IN THE SUPREME COURT OF IOWA

No. 20-0786

JAMES FARNSWORTH II,

Appellant,

v.

STATE OF IOWA,

Appellee.

ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR CERRO GORDO COUNTY
HONORABLE CHRIS FOY, JUDGE

APPELLANT'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED NOVEMBER 3, 2021

PHILIP B. MEARS

Mears Law Office
209 East Washington Street
Paul-Helen Building, Suite 203
Iowa City, Iowa 52240

ATTORNEY FOR APPELLANT

QUESTIONS PRESENTED FOR REVIEW

I. Was trial counsel ineffective in failing to consult with or employ a forensic pathologist in the case of a justification defense?

II. Did the equivalent of an unanimity instruction require the State to show sufficient evidence for all the alternatives that could be used to disprove justification?

III. As a cumulative matter was David Roth ineffective, with resulting prejudice?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State

STATEMENT SUPPORTING FURTHER REVIEW

Ordinarily there is a presumption in postconviction cases that trial counsel was constitutionally "effective". If ever there was a case where there should be no such presumption that would be this case.

Farnsworth was charged with First Degree Murder. He was 22 years old. No one in his family had ever needed a criminal lawyer before, for anything serious. He was represented at trial and then on direct appeal, by a private defense lawyer named David Roth. Roth handled the case, including the jury trial, all by himself. Roth committed suicide about the time the direct appeal ended. After his death, the extent of his dishonesty came to light

David Roth has to have been one of the most dishonest lawyers in memory. He stole millions from his clients, including Farnsworth, his own firm, and from various "investors". He was engaged in a classic Ponzi scheme defrauding more and more people to avoid his misbehavior being disclosed.

In his representation of James Farnsworth, David Roth was ineffective from start to finish. That is not surprising, since he had virtually no experience in serious felony trials, had never done a murder trial before, and probably was a little distracted while maintaining his Ponzi scheme.

He was ineffective even before he filed his appearance. He should never have taken the case. He did not have the experience. According to his legal

assistant, who testified at the postconviction hearing, he really did not want to take the case. He just quoted a high retainer thinking the family would never agree. When the family agreed to pay close to $100,000, Roth saw it as a chance to keep his scheme afloat.

He messed up the bond review. Even Judge Vaitheswaran recognized that. While he took depositions, he never once talked to a possible expert forensic pathologist to see if the picture presented by the State could be questioned.

At trial, witnesses were not sequestered. He mishandled the cross examination of the State's forensic pathologist. After the evidence was submitted, he submitted no jury instructions. He allowed the State to just tell the jury they did not have to be unanimous in refuting justification. without actually getting an instruction to that effect.

When the State used its expert to cast much doubt on the Farnsworth's self defense statement, Roth had no response. Then, of course, there was the fact that in closing argument Roth failed to mention that the standard of proof was beyond a reasonable doubt. Let me say that again. He never mentioned "beyond a reasonable doubt" in his closing statement.

He then handled the appeal, defaulting several times. He filed a combined certificate saying that the appeal was from a guilty plea case.

Despite this incompetence, the District Court and now the Court of Appeals have said that there was no harm, noting that the decision of whether to call an expert witness was a matter of trial strategy.

This Application will focus on the claim about the expert witness. Consideration of that claim must occur in the context that Roth was ineffective in every other respect, from start to finish, and was a genuinely dishonest person.

The Supreme Court should grant Further Review for at least three reasons.

1) There is a conflict between the ruling in Farnsworth and the ruling in the Court of Appeals case of Hernandez v. State, 2005 WL3115850 (Iowa App. 2005).

Postconviction relief was granted to Hernandez where his lawyer failed to retain an expert. The Supreme Court should grant review to consider when counsel is ineffective in failing to retain an expert.

. 2) The Court should grant review to consider of lack of unanimity problem discussed in State v. Bratthauer, 354 N.W. 2d 774 (Iowa 1984). Farnsworth argues that under Bratthauer the State was required to show sufficient evidence for every alternative they give to the jury as a way to disprove justification.

3) The Court should grant further review to determine when the dishonesty of a lawyer, and his cumulative ineffectiveness should negate any presumption of ineffectiveness and allow for relief.

FACTS

There really are not many facts about the crime and the criminal procedure that are necessary for this Application.

1. James Farnsworth killed Ian Decker during a fight in Fort Dodge in 2012.

2. The immediate confrontation clearly began with Decker charging Farnsworth, knocking him down with his fists. Farnsworth responded with a knife that he had in his pocket. There was a fact dispute as to whether Farnsworth was on the ground when he struck upward with the fatal stabbing motion.

3. The State's expert witness was the State Medical Examiner. She had the opinion that the angle of the fatal injury was “downward”.

4. David Roth represented Farnsworth at trial and on direct appeal **by himself**.

5. David Roth was a dishonest lawyer with little or no experience with serious felonies. He got a large retainer from Farnsworth’s family and almost immediately spent it. There was virtually no accounting for the retainer. Indeed, in the billing discovered after the case was over, there was a $5,000 payment for an "expert". The expert turned out to be the company that landscaped one of his houses.

6. David Roth took depositions learning about the downward direction of the fatal injury. He never once consulted with his own forensic expert.

7. At trial David Roth assisted the prosecutor in having the State's expert explain that the fatal wound had a downward direction.

8. In closing argument the prosecutor explained that Farnsworth's self defense claim could not be believed, because of that expert evidence.

9. At postconviction Farnsworth finally had his own an expert pathologist. Dr. Randall unequivocally stated that one could not say anything about the positioning of the bodies based on angle of an entry wound.

Court of Appeals decision

Judge Vaitheswaran wrote the opinion for the Court of Appeals affirming the conviction.

She rejected the argument that trial counsel was ineffective in not retaining the expert pathologist. She suggested that the decision to obtain an expert was a matter of trial strategy. She also doubted the testimony of Dr. Randall would have helped Farnsworth.

On the claim regarding unanimity she found that the prosecutor's statement about unanimity was in fact the correct statement of the law.

She failed to engage in the second step of the analysis when considering a less than unanimous verdict. That step considers whether the state has sufficient evidence for all of the alternatives that appear in the justification jury instruction.

As to cumulative effect of ineffectiveness the Court never looked at the uncontroverted evidence showing Roth had no serious jury trial experience.

In more important respect the Judge did agree that Roth was ineffective. She found his handling of the appearance bond to be below the level expected of competent counsel.

What is significant is that that mishandling included representation at the beginning of the case to the end.

ARGUMENT

I

INEFFECTIVE COUNSEL REQUIRES A NEW TRIAL SINCE TRIAL COUNSEL DID NOT CONSULT WITH OR EMPLOY AN EXPERT PATHOLOGIST

Standard of Review:

Ineffective-assistance claims are reviewed *de novo.* State v. Albright, 925 N.W.2d 144, 151 (Iowa 2019).

Preservation of Error:

The claim is preserved.

Summary of argument

James Farnsworth caused the death of Ian Decker and was found guilty of his murder, but just second degree. The issue at trial was whether he was "justified" along with the extent of his responsibility. Those issues required

evidence, including expert testimony. Indeed the nature of the injuries was particularly relevant to the outcome of this case.

The State had a forensic expert, the State Medical Examiner, Dr. Julia Goodin. She was deposed. She testified. Farnsworth had no expert. There is no evidence that David Roth ever consulted with one.

That by itself in a First Degree Murder case, with a defense based on justification, is a breach of duty. Given the evidence from Farnsworth's postconviction expert, the breach of the duty was prejudicial.

There were two issues that could have been developed by a defense expert.

(1) What was the significance of the description of the fatal stab wound as "downward?

(2) Were there 3 stabbing movements or just two?

At trial, the State's expert, with help from defense counsel, described that the fatal knife wound as being in a "downward" direction. The prosecutor highlighted this in her closing arguments explaining that the fight could not have happened as described by Farnsworth. She also explained there were 3 stabbing actions, again inconsistent with Farnsworth's description.

In postconviction Farnsworth presented an expert, Dr. Brad Randall. He questioned the extent and significance of the "downward" angle argument. He also questioned whether there were 3 stabs.

This testimony establishes the prejudice necessary to set aside the conviction.

Factual discussion

Discussion of downward angle

Dr. Julia Goodin, the State Medical Examiner, did the autopsy. She was deposed and latter testified.

Goodin described three wounds: (1) the fatal stab wound in the chest; (2) the two inch cut on the forearm; (3) the stab wound on the thigh. She said the stab wound to the chest had a “direction" which was "downward, left to right". Ex. 18, p.1; App. 112.

In deposition she said the fatal wound had a "downward direction, left to right". Exhibit 13, page 29, lines 18-23.

At trial, in something of a surprise, prosecutor Krisko did not ask Dr. Goodin about the angle of the fatal wound.

Into that vacuum, however, came defense attorney Roth.

At the beginning of Roth’s cross, he asked about the wound to the chest:

> "Q: And that suggested to you, did it not, that the entry would have been more perpendicular as it related to the wound to the chest?”
> A: “I think what I said was that there might have been movement with the chest wound..... Rather than saying it was more perpendicular because neither wound is exactly perpendicular. They both have direction.” Crim. Tr. p. 490, lines 5-14.

Krisko at that point remember the direction of the wound. On re-direct she asked:

> Q: "Slightly upward, left to right from the hip but the chest wound was slightly downward, left to right?"
> A: "Yes."
> Crim. Tr. p. 491-492, lines 20-25, 1-3.

Krisko's pounced on this in closing. Here is what she said:

> We know he was stabbed. And think about this for a minute—and I had to have the coroner explain to me because I--- the perpendicular question kind of threw me, but it was a good way to figure out. **If you believe James, he was somehow crouched, flung his knife, and Ian stood back and he was stabbed. Now that doesn't explain the other two wounds, of course. But that's not how the chest wound happens. Here's Ian's chest, and it's a downward angle. You don't get that from being below someone.** You get that from being at the same level, like the witnesses said, when they were both standing up, or both at the same level. We already have that information in the record. Not contradicted in any way.
> Crim. Tr. p. 523-524, lines 18-25, 1-6.

In his closing arguments, Roth did not mention the angle of any wound **at all.**

Krisko highlighted the downward angle conclusion in her final closing.

> **We have the direction of the wound showing that there is no way that James was under Ian when he stabbed him in the chest because that could not—that would be an upward direction, not a downward direction.** Crim. Tr. p. 547, lines 2-8.

The jury was left with a clear impression that James Farnsworth could not have been under Decker at the time that he inflicted the fatal wound. Moreover Farnsworth description of the fight was not to be believed.

PCR Evidence from Dr. Brad Randall

In post-conviction, Farnsworth hired an experienced pathologist to review the Decker autopsy and certain trial testimony. Dr. Brad Randall provided a Report. Ex. 87. App. 354. The State did not contest his report.

Dr. Randall had taught at the University of South Dakota School of Medicine and consulted with the South Dakota Crime Laboratory. He has been an expert in South Dakota, as well as Iowa. He had performed over 2,000 autopsies and investigated in excess of 12,000 deaths.

Dr. Randall was asked two questions. First, what was the significance of the statements that the fatal chest wound occurred in a "downward direction." He was also asked whether the evidence showed two knife movements or three.

Here is his opinion with regard to the angle of the stab wounds.

> "I have no reason to question the autopsy findings and conclusions from Dr. Goodin's report. While I do not question her description of the directionality of Mr. Decker's chest wound as "downward," the determination of directionality of stab wounds often is somewhat subjective. Dr. Goodin provides no quantifying information regarding the degree of the angle of the downward penetration. It is entirely possible that the degree of the angle of the downward path may have been negligible.

> **The State was in error regarding its statements in Closing. It is nearly impossible to infer relative positions of a victim and a person wielding a knife, by virtue of directionality of a stab wound to the chest. (emphasis added)**
>
> Mr. Farnsworth certainly could have been positioned dependent (under) Mr. Decker at the time he inflicted the wound to Mr. Decker's chest. A downward directed stab wound would not disqualify that (or essentially any other) position between Farnsworth and Decker."
> Ex. 87, p. 3-4. App. 356-357.

Here is what he said about the number of knife movements.

> It is quite possible that the left arm injury could have been sustained as Mr. Decker tried to block the stabbing knife that ultimately entered his chest. In that scenario Mr. Decker would have been the victim of only two stabbing thrusts rather than two stabbings thrusts rather than two stabbings and a separate slashing wound."
> Ex. 87, p. 4.

Ineffective counsel for failure to obtain an expert

The test to be applied to a claim of ineffective counsel is well developed. The claimant must demonstrate (1) counsel failed to perform an essential duty, and (2) prejudice resulted. Claimant must satisfy this burden by a preponderance of the evidence, and rebut the presumption of counsel's competence. Meier v. State, 337 N.W.2d 204, 206 (Iowa 1983) There must be a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been

different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Gering v. State, 382 N.W.2d 151, 153-54 (Iowa 1986).

The right to have an expert in a criminal case

The right to have an expert or the duty to hire an expert comes from two sources. First, there is the Sixth Amendment right to counsel. Several older Iowa cases discuss the obligation of a trial court to appoint an expert to assist counsel. State v. Coker, 412 N.W.2d 589, 593 (Iowa 1987)(reversing conviction after denial of expert); State v. Leutfaimany, 585 N.W.2d 200, 207-08 (Iowa 1998)(upholding denial of appointment of expert).

The second source is the requirement for effective counsel. Counsel must conduct a reasonable investigation or make reasonable decisions that make a particular investigation necessary. Ledezma v. State, 626 N.W.2d 134 (Iowa 2001)

There have been a number of cases in Iowa where post conviction courts have addressed whether trial counsel was ineffective in failing to obtain an expert. Davis v. State, 520 N.W.2d 319, 322 (Iowa App., 1994) (should have gotten expert but no prejudice since opinion about the same.); Hernandez v. State, 2005 WL3115850 (Iowa App. 2005) (conviction reversed since there should have been an alcohol expert.)

One Iowa case in particular should be discussed.

In Hernandez v. State, 2005 WL3115850 (Iowa App. 2005) the Court of Appeals reversed a conviction for failure to obtain an expert. Hernandez was convicted of homicide by motor vehicle. He was granted postconviction relief after his trial counsel failed to retain an expert toxicologist to examine the blood-alcohol testing procedure.

The Court of Appeals affirmed.

> Counsel is required to conduct a reasonable investigation or make reasonable decisions that make a particular investigation unnecessary. *Ledezma,* 626 N.W.2d at 145 (citing *Strickland,* 466 U.S. at 691, 104 S.Ct. at 2066, 80 L.Ed.2d at 695). "In each instance, the decision to investigate a particular matter must be judged in relationship to the particular underlying circumstances." *Id.*
> Hernandez v. State, 2005 WL 3115850, at *3 (Iowa App., 2005)

Part of that duty to investigate requires an investigation into whether experts might be needed. In Hernandez, trial counsel testified at the post-conviction that he had discussed the case with a toxicologist, choosing not to pursue that line of investigation.

However that toxicologist told the lawyer he needed to see all the records. Counsel had no further contact with a toxicologist.

The Court said this about prejudice:

> We conclude Hernandez was prejudiced. Had trial counsel used the funds explicitly earmarked to conduct an investigation there is a strong probability he would have retained an expert who

> would have testified in a manner similar to that of Corbett at the PCR hearing and called into doubt the validity of the State's BAC test. The other evidence of intoxication was not so strong; therefore, we conclude there is a reasonable probability the jury would have returned a verdict of not guilty if trial counsel had not breached an essential duty.
> Hernandez v. State, 2005 WL 3115850, at *4 (Iowa App., 2005)

Hernandez sounds like Farnsworth. In Hernandez, $5,000 of the posted cash bond was refunded by the trial judge so Hernandez could retain an expert. The attorney, however, just applied the money to his bill. The appeal court said Hernandez's attorney committed an ethical violation and his license to practice law was suspended. 2005 WL 3115850, at *2 (Iowa App., 2005)

The Farnsworth family gave Roth $90,000. Roth stole most of it. He knew there were forensic issues. $5,000 for an expert was used to pay his landscaper. Certainly, had Roth not committed suicide, he would have lost his license.

There was a duty to retain an expert.

This was a First Degree Murder case. Every possible defense should have been pursued.

Roth was aware of the two forensic issues presented in this claim. He had deposed Goodin. He knew there could have been only two lunges with the knife. Goetz deposition, Ex. 14 p. 17-18 lines 4-25, 1-9. App. 106.

These issues were central to the defense of justification. They went directly to whether Farnsworth's version of the fight was to be believed.

Roth never consulted with or obtained the services of his own expert pathologist. Reasonable defense counsel in a First Degree Murder case would have employed a forensic pathologist. Reasonable counsel would have consulted with an expert. There was a clear breach of duty. Judge Vaitheswaran never accepted this step in Farnsworth's argument.

In fact Roth was ineffective in several ways.

(1) Roth was ineffective at not having consulted with an expert.

(2) Roth knew the downward angle was a potential problem. Once the prosecution apparently forgot that evidence on Goodin's direct examination, Roth never should have opened the door to allow that evidence.

(3) Roth should never have been silent in the face of the Prosecutor's statement to the Jury in closing that Farnsworth could not have inflicted the injury from below. He could at least have used logic to explain how an injury could be "downward" if Decker was bending over Farnsworth.

There was prejudice.

Prejudice is established by Dr. Brad Randall's evidence.

Dr. Randall helped on the downward angle issue. The autopsy report was not clear how downward the angle really was. More importantly, Dr. Randall made

clear that you just cannot tell where combatants were standing from a downward angle of a wound like that. On that conclusion he was not equivocal. **In Dr. Randall's opinion, the wound could very well have been inflicted when Decker was standing over Farnsworth.**

James Farnsworth did not testify. But his side of the story went to the jury through his statements to police. Farnsworth said he was underneath Decker and threw the knife upwards. This evidence was substantially undercut by Krisko's argument in closing about the angle of the wound. A defense expert would have refuted that argument.

Farnsworth has shown prejudice.

Specific response to Judge Vaitheswaran:

The judge accepted several parts of Farnsworth's reasoning:

(1) The evidence that the fatal wound had a downward direction was brought out with the assistance of David Roth.

(2)The prosecutor "capitalized on this testimony during her closing argument". Justice Vaitheswaran stated the prosecutor was making "an effort to undermine non-expert testimony, placing Farnsworth close to the ground".

(3) The prosecutor told the jury that there was no way that Farnsworth was under Decker when he stabbed him.

(4) Farnsworth's postconviction expert concluded it was “nearly impossible to infer relative positions based on any direction of the wound to the chest”.

Having accepted these points what was incorrect in her analysis?

(1) The Court said that the angle of the knife was “not central to the defense of justification”. The Court said Farnsworth contradicted himself by saying the focus was on who started or continued the confrontation.

Response: Farnsworth made that argument about the unanimity issue. There was still the important issue of how the actual fight took place. The prosecutor at the time certainly thought the evidence of the downward angle was very important. The "non-expert testimony" it contradicted was the statement from Farnsworth. Most importantly prejudice on ineffective counsel is not the same standard as whether there is sufficient evidence.

(2) The Court looked at the evidence from Farnsworth’s expert that he had “no reason to question the autopsy findings”.

Response: Farnsworth's expert said two things. He said you just could not tell from the autopsy findings how downward the angle was. He also said you could not tell about who was on the ground from the angle of the wound.

(3) The Court noted that the decision of whether to call an expert is a matter of trial strategy. Judge Vaitheswaran says that Farnsworth's trial attorney reasonably could have decided that an equivocal opinion… would not have helped the defense.

Response: Trial strategy might come into play if defense counsel had ever consulted an expert prior to trial. Roth did not do that. It cannot be a matter of strategy.

II

AFTER THE PROSECUTOR TOLD THE JURY THAT THEY DID NOT HAVE TO BE UNANIMOUS IN DECIDING THE JUSTIFICATON ISSUE, IT WAS INEFFECTIVE COUNSEL TO NOT CHALLENGE THE SUFFICIENCY OF EVIDENCE THAT FARNSWORTH HAD INITIATED THE FATAL CONFLICT EITHER AT TRIAL OR ON APPEAL

Standard of Review:

Ineffective-assistance claims are reviewed *de novo.* State v. Albright, 925 N.W.2d 144, 151 (Iowa 2019).

Preservation of Error:

This claim is preserved.

Argument

This argument is complicated. It is one of first impression in Iowa as to how unanimity works in justification cases.

In criminal cases jury verdicts are mostly required to be unanimous. In some cases, where alternate theories are presented, the jury does not have to be unanimous in picking the particular theory. State v. Bratthauer, 354 N.W. 2d 774 (Iowa 1984). This has been the law in Iowa for 35 years.

When the jury does not have to be unanimous, every alternative considered must be supported by sufficient evidence. State v. Schlitter, 881 N.W.2d 380 (Iowa, 2016)

It is ineffective counsel for counsel not to make a Motion for a Directed Verdict, based on the insufficiency of all the different theories pursued. State v. Schlitter, 881 N.W.2d 380 (Iowa, 2016)

In Farnsworth, the unanimity issue is presented in the context of the justification defense.

Instruction 24 explained 5 ways the State can refute a claim of self defense.

> A person is justified in using reasonable force if he reasonably believes the force is necessary to defend himself from any imminent use of unlawful force. If the State has proved any one of the following elements, the defendant was not justified:
> 1. The defendant started or continued the incident which resulted in injury or death.

2. An alternative course of action was available to the defendant.
3. The defendant did not believe he was in imminent danger of death or injury and the use of force was not necessary to save him.
4. The defendant did not have reasonable grounds for the belief.
5. The force used by the defendant was unreasonable.
App. 81.

In Farnsworth, there was no jury instruction about unanimity regarding the justification defense. Instead, the prosecutor just told the jury during closing arguments that they did not have to be unanimous. Crim. Tr. p. 516-517, lines 17-25, 1-13. Judge Vaitheswaran found that this was a correct statement of the law. 2021 WL 5106041 at *5 (Iowa Ct. Appeals, November 3, 2021.)

Effective defense counsel would have understood the consequence of allowing less than unanimity. Competent counsel would have made a Motion for a Directed Verdict, at least as to Reason #1 in Instruction 24. That Motion would have been based on the fact that there was not legally sufficient evidence to support that alternative.

There is prejudice in this case because there was not sufficient evidence to support Reason #1.

Factual discussion

The Defendant presented a defense in part based on justification.

The judge gave Jury Instruction 24.

Section 1 of that instruction provided that there would not be justification if "the defendant started or continued the incident which resulted in injury or death."

It was clear that the State was going to argue that Farnsworth could not establish justification because he was “one who initially provoked the use of force”. The State argued Farnsworth initiated the final incident when he slapped Victoria Miller, several hours before the final fight. At that time Decker was not even present.

This came up several times.

During examination of witness Dority, prosecutor Krisko asked whether Farnsworth was the first person to be physically aggressive, when he slapped Vickie. Crim. Tr. p. 246, lines 10-13. When Roth objected the judge sustained the objection. She said that to link the first aggression back to the slap was inappropriate and exceeds what has been allowed. Crim. Tr. pg. 253, lines 13-15.

When Roth sought a directed verdict, he did not specifically object to the fact that there was not sufficient evidence with regard to each of the five justification factors.

There was not sufficient evidence to support each alternative.

The legal question is whether, “the evidence in the light most favorable to the State, drawing all fair and reasonable inferences from it, shows there is

sufficient evidence to convince a rational fact finder that alternative #1 was true beyond a reasonable doubt." Schlitter, 881 N.W. 2d. *389.

Under that standard, there just is no way that the slap can be thought of as the initiation of the conflict with Decker. The slap was hours removed in time. Decker was not present at the time. Everybody agrees that Decker attacked Farnsworth. Farnsworth was talking to Miller. He did not even know that Decker was coming to fight him.

The fact that there was insufficient evidence about one of the alternatives requires reversal. That question can be addressed since that reasonably competent counsel would have in fact lodged a direct verdict challenge to each and every alternative.

III

AS A CUMULATIVE MATTER ALL CASES OF INEFFECTIVE COUNSEL REQUIRE A NEW TRIAL

Standard of Review:

Ineffective-assistance claims are reviewed *de novo.* State v. Albright, 925 N.W.2d 144, 151 (Iowa 2019).

Preservation of Error:

This claim is preserved.

Factual discussion

In addition to the first two claims there were other instances where Roth dropped below the standard of competent counsel.

Individual claims of ineffective assistance of counsel can be considered in isolation. The courts have made clear however that you can also look at them all together. State v. Clay, 824 N.W. 2d 488 (Iowa 2012): (Iowa recognizes the cumulative effect of ineffective counsel when analyzing prejudice).

Roth was ineffective from the very start of the case to the very end. These claims when combined should require a new trial.

In a way, this poor performance was a reflection of the fact Roth did not have the necessary experience to handle a murder case. However, once having taken the money from the Farnsworth family, he had no choice but to stay with the case as long as he could.

Here are those other claims:

1. Roth should never have taken the case in the beginning.

Roth had little experience with jury trials for serious felonies. While this was shown in the record, no judge wants to recognize this. This important fact provides the lens with which all the other claims must be viewed.

A lawyer should not handle a legal matter where the lawyer did not possess "the requisite legal knowledge and skill to handle the case". See Iowa Supreme Court Disciplinary Board v. Marx 831 N.W.2d 194, 198 (Iowa 2013).

Moreover, Roth should never have taken the case involving a serious crime in Mason City. His firm represented the Mason City Police Department. See Exhibit 60. App. 336. Roth was representing the Mason City police Department at the time of the Farnsworth trial.

2. Roth mishandled the original bond conditions and failed to appeal the forfeiture provisions in the sentencing order.

The original bond in the case was $100,000 cash only. App. 7. This was not an unreasonable bond in a First Degree Murder case.

Roth went in for a bond review. The resultant order doubled the amount of the cash bond, and required $50,000 to be posted in Farnsworth's name. App. 8. This was clearly intended to create a fund out of which statutory restitution could be paid. Judge Vaitheswaran found that reasonably competent counsel should have known better.

3. Roth did not sequester witnesses.

There was no order on the record requiring sequestering of witnesses. Farnsworth and Barnard testified that the civilian witnesses for the State sat in the

courtroom together during the rest of the case. PCR Tr. p. 39 lines 3-9, 102-103 lines 20-25, 1-3.

The State disputed this factual assertion.

A portion of the transcript supports Farnsworth on this claim. Just prior to Vickie Miller testifying a discussion took place about whether she could be recalled if the Defendant wanted that. Crim. Tr. 267, lines 1-2.

Krisko explained that "she will be easy to find. She has every intention of sitting in after she testifies" (Crim. Tr. p.267, lines 4-5).

4. Roth did not tell his client about a plea offer.

A plea bargain was not likely in the Farnsworth case. Yet an offer was made. The Defendant and his family, however, were never informed about any plea offer. PCR Tr. p. 38, lines 9-11.

Judge Vaitheswaran says there was no prejudice. Maybe that is the case. But reasonable counsel should have told the client about the offer. Roth did not.

5. Roth was ineffective in not mentioning the standard of proof during closing argument

This argument is not complicated. While Farnsworth caused the death of Decker, there was considerable factual dispute as to whether the action was justified. Indeed, the jury found only second degree murder.

Central to factual determinations, in our judicial system, is the burden and standard of proof. The State not only bears the burden of proof, but it is also must show the proof beyond a reasonable doubt.

Roth in his closing argument failed to mention the standard of proof. That is so remarkable that it should be said a second time. **Roth in closing argument failed to mention the standard of proof, at all.**

That omission has to be below the level of competent counsel.

The Iowa Supreme Court talked about "beyond a reasonable doubt" in State v. McGranahan 206 N.W.2d 88 (Iowa 1973).

> **"(A)n understanding of reasonable doubt is crucial to the deliberations of the jury in nearly every criminal case."**
> 206.NW.2d at page 92.

6. Roth was ineffective on appeal in quite a number of ways.

Roth had no real experience appealing criminal cases. See Ex 48; App. 224. He had filed briefs in one prior case.

He messed up the combined certificate by identifying the appeal as from a guilty plea. App. 122. This shortened the time for his brief. He then defaulted when it came time to write the brief, having for some reason, only asked for 7 days in his first request of extension.

When he did write his brief, he failed to follow proper procedure.

He raised two claims on appeal that had not been preserved. The one issue preserved was close to frivolous.

In this case, Farnsworth has shown ineffective counsel from an unethical, conflicted, and dishonest attorney from start to finish.

CONCLUSION

Ordinarily, there is a presumption that counsel was constitutionally effective. James Farnsworth was represented by a defense lawyer who was stealing from his clients, including Farnsworth, and was engaged in a Ponzi scheme to avoid it being disclosed. If ever there was a case where there should not even be such a presumption this should be that case.

From start to finish David Roth was ineffective. This is not surprising since he did not have experience and was probably a little distracted, while maintaining his deception.

This Court should find based on the significant evidence presented, that the Court cannot have confidence in the jury verdict. For that reason, James Farnsworth should be given a new trial.

RESPECTFULLY SUBMITTED,

/s/ Philip B. Mears
PHILIP B. MEARS

MEARS LAW OFFICE
209 E. Washington Street
Paul-Helen Building, Suite 203
Iowa City, Iowa 52240
(319) 351-4363 Office
(319) 351-7911 Fax
philmears@mearslawoffice.com
AT0005330

ATTORNEY FOR APPELLANT

REQUEST TO BE HEARD IN ORAL ARGUMENT

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

RESPECTFULLY SUBMITTED,

/s/ Philip B. Mears
PHILIP B. MEARS

MEARS LAW OFFICE
209 E. Washington Street
Paul-Helen Building, Suite 203
Iowa City, Iowa 52240
(319) 351-4363 Office
(319) 351-7911 Fax
philmears@mearslawoffice.com
AT0005330

ATTORNEY FOR APPELLANT

ATTORNEY'S CERTIFICATE OF COSTS

I, Philip B. Mears, Attorney for the Appellant, hereby certify that the cost of preparing the foregoing Appellant's Page Proof Reply Brief was $5.30.

RESPECTFULLY SUBMITTED,

/s/ Philip B. Mears
PHILIP B. MEARS

MEARS LAW OFFICE
209 E. Washington Street
Paul-Helen Building, Suite 203
Iowa City, Iowa 52240
(319) 351-4363 Office
(319) 351-7911 Fax
philmears@mearslawoffice.com
AT0005330

ATTORNEY FOR APPELLANT

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

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

[X] this brief has been prepared in a proportionally spaced typeface using Times New Roman in size 14 and contains 5,583 words excluding the parts of the brief exempted by Iowa Rs. App. P. 6.903(1)(f)(1)

/s/ Philip B. Mears
Signature

_____
Date

IN THE COURT OF APPEALS OF IOWA

No. 20-0786
Filed November 3, 2021

JAMES FARNSWORTH II,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Cerro Gordo County, Christopher C. Foy, Judge.

Applicant appeals the denial of several ineffective-assistance-of-counsel claims raised in his postconviction-relief application following his conviction of second-degree murder. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Philip B. Mears of Mears Law Office, Iowa City, for appellant.

Thomas J. Miller, Attorney General, and Kyle Hanson, Assistant Attorney General, for appellee State.

Considered by Vaitheswaran, P.J., and Greer and Schumacher, JJ.

VAITHESWARAN, Presiding Judge.

James Farnsworth II stabbed Ian Decker with a pocket knife in Mason City. Decker died. The State charged Farnsworth with first-degree murder. A jury found him guilty of second-degree murder. The court of appeals affirmed Farnsworth's conviction. *See State v. Farnsworth*, No. 13-0401, 2014 WL 2884732, at *1 (Iowa Ct. App. June 25, 2014).

Farnsworth filed a postconviction-relief application, raising several ineffective-assistance-of-counsel claims. The district court denied the application following an evidentiary hearing. The court concluded Farnsworth failed to show that his trial attorney "breached an essential duty in representing him at trial or on direct appeal" and "failed to show that [counsel] could have or should have done anything different which would have changed the outcome of his case." *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (prescribing elements of ineffective-assistance claim). The court denied a motion for enlarged findings and conclusions. Farnsworth appealed.

I. Failure to Retain Forensic Pathologist

At trial, the State's chief medical examiner testified she performed an autopsy on Decker and "[t]he most significant wound" she discovered was "a stab wound to the left chest." She also discerned "a cutting wound on his left arm" and "a stab wound to the left thigh." She determined the manner of death was "[h]omicide" and the cause of death was a "[s]tab wound to the chest."

On cross-examination, Farnsworth's attorney asked the medical examiner if "the entry would have been more perpendicular as it related to the wound to the

chest." The medical examiner responded that neither the wound to the chest nor the wound to the thigh was "exactly perpendicular"; both had "a direction."

On redirect examination, the medical examiner agreed with the prosecutor that the chest wound "was slightly downward left to right." The prosecutor capitalized on this testimony during her closing argument. In an effort to undermine non-expert testimony placing Farnsworth low to the ground and below Decker immediately before the stabbing, she stated, "Here's [Decker's] chest, and it's a downward angle. You don't get that from being below someone. You get that from being at the same level, like the witnesses said, when they were both standing up, or both at the same level." She continued: "We have the direction of the wound showing that there is no way that [Farnsworth] was under [Decker] when he stabbed him in the chest because that could not—that would be an upward direction, not a downward direction."

At the postconviction-relief hearing, Farnsworth offered the report of a forensic pathologist who reviewed the medical examiner's autopsy report as well as other trial materials. After summarizing those materials, he opined, "The State was in error regarding its statements in closing. It is nearly impossible to infer relative positions of a victim and a person wielding a knife by virtue of directionality of a stab wound to the chest." The pathologist also opined "the left arm injury could have been sustained as Mr. Decker tried to block the stabbing knife that ultimately entered his chest," making him "the victim of only two stabbing thrusts rather than two stabbings and a separate slashing wound."

The postconviction court did "not read the report . . . to express any firm conclusions regarding the relative positions of Farnsworth and Decker at the time

the chest wound was inflicted." The court found the report did "not appear to shed much light on the relative positions of the combatants and would not have added much, if anything, to the evidence of justification [Farnsworth's trial attorney] was able to elicit from the witnesses for the State at trial." The court concluded Farnsworth failed to establish the breach of an essential duty or prejudice based on his trial attorney's failure to retain a forensic expert.

On appeal, Farnsworth argues his trial attorney opened the door to the medical examiner's "angle" testimony and the prosecutor's use of that testimony in her closing argument. He reprises his assertion that his trial attorney should have retained an expert pathologist to develop the following issues: "(1) What was the significance of the description of the fatal stab wound as 'downward'? (2) Were there 3 stabbing movements or just two?" In his view, "these issues were central to the defense of justification" and "went directly to whether [his] version of the fight was to be believed"—that he was actually underneath Decker and "threw the knife upwards" and "that the injury to the chest was actually a deflection."

Farnsworth relies on *Hernandez v*. *State*, No. 05-0051, 2005 WL 3115850, at *1 (Iowa Ct. App. Nov. 23, 2005). There, a defendant convicted of homicide by vehicle asserted that his trial attorney was ineffective in failing to "retain an expert toxicologist to examine the blood alcohol testing procedures followed by the State in testing [his] blood sample after money was set aside for that purpose." *Hernandez*, 2005 WL 3115850, at *1. The court of appeals agreed, concluding the defendant "was prejudiced." *Id.* at *4. The court stated that there was "a strong probability" an expert would have "called into doubt the validity of the State's" blood alcohol concentration test. *Id*.

This case is far different. The angle of the knife as it entered Decker was not "central to the defense of justification," as Farnsworth contends. Farnsworth concedes as much in connection with another argument—he correctly notes that the focus was on who started or continued the fight. The county attorney also did not believe "the angle" of the knife "was a huge issue." He "thought the bigger issue was who . . . approached who first and whether he . . . was able to stab the guy." And, as the postconviction court noted, the forensic pathologist had "no reason to question the autopsy findings and conclusions" and opined that "the determination of directionality of stab wounds often is somewhat subjective." As for the number of stab wounds, it matters little whether there were two or three; the key fact was that the stab wound to Decker's chest caused his death.

At the end of the day, whether to call an expert witness is a matter of trial strategy. *See Heaton v. State*, 420 N.W.2d 429, 432 (Iowa 1988). Farnsworth's trial attorney reasonably could have decided that an equivocal opinion such as the one given by the pathologist at the postconviction proceeding would have bolstered the state medical examiner's testimony and undermined the testimony of the non-expert witnesses who described Farnsworth's position relative to Decker's. *See Babcock v. State*, No. 19-1035, 2021 WL 603229, at *3–4 (Iowa Ct. App. Jan. 21, 2021) (stating defendant failed to show a defense expert "would have helped him in his murder trial"); *Dawson v. State*, No. 17-1679, 2019 WL 1940727, at *5 (Iowa Ct. App. May 1, 2019) (concluding defendant was not prejudiced by counsel's failure to call an expert pathologist to opine on how aggressive a fight was). On our de novo review, we agree with the district court that Farnsworth's attorney was not ineffective in failing to call an expert witness at trial.

II. Failure to State Standard of Proof

Farnsworth next contends his trial attorney "in his closing argument failed to mention the standard of proof" and this "omission has to be below the level of competent counsel." Farnsworth concedes he was unable "to find any case where counsel was declared ineffective for failing to mention or discuss the standard of proof, that is 'beyond a reasonable doubt.'" His concession together with a jury instruction on the applicable burden of proof are dispositive. Also telling is the jury's rejection of the State's case for first-degree murder, notwithstanding counsel's failure to mention the burden of proof. We agree with the postconviction court that Farnsworth failed to show counsel "breached any duty, let alone an essential duty" and did not show "he was prejudiced by the closing argument made by" counsel.

III. Failure to Challenge Sufficiency of the Evidence on Justification

Farnsworth argues his trial attorney was ineffective in failing to challenge "the sufficiency of the evidence that [he] [] initiated the fatal conflict either at trial or on appeal." But, as the State notes, his attorney did challenge the sufficiency of the evidence on this issue. Counsel stated:

> [T]he State has not proven, given that every witness that testified on behalf of the State, indicated that Ian Decker initiated the action, commenced the first blows. And that every witness produced by the State indicated that Mr. Farnsworth absorbed those blows and was below Mr. Decker. That the State has not proved, as they are required to do, that the defendant was not justified.

The trial court found there was "sufficient evidence to submit the case to a jury in regard to all of the elements and in regard to the defense." That there was. The court of appeals summarized the evidence in the prior opinion. *Farnsworth*,

2014 WL 2884732, at *1–2. The court pointed out Farnsworth punched his girlfriend at a bar after she received a text from her ex-boyfriend Decker, waited for her outside the bar, proceeded to an apartment where his girlfriend and others were headed, left the apartment but returned, and continued a fight initiated by Decker, that ultimately resulted in the stabbing. *Id*.

The jury reasonably could have found the State proved Farnsworth "continued the incident which resulted in injury or death," an element contained in the justification instruction. As the postconviction court stated, "Farnsworth had several opportunities to avoid the fatal fight with Decker but each time he made choices and took actions which continued the tension and ill will that was building up." On our de novo review, we conclude counsel could not have breached an essential duty because he raised a challenge to the sufficiency of the evidence supporting justification but, in any event, Farnsworth was not prejudiced. *See State v*. *Bowers*, No. 18-1827, 2020 WL 1310290, at *2 (Iowa Ct. App. Mar. 18, 2020) (concluding the defendant could not "show he was prejudiced by counsel's omission [of the justification defense] when moving for judgment of acquittal because the State presented ample evidence to counteract his justification defense"); *Weatherspoon v*. *State*, No. 03-0498, 2005 WL 723882, at *2 (Iowa Ct. App. Mar. 31, 2005) (finding no prejudice where "[t]he evidence overwhelmingly demonstrate[d] that even though [someone else] was the first aggressor, [the defendant] defended himself with an unreasonable amount of force, thereby negating any reliance on self-defense as justification for his actions").

IV. Other Ineffective-Assistance-of-Counsel Claims

Farnsworth argues "[t]here are many [other] instances where the performance of [trial counsel] dropped below the standard of reasonably competent counsel." He specifically contends (A) counsel should never have taken the case because of his inexperience in handling felony jury trials and because of a claimed conflict of interest; (B) counsel did not move to sequester witnesses; (C) counsel failed to tell his client about a plea offer; (D) counsel failed to object when the prosecutor told the jurors they did not have to be unanimous on the justification defense; (E) counsel failed to properly question the state medical examiner; (F) counsel failed to refer to the downward angle of the fatal stab wound in closing argument; (G) counsel was ineffective on appeal; and (H) counsel mishandled the original bond conditions and failed to appeal the forfeiture provisions contained in the sentencing order. He contends "[a]ll the claims of ineffective counsel cumulatively establish the necessary prejudice."

A. Inexperience of Counsel/Conflict of Interest

Farnsworth argues, "The breach of duty started when [counsel] took the case, a first degree murder case, that he was not competent to handle." He cites the postconviction testimony of the attorney's legal assistant, who stated the attorney quoted a high retainer because he really did not want to take the case. The testimony provides little support for the inexperience claim given the legal assistant's concession that Farnsworth's attorney might have just had "a lot on [his] plate and this would be a lot more."

Farnsworth also cites evidence of his attorney's misappropriation of assets and other "misdeeds." We agree with the postconviction court that Farnsworth

failed to tie those misdeeds to the representation in his case. Counsel's role in securing a verdict for the lesser offense of second-degree murder also weakens his claim of incompetence. We conclude counsel was not ineffective in taking Farnsworth's first-degree murder case.

We turn to the claimed conflict of interest. Farnsworth contends his attorney "should never have taken the case involving a serious crime in Mason City" because "[h]is firm represented the Mason City Police Department." Farnsworth was required to prove the firm's representation of the city posed an actual conflict of interest. *See State v. Watson*, 620 N.W.2d 233, 238 (Iowa 2000); *see also State v. Vaughan*, 859 N.W.2d 492, 500 (Iowa 2015) ("When neither the defendant nor his or her attorney raises the conflict of interest, the defendant is required to show an adverse effect on counsel's performance to warrant reversal, even if the trial court should have known about the conflict and failed to inquire."). He failed to make that showing. As the postconviction court stated:

> There is nothing in the record before the Court to show that [counsel] or his law firm ever represented any of the police officers whom the State called as trial witnesses against Farnsworth, whether in their individual capacity or as members of the Mason City Police Department, in any other lawsuits or legal matters. Further, there is nothing in the record in this case to show that any of the police officers whom the State called as trial witnesses against Farnsworth played any role or had any involvement in the cases where [counsel] or his law firm served as counsel for the City of Mason City.

See Dewberry v. State, No. 14-1198, 2015 WL 7567514, at *5 (Iowa Ct. App. Nov. 25, 2015).

B. Sequestering of Witnesses

"Courts have long recognized the practice of excluding witnesses as a means of preventing a witness from shaping his testimony to confirm with that of earlier witnesses." *State v*. *Sharkey*, 311 N.W.2d 68, 70 (Iowa 1981). Farnsworth argues "[t]here was no order on the record requiring sequestering of witnesses."

The record on whether witnesses were sequestered was conflicting. At the postconviction hearing, Farnsworth testified he "looked back . . . where all the people could sit . . . [and] saw some of the witnesses before they had testified." His brother similarly testified to seeing witnesses in the courtroom before they testified. The county attorney, in contrast, stated it was "standard protocol" to sequester witnesses and "we did that in this case." The attorney who prosecuted the case similarly testified witnesses sat and waited in a different room and "would have to be brought in from that room." She recalled discussing the issue with a witness and testified, "I know that they were sequestered because otherwise there would be no reason to keep [that witness] out." The victim-witness coordinator testified, "[W]e made arrangements with the Sheriff's Department of where the witnesses would be stationed until they went into court to testify." She said, "[W]e also spoke with them as far as not talking about the case or any testimony when they testified."

Even if a court could have found the testimony of Farnsworth and his brother more credible than the testimony of the State witnesses, the State correctly points to an absence of "proof that any of the State's witnesses changed their testimony or were otherwise influenced by anything someone else said in the courtroom."

Farnsworth failed to prove he was prejudiced by any failure to follow the sequestration protocols.

C. Plea Offer

Farnsworth contends his attorney "did not tell [him] about a plea offer." At the same time, he concedes his attorney told him the prosecutor would not offer anything less than second-degree murder and a plea of that nature would be unacceptable to Farnsworth or his family. In Farnsworth's words, "[I]t was nothing that we pursued after that."

The county attorney confirmed telling defense counsel "murder two was as low as [he] could go." In the prosecutor's words defense counsel responded, "[H]is client would not plead guilty to a murder two, so that pretty much ended discussions." Counsel could not have breached an essential duty in failing to convey a plea Farnsworth categorically ruled out. In any event, the jury returned a verdict for second-degree murder. Accordingly, Farnsworth could not establish he was prejudiced by any failure to convey any plea offer of second-degree murder.

D. Non-unanimous Jury in Deciding Justification Defense

Farnsworth argues his attorney "did not object when the prosecutor told the jury how they did not have to [be] unanimous [in deciding the justification defense]." But he also concedes, "In all likelihood, the statement by the Prosecutor to the jury during closing arguments regarding unanimity was a correct statement in the law." If the prosecutor's statement of the law was correct, Farnsworth's attorney could not have breached an essential duty in failing to challenge it.

E. Cross-Examination

Farnsworth contends his attorney "was ineffective in his examination of" the state medical examiner by "allowing the evidence that the fatal wound occurred in a downward direction." We discussed the issue in Part I. We reiterate the angle of the knife as it entered the chest was of scant importance in establishing the cause of death. The key fact was the knife's penetration into Decker's heart. Farnsworth failed to establish he was prejudiced by his attorney's questioning of the medical examiner.

F. Angle of Fatal Stab Wound

Farnsworth contends his attorney "was ineffective by failing to make any argument in closing regarding the downward angle of the fatal blow." We have already discussed the minimal relevance of the testimony. In addition, the jury received an instruction stating closing arguments were not evidence, a rule Farnsworth's attorney highlighted in his closing argument. He told the jury more than once not to accept the prosecutor's version of events. He highlighted Decker's role as "the aggressor"; Decker's "initiat[ion of] the contact"; Decker's act of "forc[ing] [Farnsworth] to the ground after striking him about the face and head"; and Decker's infliction of "multiple blows." He underscored the fact that "Farnsworth went to the ground" and "Decker was crouched above him before the stabbing took place." He summed up as follows: "[Farnsworth] on his knees, Ian Decker above him, he reacted. And as such, he's entitled [to] your consideration of self-defense." In short, counsel tackled the justification defense, asked the jury to discount the prosecutor's version, and succinctly summarized the facts supporting a finding of justification. Counsel did not breach an essential duty in

failing to counter the prosecutor's statements regarding the angle of the knife, and the omission was non-prejudicial.

G. Ineffective Appellate Counsel

Farnsworth contends counsel "was ineffective on appeal in quite a number of ways." He notes that counsel "messed up the combined certificate by identifying the appeal as from a guilty plea" and "failed to follow proper procedure" by omitting "the required section about preservation of error." As the State points out, "these delays in submitting the proof brief did not harm Farnsworth—his appeal continued through the adjudicatory process, including oral argument, a decision by the Court of Appeals, and denial of further review by the Supreme Court." Farnsworth failed to establish that he was prejudiced by counsel's omissions.

H. Mishandling of Appearance Bond

Farnsworth was "[h]eld for bond in the amount of: $100,000." A provision requiring cash bail was crossed out. Counsel made a request for bond review. Following a hearing, the district court amended the bail requirements to permit release from custody "only upon the posting of bond in the amount of $200,000 cash only," with "[a]t least $50,000 of this cash bond" to "be posted in" Farnsworth's name only. "The remainder (up to $150,000) of cash bond" could be "posted by surety." A $150,000 bond was posted by surety and Farnsworth deposited $50,000 cash in his name with the clerk of court. The $50,000 cash appearance bond contained language authorizing the clerk of court to use the "bail bond to "pay all fines, surcharges, [costs] and victim restitution that" may be ordered by the court. The $150,000 bond posted by the surety did not contain the same language.

After the jury found Farnsworth guilty, the sentencing order required him to pay $150,000 in pecuniary damages to Decker's heirs and $14,972 of restitution to the Crime Victim Assistance program. The court later released and exonerated the surety bond. The court expressed an intent to forfeit the $50,000 cash bond "for application toward victim restitution . . . [i]n the absence of a written objection by either party." Farnsworth's attorney lodged no objection and the court forfeited the bond. The restitution plan provided for $164,972 in restitution, applied the $50,000 cash bond to that sum, and stated $114,972 was "due."

Farnsworth contends his attorney mishandled his appearance bond. In his view, counsel should have left the original bond of $100,000 alone. As a result of his requested bond review, he argues the bond was doubled and Farnsworth was required to post $50,000. He also argues, "This was clearly intended to create a fund out of which statutory restitution could be paid in the event of the conviction." Farnsworth concedes his attorney "told the family this was illegal for restitution to be part of the consideration of bond" but argues he "did not do anything about it."

We need not address whether counsel breached an essential duty in seeking bond review. The operative omission with respect to the bond was counsel's failure to object to the court's application of the cash portion to Farnsworth's restitution obligation. *See State v. Letscher*, 888 N.W.2d 880, 885, 887 (Iowa 2016) ("No statutory sentencing provision exists in Iowa to authorize a court to forfeit bail. . . . The disposition of pretrial bail money is not an authorized part of sentencing, and therefore, a sentencing court is without statutory authority to forfeit bail as a part of a sentence. Action taken against bail must comply with the statutory terms and conditions."). Although the State correctly notes *Letscher*

postdated Farnsworth's posting of his bond and counsel had no duty "to foresee that result," counsel did not require *Letscher* to argue that no statutory authority supported the forfeiture of the cash bond for restitution. Indeed, statutory authority in effect at the time said precisely the opposite:

> Upon the filing of the undertaking and the certificate of the officer, or the certificate of the officer alone if money has been deposited instead of bail, *the court or clerk shall immediately order return of the money deposited to the person who deposited the same*, or order an exoneration of the surety.

Iowa Code § 811.8(2) (2015) (emphasis added). We conclude counsel had a duty to object to the district court's expressed intent to apply the cash bond amount to his outstanding restitution obligation. We further conclude Farnsworth was prejudiced by the omission, to the tune of $50,000. We "return the case to the district court for the clerk to disburse the bail money as required by law." *Letscher*, 888 N.W.2d at 886.

V. Disposition

We affirm the district court's denial of all the ineffective-assistance-of-counsel claims except the claim that Farnsworth's attorney should have objected to the intended forfeiture of the $50,000 cash bond. We reverse the denial of that claim and remand for return of that sum to Farnsworth.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
20-0786	Farnsworth v. State

Electronically signed on 2021-11-03 08:24:03