IN THE SUPREME COURT OF IOWA
Supreme Court No. 19–1571

JOHN LEE HRBEK,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POTTAWATTAMIE COUNTY
THE HONORABLE KATHLEEN A. KILNOSKI, JUDGE

# APPELLEE'S BRIEF

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## ROUTING STATEMENT

Hrbek requests retention. *See* App's Br. at 13–14. The State agrees: this appeal presents a substantial issue of first impression about the constitutionality of a new statute, and it raises a question of importance to litigants and lower courts that the Iowa Supreme Court must ultimately resolve. *See* Iowa R. App. P. 6.1101(2)(a), (c), & (d). Therefore, retention is appropriate.

## STATEMENT OF THE CASE

### Nature of the Case

This is a discretionary appeal from an order in John Lee Hrbek's first PCR action. The PCR court determined that section 822.3A, which became effective on July 1, 2019, applied to this PCR action and prohibited the PCR court from considering Hrbek's pro se filings while he was represented by counsel. *See* Order (8/25/19); App. 24. This ruling was entered over Hrbek's resistance, which argued that section 822.3A did not apply to his already-pending PCR action, and that it would violate his constitutional rights if it did. *See* Resistance to Notice (7/24/19); App. 9. Hrbek applied for discretionary review. The Iowa Supreme Court treated Hrbek's filing as an application for interlocutory appeal and granted it, over the State's resistance. *See* ADR (9/20/19); App. 27; Order (10/16/19); App. 42.

Counsel was appointed to represent Hrbek on appeal. After Hrbek's counsel filed the appellant's brief, Hrbek tried to file a pro se supplemental brief. The State resisted. This Court directed that the issue should be submitted with the appeal. *See* Order (5/27/20).

Now, this appeal raises three issues: **(1)** whether the PCR court erred in determining that section 822.3A applies in this PCR action, which was pending before section 822.3A took effect; **(2)** whether the PCR court erred in rejecting Hrbek's claims that section 822.3A was unconstitutional because it would violate his constitutional rights; and **(3)** whether section 814.6A bars this Court from considering Hrbek's pro se supplemental brief, or is unconstitutional.

**Statement of Facts**

The underlying facts of Hrbek's first-degree murder convictions are summarized in the opinion that affirmed Hrbek's convictions on direct appeal. *See State v. Hrbek*, 336 N.W.2d 431, 432–33 (1983).

**Course of Proceedings**

The "bizarre procedural history" of this PCR action is only minimally relevant to the pure legal issues raised in this appeal. *See Hrbek v. State,* No. 13–1619, 2015 WL 6087572, at *1–2 (Iowa Ct. App. Oct. 14, 2015). Details will be discussed when they are relevant.

## ARGUMENT

### I. Section 822.3A is different from most other provisions enacted or amended by S.F. 589. It is procedural, and it does not limit or abridge any existing remedy. The PCR court was correct that it applies in this action.

#### Preservation of Error

Hrbek argued that section 822.3A was limited to prospective application and that it did not apply in his already-pending action. *See* Resistance to Notice (7/24/19) at 2–4; App. 10–12. The PCR court considered that resistance and necessarily rejected Hrbek's arguments, because it directed Hrbek to comply with section 822.3A. *See* Order (8/25/19) at 2; App. 25. Thus, error is preserved. *See Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

#### Standard of Review

This challenge presents "a question of statutory interpretation." *See State v. Macke*, 933 N.W.2d 226, 230–31 (Iowa 2019).

#### Merits

This Court has determined that some provisions of S.F. 589—specifically, those limiting review of ineffective-assistance claims on direct appeal and availability of direct appeals from convictions that are entered after guilty pleas—are not retroactively applied in appeals from convictions that were entered before the law's effective date. *See*

*Macke*, 933 N.W.2d at 230–36 (considering potential retroactivity of 2019 Iowa Acts ch. 140, § 28, *codified at* Iowa Code § 814.6(1) (2020) and 2019 Iowa Acts ch. 140, § 31, *codified at* Iowa Code § 814.7 (2020)); *accord State v. Majors*, 940 N.W.2d 372, 386 n.1 (Iowa 2020) (noting that Majors could raise ineffective-assistance claims on direct appeal despite amendment to section 814.7 because "he did have such a right at the time his judgment and sentence was issued" before July 1, 2019).

But that is specific to appeals. "Statutes controlling appeals are those that were in effect at the time judgment or order appealed from was rendered." *See James v. State*, 479 N.W.2d 287, 290 (Iowa 1991) (quoting *Ontjes v. McNider*, 275 N.W. 328, 330 (Iowa 1937)); *accord Giles v. State*, 511 N.W.2d 622, 624 (Iowa 1994). Prior determinations that *those* parts of S.F. 589 are non-retroactive should not affect the applicability of *this* provision. "[W]hen only part of an enactment is remedial or procedural, effect is ordinarily given to that part." *See Schuler v. Rodberg*, 516 N.W.2d 902, 904 (Iowa 1994) (quoting *State ex rel. Buechler v. Vinsand*, 318 N.W.2d 208, 210 (Iowa 1982)).

Section 822.3A is also different from jurisdiction-stripping statutes, which cannot "deprive the court of jurisdiction" by retroactive application "after the commencement of an action" in a district court.

*See Frink v. Clark*, 285 N.W. 681, 684 (Iowa 1939). And it is different from changes to the applicable statute of limitations that would have the effect of extinguishing actions that were timely when filed. *See, e.g.*, *Brewer v. Iowa Dist. Ct. for Pottawattamie Cnty.*, 395 N.W.2d 841, 842–43 (Iowa 1986) ("[W]e are reluctant to abate pending actions which were timely when filed by retroactive application of statutory changes in the statute of limitations.").

Section 822.3A does not control outcomes of litigation, and it does not bar any particular claim, defense, or remedy. Rather, it is "procedural legislation" that "applies to all actions—those that have accrued or are pending and future actions." *See Dolezal v. Bockes*, 602 N.W.2d 348, 351 (Iowa 1999). Procedural legislation generally affects how courts operate and how parties interact with the court.

> Practice and procedure include the mode of proceeding and the formal steps by which a legal right is enforced. Those words comprehend writs, summonses and other methods of notice to parties as well as pleadings, rules of evidence and costs. Practice and procedure indicate the forms for enforcing rights as distinguished from the law which creates, defines and protects rights.

*Bascom v. Dist. Ct. of Cerro Gordo Cnty.*, 1 N.W.2d 220, 221–22 (Iowa 1941) (quoting *Duggan v. Ogden*, 180 N.E. 301, 302 (Mass. 1932)). Procedural changes generally apply to all cases, including

already-pending cases involving already-vested rights. *See id.* That distinguishes it from substantive legislation that "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past." *See Smith v. Korf, Diehl, Clayton & Cleverley*, 302 N.W.2d 137, 138 (Iowa 1981) (quoting *Walker State Bank v. Chipokas*, 228 N.W.2d 49, 51 (Iowa 1975)).

"[W]hen a statute relates solely to a remedy or procedure, it is ordinarily applied both prospectively and retrospectively." *See State ex rel. Leas in re O'Neal*, 303 N.W.2d 414, 419 (Iowa 1981). And this remains true "even in the absence of clear legislative intent." *See Smith*, 302 N.W.2d at 138–39 (citing *Walker State Bank*, 228 N.W.2d at 51). Hrbek argues that, unless otherwise specified, section 4.5 creates a presumption of prospective application. *See* App's Br. at 41–42 (citing Iowa Code § 4.5). However, that statute "is taken from section 14 of the Uniform Statutory Construction Act, which the drafters pointed out is not intended to apply to remedial or procedural statutes." *See State ex rel. Buechler*, 318 N.W.2d at 209–10 (citing *Smith*, 302 N.W.2d at 138–39). Thus, "notwithstanding section 4.5," Iowa courts will apply changes to procedural rules to *all* currently pending cases, including

"proceedings pending on the effective date of the enactment." *See id.*; *accord Emmet County State Bank v. Reutter*, 439 N.W.2d 651, 654 (Iowa 1989) (citing *Schnebly v. St. Joseph Mercy Hospital*, 166 N.W.2d 780, 782 (Iowa 1969)) (explaining that legislature's failure to specify prospective or retroactive application is not determinative).

Hrbek also seems to argue that he had a vested right to file any pro se filings that he wanted, because he was generally permitted to file his own filings throughout the previous pendency of the action. *See* Def's Br. at 42–43 (quoting Iowa Code § 4.13(1)); Def's Br. at 44 (citing *State v. Stoen*, 596 N.W.2d. 504, 508 (Iowa 1999)). But there is no such thing as "any vested right of an individual in any particular manner of procedure." *See Bascom*, 1 N.W.2d at 221; *accord Dolezal*, 602 N.W.2d at 351. If there were, litigants would have vested rights to offer evidence that was admissible when an action commenced and was subsequently made inadmissible by rule or statute (or to exclude evidence that was inadmissible when the proceedings began, and was later made admissible). However, "a statutory rule of evidence applies to a proceeding tried subsequent to its effective date, even though the provision was nonexistent at the time the proceeding was commenced." *See State ex rel. Leas*, 303 N.W.2d at 419; *accord Moffitt Building*

*Material Co. v. U. S. Lumber and Supply Co.*, 124 N.W.2d 134, 136 (Iowa 1963); *Bingham v. Blunk*, 116 N.W.2d 447, 449 (Iowa 1962); *Wormley v. Hamburg*, 40 Iowa 22, 26 (1874). Even when this affects the admissibility of evidence that is outcome-determinative, there is no vested right to have the court apply outdated procedural rules:

> To the extent section 675.41 affects the admissibility of blood test results [to establish paternity], it does not create or divest a substantive right but merely establishes a rule of evidence. Thus, at least to that extent it is applicable to proceedings that were pending on its effective date.

*State ex rel. Buechler*, 318 N.W.2d at 209–10. The alternative is that litigation would be governed by whatever procedural rules were in effect when proceedings began, and Hrbek's PCR action would be governed by whatever rules of evidence and rules of civil procedure were in effect when he initiated the action in 1987. Iowa courts have never applied that approach to procedural rules, and for good reason: operating under a single set of current, up-to-date procedural rules promotes efficiency, consistency in rulings, and fairness to litigants.

Finally, Hrbek argues that section 822.3A does not satisfy the three-part test for retroactivity for remedial legislation. *See* App's Br. at 45–47. But that test has no real applicability to legislation that changes procedural rules—it only applies to remedial legislation. *See*

*Dolezal*, 602 N.W.2d at 351–52 (finding amended rule was procedural and skipping three-part retroactivity test); *State ex rel. Buechler*, 318 N.W.2d at 209–10 (same); *State ex rel. Leas*, 303 N.W.2d at 419–20 (same); *Smith*, 302 N.W.2d at 138–39 (same).

It is theoretically possible to characterize section 822.3A as remedial because it "regulates conduct" of PCR applicants during PCR litigation "for the public good." *See Iowa Comprehensive Petrol. Underground Storage Tank Fund Bd. v. Shell Oil Co.*, 606 N.W.2d 370, 375 (Iowa 2000) (citing *McCracken v. Iowa Dep't of Human Serv.*, 595 N.W.2d 779, 784 (Iowa 1999) and *Hornby v. State*, 559 N.W.2d 23, 25 (Iowa 1997)). It may also be said that section 822.3A "remedies defects in the common law and in civil jurisprudence generally." *See Bd. of Trs. of Mun. Fire & Police Ret. Sys. v. City of West Des Moines*, 587 N.W.2d 227, 231 (Iowa 1998). But any "remedy" or "public good" from section 822.3A is a result of how it streamlines *procedures* in a specific area of litigation in Iowa courts. Categorizing such a statute as remedial (rather than procedural) would effectively eliminate the separate category of procedural legislation that is *not* remedial. And the awkwardness of applying that three-part test to section 822.3A illustrates the need for separate categories to exist. Here is the test:

> 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.

*Shell Oil Co.*, 606 N.W.2d at 375 (quoting *Emmet County State Bank*, 439 N.W.2d at 654). Procedural rules generally tend to be written in present tense with conditional or universal applicability, so there is unlikely to be much guidance in the specific language used. However, section 822.3A is the rare exception—it states: "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." *See* Iowa Code § 822.3A(1). That evinces legislative intent to apply to any PCR litigant who, on the effective date of the enactment, *is currently represented by counsel* in pending PCR litigation. For second item—"the evil to be remedied"—it is enough to note that pro se filings from represented PCR applicants are equally burdensome and unnecessary, whether the PCR action was filed before or after July 1, 2019. *See City of Waterloo v. Bainbridge*, 749 N.W.2d 245, 251 (Iowa 2008) (finding this item weighed in favor of retroactivity for remedial legislation regarding abandoned buildings because "[a] building abandoned before the effective date of the statute

creates the same unsafe condition as a building abandoned after the effective date of the statute"). Indeed, for most procedural legislation, the "evil" resulting from inefficient or suboptimal procedure would always occur wherever that previously existing procedure applied, regardless of when the litigation began. The third item is "whether there was any previously existing statute governing or limiting the mischief which the new legislation was intended to remedy." *See Shell Oil Co.*, 606 N.W.2d at 375 (quoting *Emmet County State Bank*, 439 N.W.2d at 654). Situations where brand new procedural rules are promulgated for a new type of action are probably very rare. But just like the "evil to be remedied" element, it would be routine to point to the shortcomings of any previously existing procedure and note that, until the present fix, there was nothing that effectively addressed that particular drawback. In any event, the strongest case for finding that procedural legislation is remedial might be made where it replaces a judicially created stopgap—just like section 822.3A replaces *Leonard*, *Gamble*, and *Jones* with actual rules for represented PCR litigants.

This discussion of the three-part test for remedial legislation illustrates why it makes little sense to apply that test to legislation that is better characterized as procedural: that rubric just does not fit.

The general rule for legislation that creates or alters procedural rules is much simpler and makes much more sense: "If before final decision a new law as to procedure is enacted and goes into effect, it must from that time govern and regulate the proceeding." *See Bascom*, 1 N.W.2d at 221 (quoting *Lewis v. Penn. R. Co.*, 69 A.2d 821, 822 (Pa. 1908)); *accord Iowa Dept. of Transp. v. Iowa Dist. Ct. for Scott Cnty.*, 587 N.W.2d 781, 784 (Iowa 1998) (quoting 14 Uniform Laws Annotated *Model Statutory Construction Act* § 14 commentary at 405 (1990)) ("If a procedural statute is amended, the rule is that the amendment applies to pending proceedings as well as those instituted after the amendment."). Section 822.3A is procedural—it defines "the formal steps by which a legal right is enforced" by a PCR applicant who has concurrent representation, "as distinguished from the [substantive] law which creates, defines and protects rights." *See id.* at 221–22 (quoting *Duggan*, 180 N.E. at 302). Therefore, the PCR court was correct that it would apply in Hrbek's already-pending PCR action, starting on July 1, 2019 (which is the default effective date of the law).

Hrbek's constitutional challenge to section 822.3A is moot if he is right that it does not apply to these proceedings. This Court should only proceed onward if it finds that section 822.3A *does* apply.

## II. Section 822.3A is a constitutional exercise of the legislature's authority to enact procedural rules for litigation in Iowa district courts.

### Preservation of Error

Most of Hrbek's constitutional challenges were raised and argued in his resistance; those challenges were necessarily considered and rejected by the PCR court's subsequent ruling that section 822.3A applies. *See* Resistance to Notice (7/24/19) at 2–6; App. 10–14; Order (8/25/19) at 2; App. 25. Error is preserved for those challenges.

The sole exception is the separation-of-powers challenge, which was not raised below. *See* Resistance to Notice (7/24/19); App. 9. This challenge "cannot be raised for the first time on appeal." *See Goosman v. State*, 764 N.W.2d 539, 545 (Iowa 2009).

### Standard of Review

For the ruling that none of Hrbek's challenges established that section 822.3A was unconstitutional, review is de novo. *See State v. Newton*, 929 N.W.2d 250, 254 (Iowa 2019).

### Merits

Hrbek's assorted claims that section 822.3A is unconstitutional fall into four general categories. The State will address each of them, and it will address the unrelated policy arguments about advantages and disadvantages of section 822.3A along the way.

### A. A judicially created stopgap procedure can be replaced by legislative enactment that creates a different procedure, if it is constitutional.

Hrbek argues that represented PCR litigants have acquired a common-law right to offer and receive rulings on pro se filings from the Iowa Supreme Court's decisions in *Leonard*, *Gamble*, and *Jones*. *See* App's Br. at 23–30 (discussing *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)). Before proceeding further, it is important to clarify that nothing is *inherently* unconstitutional about legislative enactments that replace common-law procedures that were created by Iowa courts, to fill gaps where no procedures yet existed. This is a legitimate exercise of the legislature's constitutional powers.

The legislature has independent constitutional authority to enact procedural rules for Iowa courts to follow. Article V, Section 14 of the Iowa Constitution states: "It shall be the duty of the general assembly to provide for the carrying into effect of this article, and to provide for a general *system of practice* in all the courts of this state." Iowa Const. art. V, § 14 (emphasis added). Thus, the Iowa legislature "possesses the fundamental responsibility to adopt rules of practice for our courts." *See Butler v. Woodbury Cty.*, 547 N.W.2d 17, 20

(Iowa Ct. App. 1996) (citing *Iowa Civil Liberties Union v. Critelli*, 244 N.W.2d 564, 568–69 (Iowa 1976)). The legislature has delegated some of that authority to this Court. *See* Iowa Code § 602.4201 ("The supreme court may prescribe all rules of pleading, practice, evidence, and procedure . . ."). However, the legislature expressly retained the power to supersede any rule adopted by this Court. *See* Iowa Code § 602.4202(4) ("If the general assembly enacts a bill changing a rule or form, the general assembly's enactment supersedes a conflicting provision in the rule or form as submitted by the supreme court."). And to any extent the courts possess an inherent power to enact rules of practice, that ends when the legislature enacts a conflicting statute. *See Critelli*, 244 N.W.2d at 568–69 (noting courts have an inherent common-law power to adopt rules "in the absence of statute").

This is a familiar pattern. First, Iowa courts are confronted with a new type of claim or situation and must develop stopgap procedures for handling it in the future, and they outline procedures that reflect their views about the proper balances between competing interests. Then, Iowans weigh in through their elected representatives, and the Iowa legislature either codifies or replaces those stopgap measures. Its enactments may achieve a different balance of interests, where the

community's priorities diverge from the judiciary's. Then, Iowa courts entertain challenges to the constitutionality of those enactments—and the fact that they differ from judicially created stopgaps they replaced does not render them inherently invalid. Such a policy disagreement is not enough for an Iowa court to strike down those enactments—that requires some actual unconstitutionality or invalidity.

Section 622.10(4) is a good example. In *State v. Cashen*, the Iowa Supreme Court outlined a stopgap procedure for Iowa courts to use in resolving motions to compel production and disclosure of a witness's privileged mental health records in a criminal prosecution. *See State v. Cashen*, 789 N.W.2d 400, 407–10 (Iowa 2010). During the next legislative session, the Iowa legislature responded to *Cashen* with section 622.10(4). *See* 2011 Iowa Acts ch. 8, § 2, *codified at* Iowa Code § 622.10(4). Then, defendants raised due-process challenges to the constitutionality of that new procedure. The Iowa Supreme Court recognized that, absent any actual unconstitutionality, its preference for one procedure over another was irrelevant—the legislature could make a value judgment and policy choice about how to balance those competing interests, and it could replace *Cashen* with procedures that addressed its concerns and reflected its values and policy priorities:

> The legislature responded [to *Cashen*] in its next session. We must interpret the resulting statutory enactment mindful of the legislature's purpose to supersede the *Cashen* test with a protocol that restores protection for the confidentiality of counseling records while also protecting the due process rights of defendants.
>
> [. . .]
>
> . . . The *Cashen* majority made a policy choice to allow defense counsel to conduct the in camera review without stating that procedure is constitutionally required. We hold that it is not. Less than a year later, the Iowa legislature made a different policy choice—to substitute the trial judge for defense counsel for the in camera inspection. We decline to make new law under the Iowa due process clause to redraw the constitutional boundaries to strike down the legislature's policy choice.
>
> [. . .]
>
> Reasonable minds may disagree over how best to balance the competing rights of criminal defendants and their victims. Our task is simply to decide whether the balance struck by the elected branches in section 622.10(4) is constitutional. We hold that section 622.10(4) is constitutional on its face and supersedes the *Cashen* protocol.

*See State v. Thompson*, 836 N.W.2d 470, 481, 486, 490 (Iowa 2014); *accord id.* at 492 n.6 (Appel, J., concurring specially) ("Our view of what might be better policy is of no consequence.").

Certainly, if section 822.3A is unconstitutional, it is invalid. But a law that replaces judicially created stopgap procedures that granted procedural rights by common-law is not inherently unconstitutional. Absent some actual unconstitutionality, Hrbek's challenge should fail.

### B. Nothing in *Leonard*, *Gamble*, or *Jones* identified a constitutional right to have hybrid pro se filings considered or ruled upon in PCR actions.

Hrbek argues that, in *Leonard*, *Gamble*, and *Jones*, "the [Iowa] Supreme Court has crafted an appropriate balance between appointed counsel and self-representation in postconviction cases." *See* App's Br. at 59. But, as explained above, the legislature's judgment about the proper balance of interests is what matters. Section 822.3A is a legislative enactment that replaces that common-law procedure with a new set of procedures that achieves a different balance of interests. It could be invalid if it authorized a violation of constitutional rights—but nothing in *Leonard*, *Gamble*, or *Jones* identifies or recognizes any constitutional right to hybrid representation in PCR proceedings.

In *Leonard*, a PCR applicant who was challenging prison disciplinary action "moved to dismiss his court-appointed counsel" and represent himself. *See Leonard*, 461 N.W.2d at 466–67. The PCR court denied the motion because it "found insufficient reason existed" to justify removing counsel. *See id.* at 467. On appeal from denial of his PCR application, he argued "he was denied due process when the district court refused to permit him to dispense with counsel." *See id.* The Iowa Supreme Court recognized that the Sixth Amendment right

to assistance of counsel also implicitly entails a corresponding right to *dispense* with counsel. *See id.* at 468 (quoting *Faretta v. California*, 422 U.S. 806, 819–20 (1975)). However, "the [S]ixth [A]mendment applies only to criminal prosecutions and so has no application to postconviction relief proceedings." *See id.* (citing *State v. Wright*, 456 N.W.2d 661, 664–65 (Iowa 1990)). Consequently, *Leonard* held that the statute that provided a PCR court with some discretion over whether to appoint PCR counsel also gave the PCR court "discretion to deny a [PCR] applicant's request to dispense with counsel." *See id.* The factors that it had outlined as reasons why PCR courts generally should not hesitate to *appoint* counsel were reprised as reasons why a PCR court might deny an applicant's request to *dismiss* PCR counsel: having counsel "benefits the applicant, aids the trial court, is conducive to a fair hearing, and is certainly helpful in event of appeal." *See id.* (quoting *Furgison v. State*, 217 N.W.2d 613, 615 (Iowa 1974)). But to Hrbek, the part that matters is this single "all important" paragraph:

> 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.

*Id.*; *see also* App's Br. at 26. *Leonard* cited no rule or statute that would authorize those filings. *See Leonard*, 461 N.W.2d at 468. Nor did it cite any constitutional provision that required this result. *See id.*

In *Gamble*, the PCR court had ordered PCR counsel to "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." *See Gamble*, 723 N.W.2d at 444. The order also directed PCR counsel to file something after that review—either to identify and assert any viable claims, to update the PCR court on the status of the ongoing review, or to state that "the application does not have any viable claims" and move for dismissal. *See id.* Apparently, similar orders had been "in widespread use" in PCR proceedings. *Id.* Gamble's PCR counsel filed a report that documented his investigation and findings that "except for one, all of Gamble's claims lacked merit," and an amended PCR application that re-asserted that claim. *See id.* Gamble filed a pro se supplement that responded to his PCR counsel, reasserted some of his original PCR claims, and also requested that the PCR court rule on his pro se claims. *See id.* The PCR court ruled on the claim advanced in PCR counsel's amended application, but it only addressed Gamble's pro se claims by stating: "they do not establish a

basis for postconviction relief based upon the reasoning set forth in [PCR counsel's] findings which are incorporated by reference herein." *See id.* On appeal from that order, Gamble's appellate counsel only challenged the PCR court's ruling that rejected the single claim that PCR counsel advanced. Gamble filed a pro se supplemental brief that made additional arguments on the merits of the PCR court's ruling, along with arguments that "the court had abdicated its responsibility by incorporating his lawyer's report in the court's judgment, and that the court had failed to adjudicate Gamble's pro se claims." *See id.*

The Iowa Supreme Court held that Gamble was correct that directing PCR counsel to file a report on the validity or invalidity of Gamble's claims had placed him "in a conflict-of-interest situation," and amounted to "the court's abdication of its own decision-making responsibility." *See id.* at 445. *Gamble* recognized that "pro se claims can be burdensome"—Gamble himself filed "a thirty-page amended application with many prolix and confusing claims." *See id.* at 446. But it reasoned that section 822.6 had intended to enable "extensive pro se participation" in PCR proceedings, because it stated that "[i]n considering the application the court shall take account of substance regardless of details of form." *See id.* at 445 (second excerpt quoting

Iowa Code § 822.6 (2006)). As for counsel's role, *Gamble* recognized that PCR counsel, like any attorney, "may not ethically urge grounds that are lacking in legal or factual support simply because his client urges him to do so." *See id.* at 446. However, it is also inappropriate to order PCR counsel "to criticize or diminish their own client's case," which likely violates their ethical duty of undivided loyalty. *See id.* The other problem was that the PCR court had essentially delegated its adjudicative role to PCR counsel and failed to "make specific findings of fact and conclusions of law as to each issue" that Gamble raised, as required by section 822.7 and "for proper review on appeal." *See id.*

*Leonard* had not cited any rule, law, or constitutional provision to authorize pro se filings by represented PCR litigants. *See Leonard*, 461 N.W.2d at 468. *Gamble* cited two statutes that, in its view, had impliedly authorized those filings; however, it did not mention or cite any constitutional provision that *required* them to be authorized. *See Gamble*, 723 N.W.2d at 445–46 (citing Iowa Code §§ 822.6, 822.7). Nothing in *Leonard* or *Gamble* can be read to imply the existence of any constitutional right to hybrid representation in PCR proceedings.

*Jones* did not add anything to this analysis, except to boil down the holdings from *Leonard* and *Gamble* into this paragraph:

> 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. *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*, 731 N.W.2d at 391–92. *Jones* did not identify a constitutional basis for *Leonard* or *Gamble*, nor recognize any new procedural right.

*Jones* recognized that *Leonard* had allowed pro se filings from represented PCR applicants to solve "the dilemma" that arises "when a court refuses to remove counsel the applicant wishes to dismiss." *See id.* at 391 (citing *Leonard*, 461 N.W.2d at 468). Now, section 822.3A provides authority for PCR applicants to move to dismiss counsel:

> 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.

*See* Iowa Code § 822.3A(3). Read together with *Leonard*, an applicant could likely establish "good cause" if PCR counsel refuses to litigate the claims or arguments that the applicant wants to advance, or otherwise refuses to act so that "all matters the applicant wants raised before the district court will be considered." *See Leonard*, 461 N.W.2d at 468.

*Gamble* found an implied procedural right to a ruling on every pro se claim by a represented PCR applicant, supported by language in two statutes in chapter 822. *See Gamble*, 723 N.W.2d at 445–46 (citing Iowa Code §§ 822.6, 822.7). However, the legislature made its intent much clearer by enacting section 822.3A: there is no longer a need to guess whether the legislature intended to create such a right. Section 822.3A clarifies that no such right exists in PCR proceedings. Generally, any procedural right that arises from a statute can also be abrogated by statute, as well. *See, e.g.*, *Dolezal*, 602 N.W.2d at 351 ("[N]o one can claim to have a vested right in any particular mode of procedure for the enforcement or defense of the party's rights.").

Hrbek argues that there is a constitutional right to counsel in PCR proceedings, and then he claims that "[t]he *Leonard*, *Gamble*, and *Jones* part of the right to counsel is constitutionally based." *See* App's Br. at 35–41. But *Leonard* expressly disavowed the applicability of any constitutional right to counsel. *See Leonard*, 461 N.W.2d at 468 (explaining that constitutional right to effective counsel that implies a right to dismiss counsel "applies only to criminal prosecutions and so has no application to postconviction relief proceedings"). *Gamble* was silent on the matter. *See Gamble*, 723 N.W.2d at 445–46. And *Jones*

reiterated language from *Leonard*, recognizing that provisions that create a constitutional right to counsel in criminal prosecutions have "no application to postconviction relief proceedings." *See Jones*, 731 N.W.2d at 391 (quoting *Leonard*, 461 N.W.2d at 468). The argument that anything in *Leonard*, *Gamble*, or *Jones* is based in a recognition of a constitutional right is foreclosed by the text of those opinions. Instead, they create a stopgap procedural right, anchored (at best) to provisions of chapter 822 that imply such a right might exist. There is nothing inherently unconstitutional about legislative enactments that replace that judicially created stopgap with a different procedure, and there is nothing inherently unconstitutional about section 822.3A.

### C. Even if there is a constitutional right to counsel in PCR proceedings, there is no constitutional right to hybrid representation in *any* proceeding.

Hrbek attempts to establish a constitutional right to counsel in PCR proceedings. *See* App's Br. at 35–41. Iowa precedent has already foreclosed that claim, although *Allison* included plenty of dicta that invited attempts to overturn that settled law. *See Allison v. State*, 914 N.W.2d 866, 895–96 (Iowa 2018) (Waterman, J., dissenting) ("[W]e have squarely, and repeatedly, held there is no constitutional right, only a statutory right, to counsel in PCR actions.").

Even if there were a constitutional right to counsel in PCR proceedings, it would not improve Hrbek's claim. That is because, in contexts where the Sixth Amendment and Article I, Section 10 create a right to effective counsel and a right to self-representation, there is still no right to hybrid representation. Even in criminal prosecutions, defendants do "not have an absolute right to both self-representation and assistance of counsel." *See State v. Hutchison*, 341 N.W.2d 33, 41 (Iowa 1983). Both federal courts and Iowa courts have repeatedly held that "'hybrid' representation is not constitutionally required and '[a] defendant does not have a constitutional right to choreograph special appearances by counsel'" while they are self-represented. *See State v. Cooley*, 468 N.W.2d 833, 837 (Iowa Ct. App. 1991) (quoting *McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984)); *accord State v. Mott*, 759 N.W.2d 140, 147 (Iowa Ct. App. 2008) (explaining that courts are "not required to permit this form of hybrid representation where both the pro se defendant and standby counsel are actively participating as defense counsel at trial"). Section 822.3A does not burden any right to effective counsel, nor any right to self-representation—it could only burden a right to hybrid representation, which does not exist in any criminal prosecutions and certainly does not exist in PCR litigation.

Hrbek alludes to a line of cases establishing constitutional rights for prisoners to have access to courts. *See* App's Br. at 59–60 (citing *Lewis v. Casey*, 518 U.S. 343 (1996) and *Bounds v. Smith*, 430 U.S. 817 (1977)). However, the United States Supreme Court has clarified that *Bounds* did not create the wide-ranging right that Hrbek implies:

> It must be acknowledged that several statements in *Bounds* went beyond the right of access recognized in the earlier cases on which it relied, which was a right to bring to court a grievance that the inmate wished to present . . . . These statements appear to suggest that the State must enable the prisoner to *discover* grievances, and to *litigate effectively* once in court. *See Bounds*, 430 U.S. at 825–26 & n.14. These elaborations upon the right of access to the courts have no antecedent in our pre-*Bounds* cases, and we now disclaim them. To demand the conferral of such sophisticated legal capabilities upon a . . . prison population is effectively to demand permanent provision of counsel, which we do not believe the Constitution requires.

*See Casey*, 518 U.S. at 355; *accord Walters v. Kautzky*, 680 N.W.2d 1, 5 (Iowa 2004). This line of cases undermines Hrbek's claim that he has a constitutional right to counsel in this PCR action, and it also undermines his claim that he has a constitutional right to whatever form of procedure would be most "effective," from his point of view. *See, e.g.*, *Myers v. State*, No. 01–1214, 2005 WL 1981518, at *2–3 (Iowa Ct. App. Aug. 17, 2005) (holding litigant with ability to file PCR by mail "cannot claim he was denied meaningful access to the courts").

Hrbek's argues that prohibiting pro se filings by represented PCR litigants "violates some other basic principle of due process." *See* App's Br. at 59–60. But he concedes that "it is hard to find authority beyond *Jones* and *Gamble*" for the existence of such a right. *See* App's Br. at 60. That is why it was necessary to start by explaining the basic "source of law" premise: any common-law stopgap procedure can be replaced with different procedures by legislative enactment, unless that enactment or the new procedure it creates is unconstitutional. *See Thompson*, 836 N.W.2d at 486, 490. Neither *Jones* nor *Gamble* purported to identify a constitutional right; both *Jones* and *Leonard* expressly disclaimed that idea and foreclosed that reading. *See Jones*, 731 N.W.2d at 391 (quoting *Leonard*, 461 N.W.2d at 468). Hrbek has no authority that establishes a constitutional right to this procedure, so he cannot show that it is beyond the legislature's power to abrogate that common-law stopgap and replace with new PCR procedures.

### D. The unpreserved separation-of-powers challenge would fail on its merits.

Hrbek argues that section 822.3A violates separation of powers. *See* App's Br. at 54–59. This challenge was never ruled upon; error is not preserved to raise it on appeal. *See* Resistance to Notice (7/24/19) at 2–6; App. 10–14. Even if preserved, this challenge would fail anyway.

The Iowa Constitution bestows the constitutional authority for Iowa district courts to exercise jurisdiction, with a key caveat:

> The district court shall be a court of law and equity, which shall be distinct and separate jurisdictions, and have jurisdiction in civil and criminal matters arising in their respective districts, *in such manner as shall be prescribed by law*.

Iowa Const. art. V, § 6 (emphasis added). Iowa district courts do not have the constitutional authority to disregard statutes that govern their operation, absent some unconstitutionality or other invalidity. Certainly, Iowa precedent has "consistently recognized the inherent common-law power of the courts to adopt rules for the management of cases on their dockets *in the absence of statute*." *See Critelli*, 244 N.W.2d at 568–69 (emphasis added). But such rules only last "[u]ntil or unless superseded," and the legislature has constitutional authority to supersede them by enactment, under Article I, Section 14. *See id.* at 569; *accord* Iowa Const. art. V, § 14 (empowering Iowa legislature "to provide for a general system of practice in all the courts of this state"). Likewise, Article I, Section 6 envisions those rules "prescribed by law" as limitations on the inherent power of Iowa district courts. *See* Iowa Const. art. I, § 6. In reality, it is Hrbek's advocacy that runs afoul of separation of powers by usurping a role committed to the legislature.

### E. Section 822.3A will not cause any unfairness that would justify an extraordinary assertion that the inherent powers of Iowa courts empower them to disregard this procedural rule.

Hrbek argues that Iowa courts may strike down section 822.3A because they have "inherent authority to regulate the parties who appear in front of them," and he argues that section 822.3A "violates this inherent power by purporting to substantially change that." *See* App's Br. at 57–59. Hrbek is correct that *State v. Hoegh* noted that there are cases where "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." *See State v. Hoegh*, 632 N.W.2d 885, 889 (Iowa 2001). But it also held that some inherent powers can be abrogated by enactment if there is "clear legislative intent." *See id.* (*citing Link v. Wabash R.R.*, 370 U.S. 626, 631–32 (1962)). Section 822.3A is extremely clear and presents an unambiguous legislative intent to prohibit pro se filings by represented PCR litigants. *See* Iowa Code § 822.3A(1).

Hrbek also quotes from Justice Zager's special concurrence in *In re Marriage of Thatcher*, specifically to point out a parenthetical from *In re K.N.* that identified a court's inherent authority to "ensure the orderly, efficient, and fair administration of justice." *See* App's Br.

at 58–59 (quoting *In re Marriage of Thatcher*, 864 N.W.2d 533, 547 (Iowa 2015) (Zager, J., dissenting) (quoting *In re K.N.*, 625 N.W.2d 731, 734 (Iowa 2001))). But *In re K.N.* specifically cautioned that any inherent authority "could not be exercised to circumvent the expressed legislative policies woven into the law." *In re K.N.*, 625 N.W.2d at 734.

In the State's view, there are two categories of cases where the inherent powers of the court may allow it to disregard an enactment that sets out a new procedure for litigation. One category would be where the enactment usurps the power to decide cases, like in *Klouda v. Sixth Judicial District Department of Correctional Services*, where the challenged statutes transferred adjudicative jurisdiction over all probation revocation cases to administrative law judges, who were executive branch employees. *See Klouda v. Sixth Judicial Dist. Dept. of Correctional Servs.*, 642 N.W.2d 255 (Iowa 2002). That violated basic separation-of-powers principles, because the "[j]udicial power vested in the courts by the Iowa Constitution is the power to decide and pronounce a judgment and carry it into effect." *See id.* at 261–63. This case falls outside that category: section 822.3A does not reassign the power to hear or decide cases, nor does it create a rule of decision that would dictate outcomes in a way that circumvented adjudication.

*See, e.g.*, *State ex rel. Allee v. Gocha*, 555 N.W.2d 683, 686 (Iowa 1996) (finding that a statute authorizing DHS agents to prepare orders for child support "poses no threat to the separation of powers doctrine" where there was no "attempt to wrest substantive decision making power from the court"). This first category is therefore inapplicable.

The other category, which is a closer fit for the argument that Hrbek seems to be making, includes cases where it is impossible or impractical for a court to exercise its core adjudicative functions if it does not assert "inherent power" to disregard the enacted rule. *See* App's Br. at 59 ("There is nothing more fundamental to the functioning of the court system that the regulation of the relationship between postconviction applicants and their counsel."); *accord Hoegh*, 632 N.W.2d at 890 (upholding "the inherent power of district courts to appoint special prosecutors," but only when supported by a record to establish appointment is "necessary for the administration of justice"). *Hoegh* strongly suggests that this would need to be a case-by-case determination, and that section 822.3A would still govern unless the applicant established that it would be impossible to carry out that essential adjudicative function without hybrid PCR representation. *See Hoegh*, 632 N.W.2d at 890–91.

The State cannot conceive of any situation where it would be necessary for a PCR court to disregard section 822.3A to carry out its core adjudicative functions, or to pursue any other relevant interest. As Hrbek correctly notes, section 822.3A does not revive pre-*Gamble* practices where PCR counsel would be ordered to submit a report on the validity or invalidity of claims in a client's PCR application. *See* App's Br. at 34–35. That delegation of the adjudicative power is still prohibited by *Gamble*, and section 822.3A does not change that.

Hrbek focuses on *Gamble*'s statement that PCR counsel "may not ethically urge grounds that are lacking in legal or factual support simply because his client urges him to do so," but "[a] pro se applicant has no ethical prohibitions against filing claims that a court might find to be without merit." *See Gamble*, 723 N.W.2d at 446; App's Br. at 29–30. This is a problem with pro se filings, not a positive feature. Hrbek argues that pro se litigants are sometime successful. *See* App's Br. at 31. But there is no reason why those *same arguments* would not have succeeded if submitted by counsel, with the added stamp of counsel's good-faith certification that the argument is non-frivolous. And PCR counsel has no reason to withhold that stamp from any claim that is not *truly* frivolous. "[A]n attorney is not subject to sanctions for

merely making factual assertions or legal arguments that ultimately are unsuccessful." *See Iowa Supreme Ct. Att'y Disciplinary Bd. v. Caghan*, 927 N.W.2d 591, 601 (Iowa 2019) (citing *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Sporer*, 897 N.W.2d 69, 86 (Iowa 2017)).

Indeed, if PCR counsel cannot raise a specific claim because it is frivolous, the applicant would be similarly prohibited from raising it. *See, e.g.*, Iowa Code § 610A.2(1)(b). And the same court rules that require non-frivolous filings also apply to PCR applicants. After all, Rule 1.413(1) is "intended to discourage *parties and counsel* from filing frivolous suits and otherwise deter misuse of pleadings, motions, or other papers." *See First Am. Bank v. Fobian Farms, Inc.*, 906 N.W.2d 736, 745 (Iowa 2018) (quoting *Barnhill v. Iowa Dist. Ct.*, 765 N.W.2d 267, 273 (Iowa 2009)). Generally, Iowa courts "do not apply different standards for represented litigants than we do for those who choose to proceed pro se." *See Colvin v. Story Cnty. Bd. of Review*, 653 N.W.2d 345, 347 n.1 (Iowa 2002); *Metro. Jacobson Dev. Venture v. Bd. of Review of Des Moines*, 476 N.W.2d 726, 729 (Iowa Ct. App. 1991)). There is no basis to assert any need to invoke the inherent power of the court to allow a filing that is already prohibited by rule or by law, no matter who would file it. *See First Am. Bank*, 906 N.W.2d at 745.

If an applicant and PCR counsel disagree about whether a claim can (or should) be raised and litigated, and if PCR counsel refuses to litigate that claim, that would likely be good cause to remove counsel. *See* Iowa Code § 822.3A(3). Read together with *Leonard*, an applicant could likely establish "good cause" if PCR counsel refuses to litigate the claims or arguments that the applicant wants to advance, or otherwise refuses to act so that "all matters the applicant wants raised before the district court will be considered." *See Leonard*, 461 N.W.2d at 468. The applicant can still present their own claims if they proceed as a pro se litigant. *See* Iowa Code § 822.3A(2). This offers the same kind of "major protection for the client from his counsel" that Hrbek seeks: the right to dispense with counsel and proceed onwards, pro se. *See* App's Br. at 33–34. The key is that the applicant's advocacy must now be presented in a singular voice—not a dual-track advocacy. That is a change that will streamline litigation. *See, e.g.*, *State v. McKee*, 223 N.W.2d 204, 206 (Iowa 1974) ("Trial judges must keep order, and a trial can become bedlam if counsel and client both take the floor.").

Hrbek argues there is a constitutional dimension to *Leonard*, *Gamble*, and *Jones* because "the postconviction process seeks to vindicate the constitutional rights of the criminally convicted." *See*

App's Br. at 59. But criminal trials must necessarily be oriented to vindicate the constitutional rights of the accused, and there is no right to hybrid representation in any criminal prosecution. *See Hutchison*, 341 N.W.2d at 41; *Cooley*, 468 N.W.2d at 837. There is no reason why hybrid representation in PCR litigation would be necessary for courts to perform the essential judicial function, when its total absence from criminal prosecutions has not prevented Iowa courts from presiding over criminal cases and ensuring that prosecutions are fair.

Hrbek paints a picture of a PCR applicant, cowed into silence by uncooperative PCR counsel, but also afraid of being unable to conduct an investigation or develop claims without PCR counsel's assistance. *See* App's Br. at 59. This is not a valid set of concerns, for two reasons. First, the same concerns are present in criminal prosecutions, where it is non-controversial that a trial judge may require a defendant to address the court through counsel. *See State v. McCray*, 231 N.W.2d 579, 580 (Iowa 1975) (quoting *McKee*, 223 N.W.2d at 205). Second, that PCR applicant still has a number of options. If the PCR applicant chooses self-representation from the outset, they may still apply for appointment of investigators and experts at state expense. *See, e.g.*, *Linn v. State*, 929 N.W.2d 717, 749–50 (Iowa 2019); *State v. Dahl*,

874 N.W.2d 348, 352–53 (Iowa 2016). Alternatively, if PCR counsel refuses to raise or press a claim in the final stages of the litigation, the applicant who elects to dismiss counsel in favor of self-representation can make of use everything that PCR counsel prepared up to that point and simply add their additional claims. Either way, the fact that an applicant may face a choice between appointed representation and self-representation does render the court unable to perform its core adjudicative functions, and it does not establish any real unfairness.

Hrbek cannot establish that section 822.3A is unconstitutional. The legislature may replace judicially create stopgap procedures with alternative procedures that achieve a different balancing of interests. That is a legitimate exercise of constitutional authority under Article I, Section 6 and Article I, Section 14 of the Iowa Constitution. And there is no constitutional right to hybrid representation in PCR proceedings, nor any need for Iowa courts to assert inherent powers and reject this new procedure as somehow inconsistent or incompatible with core adjudicative functions. The prior existence of a common-law right for represented PCR applicants to file additional pro se filings does not foreclose the legislature from specifying new procedures to streamline PCR litigation by ending that practice. Thus, Hrbek's challenge fails.

## III. Section 814.6A applies in this appeal, and it is a constitutional exercise of legislature's authority to enact procedural rules for Iowa appellate courts.

### Preservation of Error

Because this claim is about appellate procedure, there was no opportunity for the district court to consider it or rule upon it. Thus, error preservation is not a concern. *See, e.g.*, *State v. Sahinovic*, No. 15–0737, 2016 WL 1683039, at *1 n.1 (Iowa Ct. App. Apr. 27, 2016).

### Standard of Review

There is no ruling to review. Constitutional claims are generally reviewed de novo. *See Newton*, 929 N.W.2d at 254.

### Merits

Section 814.6A definitely applies in this appeal, if it is constitutional. "Statutes controlling appeals are those that were in effect at the time judgment or order appealed from was rendered." *James*, 479 N.W.2d at 290 (quoting *Ontjes*, 275 N.W. at 330). The order that Hrbek is appealing was issued on August 25, 2019. *See* Order (8/25/19); App. 24. At that point, section 814.6A had already taken effect—so it applies in this appeal, unless it is unconstitutional. *See State v. Damme*, 944 N.W.2d 98, 103 (Iowa 2020) (stating that a post-S.F.589 version of a statute "plainly applies to Damme's appeal because her judgment and sentence were entered on July 1, 2019").

The Iowa Constitution defines the jurisdiction of this Court and grants the legislature authority to prescribe restrictions on its review:

> 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.

Iowa Const. art. V, § 4 (emphasis added). And Iowa appellate courts are similarly within the scope of the legislature's power to prescribe a general system of practice in Iowa courts. *See* Iowa Const. art V, § 14.

Article V, Section 4 grants the legislature authority to limit the types of appeals that this Court may consider. *See James*, 479 N.W.2d at 290 ("[T]he right of appeal is not an inherent or constitutional right; it is a purely statutory right that may be granted or denied by the legislature as it determines."). The legislature may set deadlines for invocation of appellate jurisdiction. *See State v. Olsen*, 162 N.W. 781, 782 (Iowa 1917) (noting "[t]he right to appeal is purely statutory" and dismissing an appeal filed outside of time permitted by statute). Similarly, the legislature may place amount-in-controversy limits on appeals. *See Andrews v. Brudick*, 16 N.W. 275, 278–79 (Iowa 1883) (upholding a statute that forbade appeals to the Iowa Supreme Court

in cases that involved less than $100 in dispute). Over time, the legislature has used this authority to grant appeals or limit appeals from different categories of cases. *See, e.g.*, Iowa Code § 814.6(1)(a) (denying right to appeal from convictions for simple misdemeanors).

Article V, Section 4 also grants the legislature authority to enact procedures for the appellate courts. For example, the legislature can exercise its constitutional authority to discontinue the practice of filing a separate pleading assigning error. *See Jones*, 168 N.W. at 321. It can enact its own time-computation statutes that supersede a supervisory order from this Court. *See Root v. Toney*, 841 N.W.2d 83, 87 (Iowa 2013). In the realm of criminal appeals, the legislature has acted to expedite criminal appeals over civil appeals (section 814.15), to not require the personal appearance of the defendant in the appellate courts (section 814.17), and to end appellate jurisdiction when procedendo issues (section 814.25).

Hrbek's only real argument against the constitutionality of section 814.6A is that it "is a violation of [his] constitutional right to free speech." *See* Reply (6/1/20) at 2. This is an example of the kind of argument that should never be made, because it is frivolous. Hrbek can speak all he wants. His pro se filings just have no *legal* weight

while he is represented by counsel. Moreover, freedom of speech does not mean that Iowans can assert a right to defy the requirement that they be licensed before they can practice law, nor may Iowa lawyers assert a right to submit frivolous or scurrilous filings. *See, e.g.*, *Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Ronwin*, 557 N.W.2d 515, 517–19 (Iowa 1996). And if Hrbek wants to file his own brief, he has an easy way to do that: fire his appellate counsel, and reclaim the right to file briefing on his own behalf. Hrbek is not constitutionally entitled to an even greater word-count advantage over the State than he already receives by virtue of being permitted to file a reply brief. *See* Iowa R. App. P. 6.903(4). Nor do the applicable word-count limits violate a constitutional right to free speech. *See Neuman v. Callahan*, No. 18–0282, 2019 WL 3331247, at * 3 (Iowa Ct. App. July 24, 2019) (citing Iowa R. App. P. 6.903(1)(g)(1)); *cf. State v. Lange*, 831 N.W.2d 844, 847 (Iowa Ct. App. 2013) ("A party's disregard of the rules may lead to summary disposition of the appeal or waiver of an issue.").

There are many other pending appeals where this same issue is briefed by competent attorneys. But Hrbek offers no non-frivolous argument that section 814.6A is unconstitutional, and he fails to carry the heavy burden associated with such a challenge.

## CONCLUSION

The State respectfully requests this Court affirm the ruling that notifies Hrbek that section 822.3A applies in this PCR proceeding.

## REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

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

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **9,270** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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