3A would not apply to existing post convictions. Certainly, there is a right created by Leonard, Gamble, and Jones for an applicant to actively participate in the applicant's own case, even where there was appointed counsel. That would seem to be protected by Section 4.13(1)(b) and (d)

The analysis may not be that simple.

There are other general rules of construction in determining whether a statute is retroactive to preexisting cases.

As a matter of construction, the question of applicability is one of legislative intent. State ex rel Turner v. Limbrecht, 246 N.W. 2d 330, 332 (Iowa 1976)

If there is not specific information in the statute, as was the case with 822.3A, it is necessary to look at 'characterization' of the change.

Courts have said that Section 4.5 was not intended to apply to new rules that were, "remedial or procedural". The State Ex Rel Buechler v. Vin Sand, 318

N.W.2d. 208, 210 (Iowa 1982); Schuler v. Rodberg 516 N.W.2d. 902, 904 (Iowa 1994). But that just raises the question of what is 'remedial or procedural."

Another characterization of a change can be that it is 'substantive." If something is 'substantive,' it is applied on prospectively. State ex rel Turner v. Limbrecht, 246 N.W. 2d 330, 332 (Iowa 1976) But what is 'substantive?'

Another characterization in the criminal context is whether the defendant has acquired "vested right" in something. See State v. Stoen 596 N.W.2d. 504,508 (Iowa 1999)

Justice McDonald, in his partial dissent in the Macke case, expressed frustration with the use of those categories. In his opinion, this categorical approach "is a rhetorical device to justify result oriented decisions rather than an analytic device to actually decide cases." 933 N.W. 2d. p.244.

What about these characteristics?

Trying to figure out what is substantive and what is procedural or remedial can be complicated and confusing. For example, the legislature often will want to make a change in the law for a certain reason. Presumably any change can be thought of as 'remedial'.

Sometimes it is easier to define whether something is 'substantive'. There seems to be the idea that if something is 'substantive' it is not remedial and not retroactive.

For example, changes to a statute defining a criminal offence would almost always be 'substantive'. The Supreme Court said that "substantive law creates, defines, or regulates rights, while procedural law defines the practice, method, procedure, or legal machinery by which the substantive law is enforced." Baldwin v. City of Waterloo, 372 N.W.2d. 486, 491 (Iowa 1985). See also State v. Soppe, 374 N.W.2d. 649, 652-53 (Iowa 1985) (Holding the statutory amendment enhancing punishment could not take away a right a Defendant acquired earlier).

Analysis becomes complicated because sometimes there can be substantive rights as to certain procedures. For example, the right to appeal has been found to be a substantive right by the Iowa Supreme Court on a number of occasions. Boomhower v. Cerro Gordo County Board of Adjustment, 163 N.W.2d. 75,76 (Iowa 1968); Giles v. State 511 N.W.2d. 622,625 (Iowa 1994) See also State v. Macke, 933 N.W. 2d 226 (Iowa 2019).

If the Court were to conclude that 822.3A is 'remedial,' that does not end the analysis.

Even if something is thought of as a 'remedial' statute, there is still a three part test to decide whether the legislature intended to have the new statute or rule apply retroactively. Here is how the Supreme Court articulated that three part test:

> ...we follow a three-part test to determine whether the legislature intended retrospective or prospective application. *Emmet County State Bank v. Reutter,* 439 N.W.2d 651, 654 (Iowa 1989).

> First, we look to the language of the new legislation; second, we consider the evil to be remedied; and third, we consider whether there was any previously existing statute governing or limiting the mischief which the new legislation was intended to remedy.
>
> Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Shell Oil Co., 606 N.W.2d 370, 375 (Iowa,2000)

In Shell Oil Company, the Court found the new statute retroactive; noting that prior to the legislation, there was no comprehensive statutory scheme for petroleum contamination. Presumably, if there was no prior scheme, there could not have been any prior rights that would have been changed or impaired.

So how would that analysis work?

(1) When you look at the language of the legislation, there is no particular indication whether the change applies to cases that have already been filed. Certainly there were two other parts of Senate File 589, where the legislature addressed whether the statute applied to existing cases.

(2) The "evil" to be remedied was presumably the bad filings of the Leonards and Gambles. In thinking about this intention of the legislature, however, it is important to recall how the statute would work. It would not apply to the initial application filed by pro se applicants. See the discussion in this brief in page 51-52. The pro se issues remain in the case even if 822.3A applies. Indeed, those claims would have to be addressed in the court's final findings. The change in the

statute would be that those claims would be presented but could not be developed by the applicant. It is not clear whether 'confusion' has been reduced by the statute.

The final factor under the Shell Oil formula is to consider whether there were "previously existing statues" that governed or limit the mischief. Certainly, courts have the inherent power to police any participant before the court. If the court were to determine that pleadings were being filed maliciously or frivolously, the court would be in a position to take protective action directly with regard to the applicant.

The court should conclude that, even if the statue could be thought as remedial, it should not apply to existing cases.

F. Supreme Court Case regarding Senate File 589

SF 589 went into effect on July 1, 2019. At this point, the Iowa Supreme Court has decided one case regarding Senate File 589. That case was State v. Macke 933 N.W.2d. 226 (Iowa 2019).[3]

The Macke case addressed two parts of Senate File 589, both dealing with appellate jurisdiction over certain topics. Macke appealed his conviction after he had pled guilty. To reach the merits of his claim, he wanted to argue he had Ineffective Assistance of Counsel.

[3] The Supreme Court also decided State v. Trane, 934 N.W.2d.447 (Iowa 2019). In that case the Court followed Macke. An Ineffective Counsel claim could be decided on direct appeal since the appeal was filed before July 1, 2019.

There were two parts of Senate File 589 that were implicated. One was the withdrawal of appellate jurisdiction over direct appeals following a guilty plea. The second was whether there was direct appeal jurisdiction to address claims of ineffective assistance of counsel below.

The Supreme Court found that neither of those provisions applied to appeals taken before July 1, 2019. On the specific question of jurisdiction over appeals after a guilty plea, the Supreme Court was unanimous. With respect to jurisdiction over claims of ineffective assistance of counsel, Justice MacDonald dissented.

The holding in Macke was that the jurisdiction over appeals would be determined by the jurisdictional rules in place at the time the appeal was taken.

The State, in Macke, had argued that Senate File 589 should be interpreted retroactively to cases that were on appeal, as of July 1, 2019. Here is what the Court had to say in response to the State's position.

> The State's position on retroactivity conflicts with Iowa Code section 4.13(1), which provides, "The ... amendment ... of a statute does not affect ... [t]he prior operation of the statute or any prior action taken under the statute ... [or] [a]ny ... right ... previously acquired ... under the statute." Macke held a right to a direct appeal from her judgment of conviction and sentence in 2018, and applying Senate File 589 retroactively to her appeal would eliminate that right, contrary to Iowa Code section 4.13(1)(*a–b*). *See State v. Soppe*, 374 N.W.2d 649, 652–53 (Iowa 1985) (applying Iowa Code section 4.13(1) to hold that statutory amendment enhancing punishment "could not take [away a] right" a defendant acquired earlier); *see also In re Daniel H.*, 237 Conn. 364, 678 A.2d 462, 466–68 (1996) (holding "the removal of a right to a direct appeal [of a juvenile transfer order] is also a substantive change in the law" that

> applies only prospectively and not retroactively to cases predating statutory amendment).
>
> State v. Macke, 933 N.W.2d 226, 232 (Iowa, 2019)

In going through the retroactivity analysis, the Court noted the absence of any language in Senate File 589 stating that the provisions would apply to cases pending on appeal prior to July 1, 2019. The Court wrote that the, "clear indication of intent for retroactive application must be found in the text in the statute". Macke at 233.

G. Other appellate cases regarding the right to file pro se briefs on appeal

Part of the crime bill addressed *pro se* filings in areas other than post-convictions. Section 30 of the bill arguably prohibits *pro se* supplemental briefs on appeal, as currently and specifically authorized by the Appellate Rules. See Rule 6.901(2).

After July 1, 2019, the Attorney General's Office made a number of attempts to get the appeal courts to strike pro se briefs, arguing that they did not have to address any of those claims.

In most of those cases the appeals were filed prior to July 1, 2019. The Court of Appeals most recently made this pronouncement in State v. Scheckel, 2020 WL 1542313, at *3 (Iowa App., April 1, 2020):

> Iowa Code section 814.6A(1) was recently enacted to prohibit defendants from filing pro se supplemental briefs. *See* 2019 Iowa Acts ch. 140, § 30. Although our supreme court has not

> squarely addressed this change, this court has applied the reasoning from *Macke*, 933 N.W.2d at 227–28, and determined it does not apply to appeals filed prior to July 1, 2019. *See, e.g.*, *State v. Levy*, No. 18-0511, 2020 WL 567696, at *1 n.1 (Iowa Ct. App. Feb. 5, 2020); *State v. Syperda*, No. 18-1471, 2019 WL 6893791, at *12 (Iowa Ct. App. Dec. 18, 2019); *State v. Purk*, No. 18-0208, 2019 WL 5790875, at *7 n.8 (Iowa Ct. App. Nov. 6, 2019).
> State v. Scheckel, 2020 WL 1542313, at *3 (Iowa App., April 1, 2020)

While the reasoning in these cases was not extensive, the Court of Appeals applied the Macke decision to the availability of pro se appellate briefing. By that same logic, the prohibition of pro se pleadings in a post-conviction case should not apply to post-convictions pending on June 30, 2019.

The Supreme Court recently entered an Order in an appeal that may directly address the question of *pro se* appellate briefs in appeals filed after July 1, 2019. The appeal in Weir v State, 20-0051 was filed on January 10, 2020. In an order dated April 7, 2020, the Supreme Court responded to a request from Weir for permission to file a pro se supplemental brief. In that Order, the Court granted Weir conditional permission to file a Pro Se Supplemental Brief in accordance with Rule 6.901 (2)(a). Apparently, the issue of whether a supplemental brief can be filed and/or considered will be submitted with the appeal. In the *Weir* case, the parties will have to address the merits of whether the legislature can disestablish the appellate Rule.

H. Application of these principles and cases to Hrbek

Applying these principles, the place to start is with the statute itself, Senate File 589. In imposing the restrictions on pro se filings, the legislature was silent on the applicability of those provisions.

This is in contrast with other sections of Senate File 589. Section 2 of the statute dealt with expungement of certain misdemeanor convictions. The legislature specifically provided that, "this section applies to a misdemeanor conviction that occurred prior to on or after July 1, 2019." Division 2 of Senate File 589 dealt with changes to the Robbery and Theft Statutes. The legislature provided that sentence for people with First Degree Robbery Convictions would be changed. That change applied to convictions that occurred on or after July 1, 2018.

For the rest of the Bill, the legislature made no reference to which cases were to be affected.

Recognizing some of the limits of the characterization analysis, you are still left with the basic question of whether the restriction on pro se filings is procedural, remedial, or substantive.

Leonard, Gamble, and Jones establish a clear and very meaningful right to participate in your own post conviction. This right is tied to the statutory right to counsel in a post conviction statute. However, there is a constitutional dimension under both the state and federal constitutions to the right to have counsel at a post conviction that is raising ineffective counsel for the first time. Leonard and Gamble

made clear the right to participate pro se is in fact a part of a way in guaranteeing the right to effective counsel in post conviction.

By the new statute, the legislature purports to take away that right. Whether the Leonard right is statutory or constitutional, it should still be recognized as 'substantive'.

But even if you were to think the statute was 'remedial,' there is a three part test to decide whether the legislature intended to have the new statute or rule apply retroactively. Here is how the Supreme Court's three part test applies here:

With respect to the first part of that test, there is nothing in Section 822.3A that addresses retroactivity.

The second part of the test is the "evil to be remedied." Presumably, the evil that was intended was reducing frivolous claims. See the discussion of the State's argument regarding legislative goals in Macke. 933 N.W.2d. at 233.

Finally there is this third factor. Was there a previous statute governing or limiting the mischief? Asking whether there is a previous statute is the same as asking is there something that now addresses this evil.

The right to Counsel in postconvictions existed before Senate File 589. Indeed it exists after Senate File 589. Clearly, one of the purposes of the right to counsel is to facilitate non frivolous presentation of claims to the judge. Competent counsel can go a long way to ensure non frivolous arguments.

At the moment, courts have the inherent power to police any participant before the court. That is true for both counsel and parties. At the moment, if a court were to determine that pleadings were being filed maliciously or frivolously, there are remedies the court can take, even remedies addressed to pro se applicants. There is no particular reason to adopt such a draconian tool.

Consideration of these three factors should mean that even if the statute is remedial, it should not be applied retroactively.

ARGUMENT II

APPLICATION OF 822.3A TO POSTCONVICTION CASES WOULD VIOLATE THE CONSTITUTION

Standard of Review:

As this claim is based on a constitutional violation, review on appeal is *de novo*. Everett v. State, 789 N.W.2d 151, 155 (Iowa 2010).

Preservation of error:

After the State filed a Notice about Senate File 589, Hrbek resisted that statute in a pleading filed on July 24, 2019, (App. 9) Hrbek complained that the application of the statute would be unconstitutional.

In his Application for Discretionary Review, Hrbek talked about several constitutional problems created by applying the statute to his case. He mentioned the right of access to the courts. He mentioned the right to counsel. Application for Discretionary Review. p.4; App. 30).

Issues of retrospective and prospective application aside, the restriction on pro se filing in a postconviction violates Hrbek's constitutional rights in several ways.

A. When the legislature overturned the right to make pro se filings when represented by counsel, it violated the principle of separation of powers, which includes the inherent power of the court.

Over the last thirty years, the Iowa Supreme Court has crafted a right of self representation in post conviction cases, primarily through case law but also through appellate rules. This right coexists with and has become a part of the right to counsel in post convictions and on appeal.

In 2019, the Iowa legislature has passed a statute that redefines that balance, eliminating the right to self-representation if the appellate wishes to have counsel.

If applied to Hrbek's case, this statute, 822.3A, would be unconstitutional in several ways. It interferes and conflicts with the constitutionally protected right of the courts to govern their own affairs. It interferes with the carefully defined right to counsel and self representation established by the Supreme Court over almost 30 years.

This principle is articulated sometimes as the separation of powers principle. It also is articulated as the 'inherent power of the court'. The two doctrines are very much the same, either of which would operate to prohibit 822.3A from doing what it purports to do.

All judicial power in Iowa is vested in the Iowa Supreme Court and its inferior courts. Iowa Const. Art. V, § 1.

> "Courts constitute the agency by which judicial authority is made operative. The element of sovereignty known as judicial is vested, under our system of government, in an independent department, and the power of a court and the various subjects over which each court shall have jurisdiction are prescribed by law." Franklin v. Bonner, 207 N.W. 778, 779 (Iowa 1926).

Article V, sections 4 and 6 are related to the jurisdiction of the courts. Article V, section 4 provides the jurisdiction of the Iowa Supreme Court. Iowa Const. art. V, § 4. It states:

> The supreme court shall have appellate jurisdiction only in cases in chancery, and shall constitute a court for the correction of errors at law, under such restrictions as the general assembly may, by law, prescribe; and shall have power to issue all writs and process necessary to secure justice to parties, and shall exercise a supervisory and administrative control over all inferior judicial tribunals throughout the state.

The Iowa Supreme Court has both the jurisdiction and the duty to invalidate state actions that conflict with the state and federal constitutions. See Varnum v. Brien, 763 N.W.2d 862, 875-76 (Iowa 2009) (noting the courts have an obligation to protect the supremacy of the constitution).

The separation-of-powers doctrine is violated 'if one branch of government purports to use powers that are clearly forbidden, or attempts to use powers granted by the constitution to another branch.'" Klouda v. Sixth Judicial Dist. Dept. of Corr. Serv., 642 N.W.2d 255, 260 (Iowa 2002) (quoting State v. Phillips, 610

N.W.2d 840, 842 (Iowa 2000)). The doctrine means that one branch of government may not impair another branch in "the performance of its constitutional duties." Id.

Recently, the Iowa Supreme Court examined the judicial branch's role within Iowa's "venerable system of government":

> The Iowa Constitution, like its federal counterpart, establishes three separate, yet equal, branches of government. Our constitution tasks the legislature with making laws, the executive with enforcing the laws, and the judiciary with construing and applying the laws to cases brought before the courts.
> Planned Parenthood of the Heartland v. Reynolds ex rel. State, 915 N.W.2d 206, 212 (Iowa 2018) (internal citations omitted)

One of the rights enumerated in both the United States and Iowa Constitutions is the assistance of counsel. U.S. Const. amends. VI, XIV; Iowa Const. art. I,§ 10. Having a constitutional right to counsel means the having a right to *effective* assistance of counsel. State v. Ambrose, 861 N.W.2d 550, 556 (Iowa 2015) (citations omitted). Counsel is required to ensure that persons are not convicted in unconstitutional ways. Regulating appointed counsel is one of the core functions of the judiciary.

Related to the concept of separation of powers is the notion that there are certain inherent powers of the court system, even powers that cannot be infringed by the legislature. Two cases are worth noting. In State v. Hoegh, 632 N.W.2d 885 (Iowa 2001), the court discussed the inherent powers of the court in the context of

legislation giving the board of supervisors authority to appoint a special prosecutor. Here is what the Supreme Court said

> It is fundamental to our system of government that the authority for courts to act is conferred by the constitution or by statute. Yet, it is equally fundamental that in addition to these delegated powers, courts also possess broad powers to do whatever is reasonably necessary to discharge their traditional responsibilities. *Webster County Bd. of Supervisors v. Flattery,* 268 N.W.2d 869, 874 (Iowa 1978). This type of judicial authority is known as inherent power, and it is derived from the separation of powers between the three branches of government, as well as limited by it.
> State v. Hoegh, 632 N.W.2d 885, 888 (Iowa,2001)

The Court went on to say:

> We have recognized that some inherent powers may be controlled or restricted by statute. *See Harding v. McCullough,* 236 Iowa 556, 558, 19 N.W.2d 613, 616 (1945). Some inherent powers may even be overridden by statute. *See Carlisle,* 517 U.S. at 426, 116 S.Ct. at 1466, 134 L.Ed.2d at 624. Other inherent powers may be so fundamental to the operation of a court that any attempt by the legislature to restrict or divest the court of the power could violate the separation of powers doctrine. *Gray v. Comm'r of Revenue,* 422 Mass. 666, 672, 665 N.E.2d 17, 22 (1996).
> State v. Hoegh, 632 N.W.2d 885, 889 (Iowa,2001)

Fourteen years later, the Supreme Court decided In re the Marriage of Thatcher, 864 N.W.2d 533 (Iowa 2015). In that quite unusual dissolution of marriage case, the Court discussed the court's inherent power in two different opinions. Justice Zager concurred specially and discussed the inherent power of the

court. His opinion identified a number of instances where there was inherent authority.

Here is what he wrote:

> Courts possess this inherent authority in a number of areas. *See, e.g., State v. Iowa Dist. Ct.,* 750 N.W.2d 531, 534 (Iowa 2008) ("Of course, when a court is acting within its jurisdiction it always has the inherent authority to do what is reasonably necessary for the administration of justice in a case before the court."); *In re K.N.,* 625 N.W.2d 731, 734 (Iowa 2001) (acknowledging district courts' "authority to ensure the orderly, efficient, and fair administration of justice"); *Johnson v. Miller,* 270 N.W.2d 624, 626 (Iowa 1978) (recognizing district courts' authority "to adopt rules for the management of cases on their dockets"); *Iowa Civil Liberties Union v. Critelli,* 244 N.W.2d 564, 569–70 (Iowa 1976) (recognizing district courts' "inherent common-law power" to promulgate a local rule of criminal procedure); *Peters v. Peters,* 249 Iowa 110, 114, 86 N.W.2d 206, 209 (1957) ("In Iowa separate maintenance has not been a statutory remedy, and authority to grant that relief has been based upon the inherent power of courts of equity."); *Hardenbergh v. Both,* 247 Iowa 153, 159, 73 N.W.2d 103, 106 (1955) ("[The] enforcement [of discovery] was an original and inherent power of a court of equity."); *Brooks v. Paulson,* 227 Iowa 1359, 1361, 291 N.W. 144, 145 (1940) ("It is so well recognized that a court of Equity has the inherent power, in its discretion, to consolidate causes pending therein for the purpose of avoiding a multiplicity of suits, that citations are hardly necessary."); *In re Marriage of Ihle,* 577 N.W.2d 64, 67 (Iowa Ct.App.1998) (recognizing inherent authority of trial judge to impose reasonable time limits on trial).
>
> In re Marriage of Thatcher, 864 N.W.2d 533, 547 (Iowa,2015)

Included in that list was the authority to ensure the "orderly, efficient, and fair administration of justice."

This case presents the question of whether the courts have inherent authority to regulate the parties who appear in front of them. At the moment after Leonard, Gamble, and Jones, the Supreme Court has crafted an appropriate balance between appointed counsel and self-representation in Postconviction cases.

The legal question presented in this case is whether the legislature violates this inherent power by purporting to substantially change that.

Hrbek says that it does. There is nothing more fundamental to the functioning of the court system that the regulation of the relationship between postconviction applicants and their counsel. This is necessary since the postconviction process seeks to vindicate the constitutional rights of the criminally convicted.

B. Legislation limiting pro se filings when represented by counsel, violates the right of access to the Courts or some principle of due process.

The United States Supreme Court has established that prisoners have a right of access to the courts. The primary case was Bounds v. Smith 430 U.S. 817, 822, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977). This right included an obligation to assist prisoners who needed to "attack their sentences directly or collaterally." Lewis v. Casey 518 U.S. 343, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996).

Application of new section 822.3A violates this right of access to the courts in two respects. First of all, if the statute applies, pro se claims for relief presented in the initial application may very well be presented to the judge at the end of a

case, with the applicant not being able to develop the claims. See discussion of the statute in action at page 51-52. This will occur if, for example, counsel does not feel like the claim has merit.

Even if the statute does not violate the right of access to the courts, it violates some other basic principle of due process. Jones and Gamble made clear that there was a right for applicants to have their issues addressed by the court. On some level this is such a basic due process right that it is hard to find authority beyond Jones and Gamble. But it is clear that if section 822.3A applies to Hrbek's case, he will have no guarantee that his pro se issues will ever be developed in his post-conviction.

The right to present an issue carries with it the right to be able to argue and develop claims.

C: Legislation limiting Pro Se filings violates the right to counsel in a post-conviction.

At first glance, it may not seem that the elimination of the right to file pleadings pro se would violate the right to counsel. At the same time, the court needs to recognize what Leonard, Gamble, and Jones did. They engrafted upon the right to counsel the right to pro se filings. The right to pro se filings operates as a check on appointed counsel. The right to pro se filings can provide necessary direction to appointed counsel.

Moreover, this right to counsel is not just a statutory right. As this court said in Allison and the United States Supreme Court said in Martinez, there really is a constitutional dimension to the right in a post-conviction to challenge the effectiveness of your trial counsel.

CONCLUSION

John Hrbek has a post-conviction case regarding his first degree murder conviction. It has been pending for a long time. He has struggled at times with his appointed counsel. Indeed, appointed counsel allowed the case to lapse and be dismissed for a number of years before it was reinstated.

John Hrbek has been an active participant in his post-conviction. However, he does not want to dispense with counsel. There are clearly things that counsel can do that John Hrbek cannot do.

Newly enacted section 822.3A would force Hrbek to make an impossible choice. If he wants to continue to file pleadings he has to surrender his right to counsel.

At a minimum, Hrbek has shown in this brief that this new statute should not apply to his case, which was already filed on June 30, 2019. The rights involved that are being taken away by 822.3A are substantive and the statute should not apply retroactively.

Hrbek has also shown that there would be considerable constitutional problems if the statute was to apply to him, making him choose between counsel and self-representation.

This Court should find the new statute unconstitutional or at least find that it does not apply to existing post-convictions cases such as John Hrbek's.

REQUEST TO BE HEARD IN ORAL ARGUMENT

The Appellant hereby requests to be heard in oral argument in connection with this appeal.

RESPECTFULLY SUBMITTED,

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ATTORNEY'S CERTIFICATE OF COSTS

I, Philip B. Mears, Attorney for the Appellant, hereby certify that the cost of preparing the foregoing Appellant's Page Proof Brief was $0 as the case was filed electronically.

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(f)(1) or (2) because:

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/s/ Philip B. Mears
Signature

_____
Date