SUPREME COURT NO. 21-0411
MARSHALL COUNTY CASE NO. PCCI007430

IN THE
SUPREME COURT OF IOWA

ARZEL JONES

Applicant-Appellant,

v.

STATE OF IOWA

Respondent-Appellee.

ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR MARSHALL COUNTY
HONORABLE JAMES ELLEFSON, DISTRICT COURT JUDGE

FINAL BRIEF FOR APPELLANT

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CERTIFICATE OF FILING

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ROUTING STATEMENT

Because this case involves the application of facts to existing law, transfer to the Iowa Court of Appeals is appropriate. Iowa R. App. P. 6.1101.

STATEMENT OF THE CASE

This appeal follows the denial of Arzel Jones's first application for postconviction relief. Following a bench trial in 2008, Jones was convicted of kidnapping in the third degree, two counts of assault causing bodily injury, assault with intent to inflict serious injury, sexual abuse in the second degree, sexual abuse in the third degree. (App. 40-41). Jones is serving a total sentence not to exceed 35 years. In this postconviction relief action, Jones set forth multiple claims of ineffective assistance of trial counsel, as well as claims of actual innocence, prosecutorial misconduct, and other constitutional violations. After a five-day trial that spanned the course of over a year, the district court denied Jones's application. Jones, acting pro se, timely filed a notice of appeal, and appellate counsel was appointed. Jones's PCR counsel never filed a notice of appeal. (App. 79, 83).

On August 6, 2021, the Iowa Supreme Court, sua sponte, entered an order directing the parties to brief the issue of whether this Court has jurisdiction over the appeal, as PCR counsel never filed a notice of appeal.

Jones's appellate counsel then filed a notice of appeal and application for delayed appeal, which the State resisted.

STATEMENT OF FACTS

On December 13, 2007, the State filed two Trial Informations against Arzel Jones. (App. 40). In Marshall County case number FECR070049, Jones was charged with kidnapping in the third degree and domestic abuse assault causing injury, both alleged to have occurred on November 30, 2007, against the alleged victim "M.P." (App. 40). In Marshall County case number FECR070050, Jones was charged with kidnapping in the first degree, attempt to commit murder, two counts of sexual abuse in the second degree, harassment in the first degree, and domestic abuse causing bodily injury. These were alleged to have occurred on December 4, 2007, also against "M.P." (App. 40).

Jones was appointed counsel, demanded speedy trial, and waived a jury trial. (App. 40). Both cases were tried together before the district court in January 2008. On March 7, 2008, the district court entered his written findings and verdict, but did not read the verdict in open court. (App. 41, 91). In FECR070049, Jones was found guilty of kidnapping in the third degree and a lesser included charge of assault causing bodily injury. In FECR070050, Jones was acquitted of kidnapping in the first degree and

harassment in the first degree, but found guilty of assault with intent to inflict serious injury, sexual abuse in the second degree, sexual abuse in the third degree, and assault causing bodily injury. *State v. Jones*, 817 N.W.2d 11, 15 (Iowa 2012).

Jones was appointed new counsel for his post-trial motions and again for his sentencing hearing. He was ultimately sentenced to a total sentence not to exceed thirty-five years. (App. 41).

On direct appeal, the Iowa Supreme Court granted further review but ultimately denied relief to Jones, finding that (1) Jones was not prejudiced by the district court's failure to announce the verdict in open court in violation of Iowa Rule of Criminal Procedure 2.17(2); and (2) the State did not commit a Brady violation by failing to disclose a transcript of a 911 call made by M.P.'s ex-boyfriend. *State v. Jones*, 817 N.W.2d 11 (Iowa 2012). The remainder of the Court of Appeals ruling was affirmed. *Jones* at 13; *see State v. Jones*, No. 09-0146, 2011 Iowa App. LEXIS 1274 (Iowa Ct. App. Nov. 9, 2011). The appellate court described the facts as follows:

> In fall 2007, Arzel Jones met M.P. at the bar where she worked in Marshalltown. Shortly thereafter, they began a consensual sexual relationship and saw each other on a daily basis. On November 30, Jones went to M.P.'s home and asked her to accompany him to his apartment to look at a damaged kitchen wall. When they arrived, M.P. noticed the wall was undamaged. Jones began accusing M.P. of being unfaithful in their relationship. Over the course of the next several hours, Jones

punched M.P. in the chest two or three times, slapped her across the face, and slapped the back of her head.

After M.P. did not show up for work, M.P.'s ex-boyfriend called 911. In the call, he reported a "woman beating" and identified the victim as M.P. He described the attacker as a black male named "Kujo." When asked if M.P. and Kujo were outside, the ex-boyfriend replied, "No they're inside, but I guess a couple of days ago, whatever what happened was she ended up uh—he ended up choking her and she got a cut on her neck." Because he was not sure of the address, the ex-boyfriend gave the dispatcher directions to the location, described the location as a yellow apartment building, and stated a number of black individuals lived there.

When police responded to the call and knocked on the door of Jones's apartment, Jones covered M.P.'s mouth with his hand and placed his legs across her body, restraining her movement. After they did not hear a response, the police attempted to look in the apartment's windows, but could not note anything other than the lights were turned off. Jones forced M.P. into the bedroom and continued to cover her mouth. The police knocked at the door a second time, but again, no one responded.

After the police left, Jones told M.P. to call the police and her family. At the direction of Jones, M.P. informed them she was in Ames with a friend. M.P. also called her employer and reported she would not make it to work that night because her grandmother was sick.

M.P. described her injuries as bruises to her chest and swelling on the side of her face and around her eye. M.P. did not believe Jones would let her return home and did not want her parents or son to see her injuries. Further, M.P. believed Jones felt sorry for his actions because he began displaying different behavior, which included purchasing ice packs and dinner for her. M.P. spent the weekend at Jones's apartment and left on the afternoon of December 3 to pick up her son from school.

M.P. went to work that night and was finishing a late shift at the bar during the early hours of December 4. Jones arrived at the bar, sat at a table where he could see M.P., and ordered several drinks. Just before the bar closed, Jones purchased a six-pack of beer and left. M.P. left work fearing that Jones was waiting for her in the parking lot. M.P. did not see Jones, but after she started her car, Jones got into the car with her. Jones ordered M.P. to drive to the gas station near his apartment. Upon arrival, Jones took the keys from the ignition and went into the store, leaving M.P. in the car. When Jones came out of the store, he ordered M.P. to get into the passenger seat so that he could drive. Although M.P. informed Jones she needed to go home, Jones drove them back to his apartment.

M.P. feared she could not escape and followed Jones into his apartment. Once inside, Jones locked the door and ordered M.P. to remove her clothes. During the next several hours, Jones forced M.P. to engage in nonconsensual sexual activity by holding a metal fork to her neck, threatened M.P.'s life, kicked M.P. in the face while wearing boots, punched M.P. in the chest, and strangled her.

Jones then forced M.P. to take a shower and drove her to the emergency room and two health clinics. He told her to tell the doctors and her parents that she had broken up a bar fight. However, Jones forced M.P. to leave each location before doctors could treat her.

M.P. finally went home on the afternoon of December 4. After M.P. told her parents that Jones had physically abused and sexually assaulted her, they contacted the police and took her to the hospital. M.P.'s treating physician testified M.P. had a laceration on the inside of her mouth, bruises and welts on her face, bruises on her chest and arm, and a welt on her neck. The physician estimated M.P. received the welt on her neck sometime in the preceding twelve to eighteen hours.

Eight days before trial, a police officer who responded to Jones's apartment on November 30 referred to the 911 call during his deposition. Jones then requested a copy of the

> transcript detailing the call. The State did not provide a transcript to Jones until after trial.

State v. Jones, 817 N.W.2d 11 (Iowa 2012).

Jones disputes these findings and maintains his actual innocence. There was no evidence presented that he was "Kujo" as described in the 911 call and no DNA evidence linking Jones to M.P.'s injuries or to the fork that was allegedly used as a dangerous weapon. Jones timely filed his application for postconviction relief on July 16, 2012 and requested counsel. Following years of delays, changes in court appointed counsel, and contested motions, this matter finally came before the court for trial on April 17 and 18, 2019. The trial resumed on January 22 and 23, 2020, and then reconvened for a final day of trial on December 17, 2020. (App. 47).

Jones called several witnesses throughout the five days of trial, including multiple Marshalltown police officers who were involved with the crime scene investigation, collection, and preservation of evidence. Most relevant to this appeal is who Jones was *unable* to call. His requests for expert witnesses, including a crime scene technician and DCI investigator were denied; he was prohibited from deposing M.P. or calling her to testify; and he was prohibited from calling the prosecuting attorney as a witness at trial.

Both parties filed post-trial briefs, and the district court ultimately entered its ruling denying Jones's application for postconviction relief on February 26, 2021. (App. 37). Jones timely filed a pro se notice of appeal. (App. 79).

Additional facts will be set forth below.

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER JONES'S APPEAL

Preservation of Error

On August 6, 2021, this Court entered an order directing the parties to address whether the court has jurisdiction over the appeal and whether a delayed appeal should be granted.

Merits

On February 26, 2021, the district court entered its final ruling in this case, denying Jones's application for postconviction relief. On March 15, Jones, through PCR counsel, filed a motion for new trial, which was denied the following day. (App. 77). PCR counsel did no further work on Jones's behalf. On March 22, 2021, Jones filed a "Pro Se Motion Under Lado v. State,"[1] requesting an appeal from his PCR trial, and noting that he had not

[1] In *Lado v. State*, the Iowa Supreme Court found structural error when the PCR applicant was constructively without counsel during his postconviction relief proceeding, as his application was dismissed without any consideration of its merits or meaningful adversarial testing, rendering the entire proceeding "presumptively unreliable." 804 N.W.2d 248, 252-53 (Iowa 2011).

heard from his PCR counsel since December 2020. (App. 79). That same day, Jones filed another pro se motion, requesting a copy of both the State's and his own PCR counsel's briefs that had been filed in this matter. (App. 80). Also on March 22, 2021, the clerk's office prepared and filed the Combined General Docket report and certified notice of appeal. The following day, the district court entered an order finding that Jones was indigent and required the assistance of appellate counsel. (App. 81). On March 31, the State Appellate Defender's Office filed a motion to withdraw as appellate counsel, and the district court appointed Jamie Hunter to represent Jones on appeal.

On August 6, 2021, this Court reviewed the case file and noted that "appellant filed a pro se notice of appeal while still represented by counsel. The appellant's counsel did not file a notice of appeal on his behalf." (8/6/21 Order). On August 9, 2021, Jones's appellate counsel filed a notice of appeal in district court, and then filed an Application for Delayed Appeal in this court. The State resisted Jones's request for a delayed appeal. The Court then instructed the parties to brief the issue of whether a delayed appeal should be granted along with the jurisdictional issue.

A. Iowa Code § 822.3A does not apply to Jones's Notice of Appeal

Iowa Code section 822.3A(1) 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. The court shall not consider, and opposing counsel shall not respond to, such pro se filings.

Iowa Code § 822.3A(1).

This prohibition against pro se filings is not applicable to Jones's notice of appeal for multiple reasons. First, at the time of Jones's notice of appeal, he was not "seeking relief under section 822.2." He had already been denied relief. He was now seeking to invoke the jurisdiction of the appellate court by filing a notice of appeal, which the statute does not prohibit.

Next, at the time of Jones's notice of appeal, he was not "currently represented by counsel." The last action of his court appointed counsel was the March 15 motion for new trial, which was denied on March 16. Jones's March 22 notice of appeal clearly indicated he was proceeding pro se. Indeed, his postconviction attorney never filed a notice of appeal or anything else on Jones's behalf. Iowa Code section 822.3A(2) specifically allows applicants to proceed without the assistance of counsel.

Finally, even if Jones was represented by counsel, the fact that he filed the notice pro se does not invalidate the notice of appeal or revoke this court's jurisdiction. The statute only prevents the *court* from considering

pro se filings. It does not prevent the *clerk* from accepting them. The notice of appeal is directed to the clerk. *See* Iowa R. App. P. 6.102(2) ("An appeal . . . is taken by filing a notice of appeal with the clerk of the district court"). The court does not need to "consider" Jones's notice of appeal; the filing merely initiates the appeal process. Nothing in section 822.3A precludes this court from having jurisdiction over the appeal.

B. PCR counsel's failure to file a notice of appeal is structural error

As mentioned above, Jones's PCR counsel made no filings after the March 15 motion and never filed a notice of appeal. In Jones's pro se notice of appeal, he noted that he had not talked to or seen his attorney since December 2020 and that he had never received the brief filed on his behalf. (App. 79, 80). The record is replete with Jones's complaints that his PCR counsel was ineffective.

The failure of PCR counsel to file a notice of appeal goes beyond ineffective assistance of counsel and constitutes the "constructive denial of counsel" within the meaning of *Lado v. State*, 804 N.W.2d 248 (Iowa 2011).

> Structural errors are not merely errors in a legal proceeding, but errors "affecting the framework within which the trial proceeds." We have recognized structural error occurs when: (1) counsel is completely denied, actually or constructively, at a crucial stage of the proceeding; (2) where counsel does not place the prosecution's case against meaningful adversarial testing; or (3) where surrounding circumstances justify a presumption of ineffectiveness, such as where counsel has an

> actual conflict of interest in jointly representing multiple defendants.

Lado at 252 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)). Jones's PCR counsel was timely put on notice of Jones's desire to appeal with the filing of the pro se notice of appeal, yet failed to act. Even if this court finds that Jones was technically still represented by counsel, counsel's failure constitutes constructive absence or denial of counsel. Because Jones was constructively without counsel, his notice of appeal should be considered a valid filing under Iowa Code § 822.3A(2) which does not "…prohibit a defendant from proceeding without the assistance of counsel." Iowa Code § 822.3A(2).

C. Iowa Code § 822.3A violates the Separation of Powers Doctrine as applied to Jones

A finding that pro se notices of appeal are invalid would constitute an encroachment upon the Court's inherent jurisdiction, as well as the Court's role in addressing constitutional violations. The Iowa Constitution establishes three separate, but equal branches of government. Iowa Const. art. III, sec. 1. Constitutional guarantees, such as the right to due process and equal protection of the law, limit the power of the majoritarian branches of government. *See Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206, 213 (Iowa 2018). All judicial power in Iowa is

vested in the Iowa Supreme Court and its inferior courts. Iowa Const. art. V, sec. 1. With respect to the jurisdiction of district courts, the Iowa Constitution provides:

> 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, sec. 6.

The jurisdiction conferred on the Iowa Supreme Court includes oversight for "the corrections of errors at law" and the authority to "issue all writs and process necessary to secure justice to parties." Iowa Const. art. V, sec. 4. That jurisdiction is compromised by the potential limitation on who may file a notice of appeal in Iowa Code section 822.3A.

While the legislature can, in some circumstances, limit the judiciary by prescribing the *manner* of jurisdiction, it cannot *remove* jurisdiction from the court. A statute that seeks to divest district courts of their ability to accept a pro se notice of appeal improperly intrudes upon the jurisdiction and inherent authority of the judicial branch. The legislature cannot intervene in deciding what participation is allowed in a case pending before the court. *See Planned Parenthood* at 212; *see also Klouda v. Sixth Judicial Dist. Dept. of Correctional Services*, 642 N.W.2d 255 (Iowa 2002).

Very recently, this Court has highlighted certain principles applicable to the separation of powers doctrine:

> "'[T]he legislature cannot exercise judicial powers, and cannot reverse, vacate, or overrule the judgment or decree of a court.' *Wilcox v. Miner*, 201 Iowa 476, 478, 205 N.W. 847, 848 (1925). Nor can the legislature 'arbitrarily decree that courts are without subject matter jurisdiction in a certain class of cases then pending in the courts.' *Schwarzkopf v. Sac Cnty. Bd. of Supervisors*, 341 N.W.2d 1, 6 (Iowa 1983) (en banc). Nor can the legislative department 'change the character of the court' such that it shall be something other than "a court for the correction of errors at law." *Wine v. Jones*, 183 Iowa 1166, 1177, 168 N.W. 318, 321 (1918) (second quoting *Andrews v. Burdick*, 62 Iowa 714, 721, 16 N.W. 275, 279 (1883)). Ultimately, "[f]or the judiciary to play an undiminished role as an independent and equal coordinate branch of government **nothing must impede the immediate, necessary, efficient and basic functioning of the courts**.' *Webster Cnty. Bd. of Supervisors*, 268 N.W.2d at 873."

State v. Tucker, 959 N.W.2d 140, 150 (Iowa 2021) (emphasis added). By refusing to accept pro se notices of appeal in postconviction relief actions, the legislature is intruding on Iowa courts' independent role in administering the court, interpreting the laws, and protecting Iowans' constitutional rights. Moreover, the statute would frustrate the efficiency of the courts, requiring subsequent postconviction relief actions to litigate whether initial counsel was ineffective in failing to file a notice of appeal.

In *State v. Thompson*, the Iowa Supreme Court found that the prohibition of pro se supplemental briefs on appeal did not violate the

separation of powers clause, as Iowa Code section 814.6A "merely restricts represented parties from filing documents in the appellate courts and thus regulates the manner in which legal claims and arguments can be presented to the appellate courts for resolution." 954 N.W.2d 402, 418 (Iowa 2021). In contrast, prohibiting pro se notices of appeal does not "regulate the manner" in which legal claims are presented – its effect is the preclusion of the legal claims from being presented at all.

For all of these reasons, Iowa Code section 822.3A violates the separation of powers doctrine if construed to prohibit the filings of pro se notices of appeal. As such, this Court should find that it has jurisdiction over Jones's appeal.

D. This Court should grant Jones's motion for a delayed appeal

Alternatively, this Court should exercise its authority to grant Jones's motion for a delayed appeal. *See* Iowa R. App. P. 6.1003. The Iowa Supreme Court has recognized its inherent authority to grant delayed appeals in those instances where circumstances beyond appellant's control have frustrated an intent to appeal. *Swanson v. State*, 406 N.W.2d 792, 793 (Iowa 1987) *see also M.D. v. K.A.*, 921 N.W.2d 229 (Iowa 2018) (Christensen, J., concurring) ("We have also regularly exercised our inherent authority to allow delayed appeals in criminal cases where the defendant can document

that he or she attempted to initiate an appeal before the deadline, without ever finding that a due process violation actually occurred. This is done 'to prevent unnecessary challenges,' and on the theory that a valid due process argument 'might' be advanced."); *see also Anderson v. State*, No. 19-2016, 2021 Iowa Sup. LEXIS 78 (Iowa June 18, 2021) (acknowledging that the same federal constitutional considerations that requires the Court to recognize delayed appeals are available in some civil settings).

Unlike the inmate in *Swanson*, whose untimely appeal was considered "excusable neglect," Jones clearly and promptly indicated his intent to appeal. His pro se notice of appeal was timely. The clerk accepted the filing, and prepared and filed the Combined General Docket report and certified notice of appeal. Jones was appointed appellate counsel. He had no indication that there was any issue with his pro se notice of appeal until this court's August 6 Order, nearly five months later.

Because Jones clearly and timely indicated his intent to appeal, and because it was entirely beyond Jones's control that his postconviction counsel failed to file a notice of appeal, this court should grant his request for a delayed appeal.

II. THE DISTRICT COURT ERRED IN DENYING JONES'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Preservation of Error

Jones preserved this issue by raising claims of ineffective assistance of counsel, which were denied by the district court. (App. 37).

Standard of Review

When the basis for postconviction relief is a constitutional violation, review is de novo. *Bugley v. State*, 596 N.W.2d 893, 895 (Iowa 1999).

Merits

Jones was denied effective assistance of counsel as provided by the Sixth Amendment to the U.S. Constitution and Article I, section 10 of the Iowa Constitution. In order to support a claim of ineffective assistance of counsel, an applicant must show (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "There is a greater tendency for courts to find ineffective assistance of counsel when there has been 'an abdication-not an exercise-of … professional [responsibility].'" *Ledezma v. State*, 626 N.W.2d 134, 143 (Iowa 2001) (citing *McQueen v. Swenson*, 498 F.2d 207, 216 (8th Cir. 1974)).

To prove counsel failed to perform an essential duty, Jones "must show that counsel's performance was deficient" meaning that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at

686. Defense counsel's performance is measured by determining "whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688.

Iowa recognizes the cumulative effect of ineffective assistance of counsel claims when analyzing prejudice under *Strickland. See State v. Clay*, 824 N.W.2d 488 (Iowa 2012). If a claimant raises multiple claims of ineffective assistance of counsel, the cumulative prejudice from those individual claims should be properly assessed under the prejudice prong of *Strickland*. *Id*. at 500. The court should look at the cumulative effect of the prejudice arising from all the claims. *Id*.

Here, Jones raised multiple ways in which trial counsel was ineffective, including: failing to object to prosecutorial misconduct; failing to test forks and washcloth for DNA or fingerprints; and failing to introduce evidence regarding time gap in the State's photos. (App. 7).

First, there was also a washcloth or small towel (hereinafter referred to as a washcloth) taken into evidence from Jones's apartment. (Trial Tr. v. 1 at 55). According to the police report, the washcloth was allegedly used by M.P. to clean the scene of blood and possibly also to clean her genitals after the alleged abuse. (Trial Tr. v. 1 at 82, 132). Even though trial counsel admitted that a lack of blood or DNA on the washcloth could be

exculpatory, he never examined the washcloth or had it tested. (Trial Tr. v. 1 at 133). Assumedly, if the washcloth *did* contain blood as alleged by its key witness, the State would have presented it as evidence during trial. Jones contended that had the washcloth been tested, it would have exonerated him because it would have shown no blood or DNA evidence from M.P. (Trial Tr. v. 1 at 84). The district court failed to address this washcloth in its final ruling.

Next, photographs taken of Jones's apartment during the investigation show there was a 44-minute break between photographs 65 and 66. (Trial Tr. v. 1 at 39-40, 69-70, 189-90; v. 2 at 146, 152; v. 3 at 151). Trial counsel never addressed this gap with the court during Jones's criminal trial. Jones also complained that his trial counsel failed to have the two forks tested for DNA or fingerprints and failed to present evidence that the forks had been planted in Jones's apartment by law enforcement. (Trial Tr. v. 1 at 44, 54; v. 2 at 61-62; v. 3 at 35). The forks were critical to the State's case, as a fork was the "dangerous weapon" to form the basis of Jones's second-degree sex abuse conviction from the December 4, 2007 incident, which requires display of a "dangerous weapon in a threatening manner." Iowa Code § 709.3(1)(a). Specifically, the trial court had found that Jones "placed the

tines of the fork against [M.P.'s] neck and ordered her to perform fellatio on him." (App. 105).

Throughout the PCR proceedings, Jones contended that the forks allegedly found in his apartment would not have contained his fingerprints or DNA. Investigator Gratias testified at the PCR trial that defense counsel should have checked for DNA and fingerprints on the forks. (Trial Tr. v. 4 at 35-36). Jones further explained that he had only *one* fork in his apartment, which actually belonged to a neighbor who had given him a plate for Thanksgiving dinner. (App. 32-33). Gratias opined that the forks taken in the photographs appeared to be different. (Trial Tr. v. 4 at 17, 21). In contrast, the district court found that the physical forks in evidence appeared to be identically matched forks. (App. 58).

According to Jones, the 44-minute gap in photos provided law enforcement enough time to plant the forks in Jones's apartment. Marshalltown Police Officers testified that it was common for things to get moved around during a search, and denied planting evidence against Jones. (Trial Tr. v. 1 at 180, 198; v. 2 at 130-31, 147, 178). Despite the officers' self-serving denials, Jones submits that the gap in photographs and the altered crime scene should have been presented to the trial court, and failure to do so constituted a breach of an essential duty. Combined with counsel's

failure to have the evidence tested for DNA and fingerprints, the outcome of Jones's trial would likely have been different. And if police officers planted evidence or altered the crime scene, it undermines the entire investigation and warrants a new trial on all counts.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING JONES'S INVESTIGATOR AND EXPERT REQUESTS

Preservation of Error

Jones filed an application to hire private investigator at state expense, which included a request for an expert in connection with crime scene investigation and preservation of evidence. (App. 9). In a subsequent motion, Jones again requested expert in connection with crime scene investigation and preservation of evidence, also described as a "crime scene tech," and also requested DNA testing on the forks and a washcloth. (App. 17). The district court denied Jones's requests. (Trial Tr. v. 4 at 71).

Standard of Review

Decisions on appointment of an expert are reviewed for an abuse of discretion. *Linn v. State*, 929 N.W.2d 717, 729 (Iowa 2019) (*citing State v. Dahl*, 874 N.W.2d 348 (Iowa 2016)).

Merits

Iowa Code section 822.5 specifies that the "costs and expenses of legal representation shall also be made available to the applicant in the preparation of the application, in the trial court, and on review if the applicant is unable to pay." Iowa Code section 815.7(5) states that expenses shall include "any sums necessary for investigations in the interest of justice."

In order for the PCR court to grant a motion for appointment of an expert, there must be a reasonable need for expert services. *Linn v. State*, 929 N.W.2d 717, 749 (Iowa 2019). Similarly, when an indigent applicant requests the appointment of a private investigator, he must inform the district court of facts that demonstrate a reasonable need for investigative services. *State v. Dahl*, 874 N.W.2d 348, 352 (Iowa 2016).

Here, the factual matters in the record demonstrate a reasonable need for an expert in this matter, and that such an expert would have benefitted the Applicant, aided the trial court, would have been conducive to a fair hearing, and would have been helpful on appeal. *See Linn* at 750-52 (Iowa 2019). Jones made requests for expert witnesses throughout the case. (App. 9, 17). Although his November 3, 2018 filing is captioned "Application to Hire Private Investigator at State Expense," the application is actually

requesting to hire an investigator to provide "an expert opinion" on crime scene investigation and preservation of evidence. (App. 9).

The district court did initially allow Jones to employ a private investigator at state expense, and Jones's PCR counsel retained investigator Scott Gratias to review the case. (App. 11). However, as a private investigator, Gratias was not qualified to opine on the true issues that Jones raised: examining DNA on the forks and washcloth; examining the evidence, including the digital photographs and metadata; crime scene investigation and preservation of evidence protocol.

On January 16, 2020, Jones filed a "Motion for Specific Relief," again requesting an expert in connection with crime scene investigation and preservation of evidence. (App. 17). Jones noted that the investigator, Gratias, was not qualified to testify as an expert in those areas. (App. 17).

During the January 22, 2020 trial date, counsel for Jones explained that he thought that investigator Gratias could serve as a crime technician, but later found out that he did not have the background to testify in that capacity. (Trial Tr. v. 3 at 98-99). Jones explained to the court that he needed a crime tech to testify about the altered evidence, specifically the time on the digital photographs and whether it had been altered. (Trial Tr. v. 3 at 101-02). A crime scene tech was also needed to testify as to what

investigative procedures had not been followed, and the following harm. Jones further complained that Gratias was not doing anything to help his case and that his counsel was ineffective for not timely requesting a crime tech. (Trial Tr. v. 3 at 84-86, 98).

The court stated that it had "no intention of ordering any new expert crime tech, crime scene technician, or otherwise." (Trial Tr. v. 3 at 103). The following day, counsel for Jones requested a DCI investigator to serve as the expert witness to review the crime scene photos. (Trial Tr. v.4 at 60-61). He also renewed his request for a crime tech expert who could "put in some more science to whether or not the forks seen in the physical evidence now part of this case are the same forks or fork found in the pictures at the crime scene" and "show that there's some problem with the photographs". (Trial Tr. v.4 at 68). Counsel again explained how he had erroneously believed that Gratias would be able to make that assessment. (Trial Tr. v. 4 at 68-69). The district court ultimately denied Jones's request for a crime tech and DCI investigator. (Trial Tr. v. 4 at 71). In explaining his ruling, the court stated that the DNA and metadata were "not newly discovered evidence" and that Jones was not allowed to "retry the criminal case." (Trial Tr. v. 4 at 71).

Investigator Gratias did testify at the PCR trial, although not to the critical issues Jones raised. However, Gratias did note that he has hired crime scene techs as experts before, and they may have been able to establish if anything was altered or staged. (Trial Tr. v. 4 at 18).

In denying Jones's expert requests, the district court improperly focused on the notion that crime techs "existed" back at the time of trial in 2008, so it was not "new evidence." (Trial Tr. v. 3 at 100). However, the proposed expert testimony went towards Jones's claims of ineffective assistance of trial counsel. It is precisely because crime scene techs existed back in 2008 that Jones's trial counsel was ineffective for failing to have one testify as to law enforcement's mishandling of the crime scene, altering of photos/metadata; as well as for failing to investigate and introduce evidence regarding the DNA (or lack of) on the two forks and washcloth. At the time of the PCR trial, the washcloth that M.P. allegedly used to clean up her blood was still sealed in its evidence bag and had not been tested by anyone. (Trial Tr. v. 1 at 55, 82, 132).

To establish prejudice, an applicant must show a substantial probability that the result of the proceeding would have been different had counsel performed competently. *Strickland v. Washington*, 466 U.S. 668 694 (1984), *see also Linn* at 731. Here, without the use of expert testimony,

Jones's ability to demonstrate how he was prejudiced was severely impeded. The Iowa Supreme Court has held that an applicant's self-serving statements, unsupported by evidence, are inadequate to establish a PCR claim. *See Kirchner v. State*, 756 N.W.2d 202 (Iowa 2008). Jones alleged that he did not have two forks in his apartment, did not use any fork to threaten M.P., and that M.P. never had to use a washcloth to clean up. However, he needed expert testimony to corroborate his claims. Therefore, this case should be remanded to allow Jones to retain an expert witness in support of his claims.

IV. THE DISTRICT COURT IMPROPERLY PREVENTED JONES FROM INVESTIGATING M.P. AND FROM PRESENTING EVIDENCE IN SUPPORT OF HIS ACTUAL INNOCENCE CLAIM

Preservation of Error

Prior to trial, the district court entered an order denying Jones's request to depose the victim in the criminal case, M.P. (App. 13). Jones then requested to call M.P. to testify at trial. (Trial Tr. v. 2 at 82). The district court forbade Jones from issuing M.P. a subpoena or in any way attempting to contact her. (Trial Tr. at 82-83). Jones also filed a motion renewing his request to contact M.P. (App. 17).

Jones was also prohibited from deposing prosecutor Suzanne Lampkin or calling her as a witness at trial. (App. 20, 27).

Standard of Review

When the basis for postconviction relief is a constitutional violation, review is de novo. *Bugley v. State*, 596 N.W.2d 893, 895 (Iowa 1999).

Merits

An applicant who claims freestanding actual innocence is claiming that he is factually and actually innocent. *Schmidt v. State*, 909 N.W.2d 778, 797 (Iowa 2018). In order to prevail under an actual innocence claim, an applicant must prove by clear and convincing evidence that, despite the evidence of guilt supporting the conviction, no reasonable fact finder could convict the applicant. *Id*.

Jones was able to raise some arguments throughout his piecemeal PCR trial in support of his actual innocence. One example is the testimony of Dr. Van Gundy, who examined M.P. after the December 4 incident but did not contact law enforcement about concerns of sexual abuse. M.P. told Dr. Van Gundy that she had been assaulted while trying to break up a bar fight. (Trial Tr. v. 3 at 19). And even when Dr. Van Gundy asked Jones to leave the exam room, M.P. indicated that she wanted him to stay. (Trial Tr. v. 3 at 20).

After M.P. left the hospital on December 4, Dr. Van Gundy called her mother to discuss M.P.'s prescription. (Trial Tr. v. 3 at 23). M.P. returned to

the hospital with her family at 4:56 p.m. It was only on this return trip, which was after the phone call with M.P.'s mother, that M.P. alleged for the first time that she had been raped. (Trial Tr. v. 3 at 22). However, M.P. refused a rape kit, even though Dr. Van Gundy explained to her that one would still provide potentially valuable evidence. (Trial Tr. v. 3 at 18, 22).

The timing of M.P.'s second trip to see Dr. Van Gundy is important not just because her story changed, but also because Officer Richard Lang, who applied for the search warrant, first testified that he had met with the issuing court around 4:00 p.m. to present the warrant (although he later changed his testimony that it must have been after 5:00 when he obtained the search warrant). (App. 55). Officer Lang's affidavit in support of the warrant references information from M.P. that was not provided to anyone until the 4:56 doctor visit. (App. 32).

Most notable, however, is the evidence that Jones was prohibited from presenting. Specifically, one of the key components to Jones's innocence was his assertion that M.P.'s testimony was coerced by prosecuting attorney Suzanne Lampkin and that M.P. lied under oath at the criminal trial. (Trial Tr. v.1 at 23; v.2 at 82). This is especially important in a 'he said/she said' case such as this. M.P.'s potential testimony was relevant, material, and necessary to Jones's case. Relevant evidence is generally admissible, with

certain exceptions. Iowa R. Evid. 5.402. Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence; and if the fact is of consequence in determining the action. Iowa R. Evid. 5.401.

Although PCR counsel obtained M.P.'s contact information, he was forbidden from interviewing her, deposing her, or calling her as a witness. (App. 17). There was no authority to forbid Jones from calling her as a witness at trial, and the court's ruling deprived Jones of his right to due process and establish his claims of innocence pursuant to *Schmidt*.

Jones also complains that he was unable to cross examine his trial counsel, Tomas Rodriguez, in person and that he was unable to subpoena the prosecutor, Suzanne Lampkin, and question her about her coercion of M.P. and prosecutorial misconduct, including the handling of physical evidence and the missing interview disk. (App. 20). At the PCR trial, Jones's counsel advised the court that Ms. Lampkin's testimony was necessary, while the court disagreed. (Trial Tr. v. 2 at 183). The court later entered an order prohibiting Jones from deposing Lampkin or calling her as a witness at trial. (App. 20). While the district court pointed out that a prosecutor's mental impressions during trial are off limits, Jones wanted to question her about her actions prior to trial, including the nature and timing of her conversations

with M.P. (App. 20). These topics fall outside of the privileged mental impressions.

As a result, this case should be remanded to allow Jones to develop his claims of actual innocence.

CONCLUSION

For the reasons articulated herein, Arzel Jones requests this court vacate his convictions. Alternatively, Jones requests a remand for further proceedings in district court.

REQUEST FOR ORAL ARGUMENT

Counsel for Appellant requests to be heard in oral argument.

COST CERTIFICATE

I hereby certify that the costs of printing this brief was $0 because it was electronically submitted.

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/s/ Jamie Hunter

_____

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