IN THE SUPREME COURT OF IOWA

No. 23–0568

DONALD LYLE CLARK,

Appellee,

vs.

STATE OF IOWA,

Appellant.

Appeal from the Iowa District Court
Johnson County Case No. LACV079404
Honorable Lars Anderson, District Judge

APPELLANT'S FINAL BRIEF

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II. In a legal malpractice action against a public defender, is telling the jury that the public defender was previously adjudicated to have violated the plaintiff's Sixth Amendment rights and to have provided the plaintiff ineffective assistance of counsel prejudicial as a matter of law, such that the district court erred in denying a mistrial?

Important Authorities

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ROUTING STATEMENT

The Court should retain this case. It involves a "malpractice claim related to representation of a client in a criminal matter," otherwise known as a "criminal malpractice" claim. *Clark v. State ("Clark III")*, 955 N.W.2d 459, 464 n.3 (Iowa 2021); *see Barker v. Capotosto*, 875 N.W.2d 157, 161 n.2 (Iowa 2016). And it presents a substantial question of clarifying or changing legal principles—particularly whether (and under what circumstances) emotional distress damages are available in legal malpractice cases generally, and in this criminal malpractice case specifically. *See* Iowa R. App. P. 6.1101(2)(*f*); *see also Miranda v. Said*, 836 N.W.2d 8, 33 (Iowa 2013); *id.* at 35 (Waterman, J., dissenting) (opining *Miranda* was "the first time an Iowa appellate court has allowed a claim for emotional distress to proceed in a legal malpractice action").

In addition, while the district court's ruling is not a published decision, allowing emotional distress damages here conflicts with how the Iowa Court of Appeals applied *Miranda* and the "illegitimate conduct" standard in *McFarland v. Rieper*, No. 18–0004, 2019 WL 2871208, at *3 (Iowa Ct. App. July 3, 2019). *Cf.* Iowa R. App. P. 6.1101(2)(*b*). Retention will let the Court harmonize, synthesize, or reconcile *Miranda*, *McFarland*, and other applicable precedents such as *Lawrence v. Grinde*, 534 N.W.2d 414, 422–23 (Iowa 1995).

STATEMENT OF THE CASE

This is a legal malpractice action against a public defender. Plaintiff Donald Clark was charged with Second-Degree Sexual Abuse stemming from allegations that he inappropriately touched one of his counseling students, a ten-year-old boy. Public defender John Robertson represented Clark, but was unsuccessful. Clark was convicted and the convictions were affirmed on appeal.

After obtaining PCR relief, Clark filed a legal malpractice action against the State of Iowa, Robertson's employer. App. Vol. I, at 5. Robertson died before the PCR proceedings began in earnest, and thus had no opportunity in either the PCR proceeding or this lawsuit to explain his defense strategy, decision-making, or investigative efforts.

Clark exclusively pursued emotional distress damages in his legal malpractice case. And during trial, Clark's expert defied an *in limine* order, telling the jury that Robertson had already been adjudicated to have violated Clark's Sixth Amendment rights and to have provided Clark with ineffective assistance of counsel.

After six days of trial, the jury returned a substantial verdict for Clark, awarding him $12 million in emotional distress damages. App. Vol. II, at 73. But Clark's damages are not cognizable, and the expert's statement was prohibitively prejudicial, so the State appeals.

STATEMENT OF THE FACTS

This appeal stems from two trials—a criminal sex-abuse trial and a later legal malpractice trial. Recounting the material events of two separate jury trials spills some ink, but the record sheds important light on the district court's errors.

C.B., a Minor Child, Accuses Clark of Sexual Abuse

In 2004, a ten-year-old boy—C.B.—was a fifth-grade student at Lemme Elementary School in Iowa City. [App. Vol. I, 174, Crim. Tr. 32:16-17].[1] When C.B. started acting out in class, he began seeing the elementary school's counselor, Donald Clark, once or twice a week. [App. Vol. I, 174–75, Crim. Tr. 32:19–33:9].

When Clark first started at Lemme, he covered his door window—the sole window into the classroom—with paper. [App. Vol. I, 231–32, Crim. Tr. 89:20–90:21]. He had to be coached by the principal to remove the full covering, though he left part of his window covered. [App. Vol. I, 232, Crim. Tr. 90:18-21]. Clark kept no counseling records of his students. [App. Vol. I, 251, Crim. Tr. 109:13-24].

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[1] Clark's criminal trial transcript was read to this jury. [9/21/22 Tr. 30:5]. Because a transcript already existed, it was not simultaneously reported into the malpractice trial transcript. [9/21/22 Tr. 29:23–30:2]. Portions of the criminal trial transcript that were not read to this jury are indicated with black lines. [9/27/22 Tr. 96:16–97:3].

At first C.B.'s visits with Clark were fine. [App. Vol. I, 176, Crim. Tr. 34:2-4]. Clark was kind to C.B. and played games with him on the floor of his classroom. [App. Vol. I, 176, Crim. Tr. 34:6-8].

But then it changed. One day, Clark consoled C.B. and put his hand on C.B.'s knee. [App. Vol. I, 176, Crim. Tr. 34:17-18]. Clark moved his hand up C.B.'s thigh, up C.B.'s upper thigh, and started touching C.B.'s "genitals outside of [his] pants." [App. Vol. I, 176, Crim. Tr. 34:17-20]. C.B. froze and then tried to protest, but Clark put his hand over C.B.'s mouth. [App. Vol. I, 176, Crim. Tr. 34:22–35:6]. Clark stopped, told C.B. not to tell anyone, waited for C.B. to calm down, and then walked C.B. back to class. [App. Vol. I, 177, Crim. Tr. 35:7-11].

Clark continued to retrieve C.B. and bring him in for sessions, and C.B. continued to comply because, as a ten-year-old, he "saw adults as authority figures." [App. Vol. I, 178, Crim. Tr. 36:9-12].

But then it happened again. Clark retrieved C.B. from class, brought him into his room, and turned off the lights. [App. Vol. I, 178, Crim. Tr. 36:21-25]. Clark covered C.B.'s face with a stuffed animal, put his hands inside C.B.'s pants, and rubbed C.B.'s genitals. [App. Vol. I, 179, Crim. Tr. 37:5-7]. C.B. tried to tell him to stop, but he was muffled by the stuffed animal. [App. Vol. I, 179, Crim. Tr. 37:7]. Clark told him to "shut up," and sounded

"aggravated, very upset, [and] aggressive." [App. Vol. I, 179, Crim. Tr. 37:7-9]. Clark eventually stopped, waited for C.B. to stop crying, and walked him back to class. [App. Vol. I, 179, Crim. Tr. 37:23-24]. Clark told C.B. not to tell anyone about what happened. [App. Vol. I, 180, Crim. Tr. 38:2-5].

Like many child victims, C.B. kept his abuse a secret for years, struggling to understand what happened or whether it was his fault. [App. Vol. I, 180, Crim. Tr. 38:9-14]. And his life took a drastic turn. [App. Vol. I, 188, Crim. Tr. 46:15-24]. He was severely depressed, using drugs and alcohol in middle school. [App. Vol. I, 197, Crim. Tr. 55:17-24]. He attempted suicide. [App. Vol. I, 187, Crim. Tr. 46:23-24]. C.B.'s parents eventually enrolled him in the Midwest Academy, a school for troubled youth. [App. Vol. I, 228, Crim. Tr. 86:10-12].

C.B. attended group therapy at the Academy, where during a session another student recounted sexually abusing his brother. [App. Vol. I, 181, Crim. Tr. 39:19-25]. The story roused C.B.'s emotions about the abuse, and he finally relented. [App. Vol. I, 182, Crim. Tr. 40:4]. C.B. wrote an email letter to his parents, disclosing Clark's abuse roughly five years after it occurred. [App. Vol. I, 182, Crim. Tr. 40:5-6].

C.B.'s parents notified the school and the police, and both a social worker and detective interviewed C.B. [App. Vol. I, 182,

Crim. Tr. 40:5-9]. C.B. gave the police oral and written statements. [App. Vol. I, 182, Crim. Tr. 40:10-12].

Clark was questioned by the police in a two-hour, recorded interview. [App. Vol. I, 253, Crim. Tr. 110:20-24]. Although the questioning officer never disclosed the exact allegation, Clark specifically denied rubbing C.B. [App. Vol. I, 253, Crim. Tr. 111:2-4]. The officer found that significant, as he never mentioned any allegation of rubbing at that point. [App. Vol. I, 253, Crim. Tr. 111:4-7]. Clark told the officer he thought C.B. was gay. [App. Vol. I, 253, Crim. Tr. 111:22-23]. Clark speculated C.B. was struggling with his sexuality and blamed Clark, who himself was gay. [App. Vol. I, 254, Crim. Tr. 112:20-25].

During the investigation, the officer visited Lemme Elementary School. He described Clark's classroom as "off a main hallway." [App. Vol. I, 255, Crim. Tr. 113-24]. The officer believed the classroom was "kind of out of the way," as he visited it both during summer and when school was in session and "never saw anybody around either time." [App. Vol. I, 256, Crim. Tr. 114:3-6].

If Clark's door was closed, the only way to see into his classroom was through a six-inch wide, three-feet tall window in the door. [App. Vol. I, 257, Crim. Tr. 115:18-20]. The officer "could not see very much [into the classroom] from just even a few feet back." [App. Vol. I, 256, Crim. Tr. 114:21-24]. According to the

officer, to see the "entire room, you would have to have your face pressed against the glass." [App. Vol. I, 256, Crim. Tr. 114:24–115:1]. And if the classroom lights were off, "you cannot see anything inside." [App. Vol. I, 257, Crim. Tr. 115:15-17]. When the officer visited the classroom, he observed tape and tape residue on the window. [App. Vol. I, 263, Crim. Tr. 121:2-5].

The State charged Clark with Second-Degree Sexual Abuse. [App. Vol. I, 263, Crim. Tr. 121:19-22].

Clark Is Represented by Public Defender John Robertson

After Clark's arrest, assistant local "public defender John Robertson represented Clark" after being appointed by the district court. *Clark III*, 955 N.W.2d at 462; *see* Iowa Code § 13B.8(1)–(2).

Robertson, like many public defenders, had a full caseload of over 500 cases that year, including nearly four dozen felonies. [9/26/22 Tr. 24:1-12]. *See Barker*, 875 N.W.2d at 172 (Zager, J., dissenting) (observing court-appointed criminal defense counsel nationwide face "increasing caseloads and shrinking budgets").

Before trial, Robertson deposed C.B., C.B.'s parents, and the investigating officer. During the depositions, "the existence of" C.B.'s email to his parents from the Academy "was disclosed to the [Robertson]. That email was the first disclosure of a possible

diagnosis of schizophrenia." *State v. Clark* ("*Clark I*"), 2011 WL 5514221, at *5 (Iowa Ct. App. 2011) (Mullins, J., dissenting).

Robertson "immediately requested a copy of the email. The State failed to provide a copy of that email until . . . only five days before trial, and then provided only a redacted version." *Id.* "The late disclosure was not a problem of defendant's making." *Id.* Indeed, the State waited "six business hours" before trial to disclose the "victim believed he was suffering from schizophrenia." *Id.* "Regardless of the reason for the delay in disclosure, . . . it is the State that failed to make timely disclosure." *Id.*

In response to the late disclosure, Robertson moved for a continuance and to reopen depositions, but the court denied the motion. *State v. Clark* ("*Clark II*"), 814 N.W.2d 551, 558 (Iowa 2012). Robertson persisted. *Id.* The morning of trial, Robertson renewed his motion for continuance, which was again denied. *Id.;* [9/22/22 Tr. 112–14]. So the case proceeded to trial.

Robertson's opening statement told the jury what it needed to know: C.B. was a troubled child, C.B.'s troubles existed long before meeting Clark, C.B. waited a long time to report the supposed abuse, Clark was a professional who cared about children and their privacy, Clark never had any other allegations against him like this, the prosecution's case has problems, and the evidence won't show that C.B. was abused. [App. Vol. I, 165–66, Crim. Tr. 23:18-

29:2]. He told the jury to "have courage," to follow its instincts, and that "in the end you will have question mark, after question mark, after question mark, after question mark as to what is really going on here." [App. Vol. I, 169–70, Crim. Tr. 27:25–28:4].

C.B. took the stand, now sixteen years old. [App. Vol. I, 172, Crim. Tr. 30:21]. C.B. recounted the sexual abuse and why, at ten years old, he didn't come forward. [App. Vol. I, 176, Crim. Tr. 34:11–40:12]. He told the jury that the abuse never left him. [App. Vol. I, 182, Crim. Tr. 40:13-16].

Robertson cross-examined C.B.—conducting "the delicate and often difficult task of cross-examining a child who claimed to have been the victim of sexual assault." *People v. Hemingway*, 85 A.D.3d 1299, 1303 (N.Y. Sup. Ct. 2011).

Robertson explored the "horrifying" environment at the Academy at the time C.B. disclosed his abuse, implying that C.B.'s story was a ruse to persuade his parents to bring him home. [App. Vol. I, 184–85, Crim. Tr. 42:17–43:15]. Robertson questioned C.B. about having schizophrenia—eliciting testimony that C.B. would "think that someone would be talking to me, but no one would be there." [App. Vol. I, 186, Crim. Tr. 44:1-3]. Robertson confirmed that C.B.'s parents started believing he was sexually abused in third grade, likely by a Catholic priest, to explain his behavior issues. [App. Vol. I, 187, Crim. Tr. 45:18-25]. Robertson got C.B. to admit

he'd previously lied about other people being "out to get" him. [App. Vol. I, 189, Crim. Tr. 47:11-15].

Robertson also questioned C.B. about his prior knowledge of Clark sexually touching someone else. C.B. testified that he learned from his father that, while Clark was in jail for an OWI, Clark engaged in "sexual acts" with an inmate. [App. Vol. I, 195–96, Crim. Tr. 53:22–54:21]. In all, Robertson's cross-examination showed the jury C.B. was troubled, often lied, and could have been repeating a story he heard about Clark to escape the Academy.

Robertson cross-examined C.B.'s parents. Robertson showed the father never noticed anything off about C.B.'s demeanor during the alleged abuse. [App. Vol. I, 210, Crim. Tr. 68:13-15]. And Robertson again confirmed C.B. learned of Clark's sexual acts in jail prior to accusing him Clark of sexual abuse. [App. Vol. I, 216, Crim. Tr. 74:7-15].

Two Lemme staff members testified. The principal relayed his concerns that Clark would cover his door window. [App. Vol. I, 232, Crim. Tr. 90:12-21]. But Robertson's cross-examination showed that the issue pre-dated Clark counseling C.B. and the issue never arose again. [App. Vol. I, 236, Crim. Tr. 92:23–93:3]. Robertson showed Clark treated between 70 and 100 kids a year, and that it was normal for elementary school counselors to have stuffed animals in the classroom. [App. Vol. I, 236, Crim. Tr. 94:19–95:13].

Another teacher also testified to being concerned that Clark covered his door window. [App. Vol. I, 240, Crim. Tr. 98:4-14]. Robertson confirmed the teacher would, "in a heartbeat," report any concern that a teacher was inappropriate with a student, and the teacher never reported Clark. [App. Vol. I, 242, Crim. Tr. 100:24–101:8].

Robertson then cross-examined the investigating officer. Robertson showed the officer never saw C.B.'s email to his parents discussing schizophrenia, nor did the officer follow up on C.B. learning of Clark's sexual acts in jail. [App. Vol. I, 265, Crim. Tr. 123:12-25]. Robertson implied the officer helped C.B. with his witness statement—how else would C.B. know Clark's middle name? [App. Vol. I, 266, Crim. Tr. 124:1-16]. Robertson exposed that the officer never knew about C.B.'s mental health history or pattern of lying. [App. Vol. I, 267, Crim. Tr. 125:15-23]. And Robertson conveyed the officer made up his mind before ever speaking with Clark. [App. Vol. I, 269–70, Crim. Tr. 127:24–128:22].

Robertson also disputed the officer's description of the classroom. Robertson showed the office was historically used as a counseling office—Clark didn't pick its location. [App. Vol. I, 272, Crim. Tr. 130:10-18]. The officer did not check to see if other doors

had tape or other paper decorations. [App. Vol. I, 272, Crim. Tr. 130:19-23].

Clark chose to testify in his defense. Robertson presented an experienced educator—someone who taught children friendship skills, supported parents, and appeased teachers. [App. Vol. I, 278–79, Crim. Tr. 136:11–137:2]. Clark helped teach children what sexual abuse is and how to report it. [App. Vol. I, 280, Crim. Tr. 138:7-18]. Indeed, C.B. was in the group of boys Clark taught about sexual abuse. [App. Vol. I, 280, Crim. Tr. 138:23-25].

Clark detailed how C.B. came to see him, showing C.B.'s behavior problems predated his counseling sessions. [App. Vol. I, 281–84, Crim. Tr. 139:1–142:6]. He told the jury using stuffed animals is part of counselor's required curriculum, and he explained that he doesn't keep records so they aren't used against children during custody disputes. [App. Vol. I, 287–88, Crim. Tr. 145:14–146:4]. Clark testified he never touched children during one-on-one sessions, not even hugs. [App. Vol. I, 292, Crim. Tr. 150:4-10]. Nor did he share his sexual orientation with students. [App. Vol. I, 293, Crim. Tr. 151:1-21].

Robertson asked Clark about his classroom. [App. Vol. I, 294, Crim. Tr. 152:20]. Clark explained the has long been a counselor's office. [App. Vol. I, 294–95, Crim. Tr. 152:20–153:4]. He testified he first decorated his room—including his door—to make it fun for the

kids. [App. Vol. I, 296, Crim. Tr. 154:17-25]. After being spoken to, he testified to leaving "that little window completely open" and just decorating around it. [App. Vol. I, 297, Crim. Tr. 155:5-13].

Clark kept his door open for some group activities, though he kept it closed when speaking to children one-on-one, since "it was hard enough to get kids to feel comfortable enough to talk to you." [App. Vol. I, 296, Crim. Tr. 154:1-10]. Robertson also had Clark confirm he never covered any part of his window while counseling C.B., and never turned the lights off. [App. Vol. I, 297–98, Crim. Tr. 155:22–156:3].

Robertson asked Clark about getting the phone call from the police, and Clark broke down on the stand. [App. Vol. I, 299, Crim. Tr. 157:11-14]. Clark explained his speculations about where the false allegations were coming from, and that in his experience, children will often blame someone they trust because they still fear the actual perpetrator. [App. Vol. I, 299–300, Crim. Tr. 157:12–158:7].

On cross, the prosecutor repeatedly questioned Clark on his knowledge of sexual abuse victims. [App. Vol. I, 305–06, Crim. Tr. 163:1–164:9]. Robertson objected to the questions, telling the court (and jury) that the prosecutor's "line of questioning actually functions to ty to put into the mind of the jurors information that is

not in evidence." [App. Vol. I, 298, Crim. Tr. 156:10-23]. The objection was overruled. [App. Vol. I, 298, Crim. Tr. 156:24].

Where Robertson presented an experienced educator, the prosecutor presented a predator—Clark knew how to spot a victim that was unlikely to report. [App. Vol. I, 305, Crim. Tr. 163:4-16]. Robertson continued to object to the questioning but was overruled. [App. Vol. I, 307, Crim. Tr. 165:4-11].

Robertson called no other witnesses to testify. [App. Vol. I, 308, Crim. Tr. 166:15]. Like many defense lawyers, Robertson's approach was primarily poking holes in the prosecution's case.

As with the opening, Robertson's closing told the jury what it needed to know. He reminded the jury to disregard advocacy and focus on what facts were actually proven. [App. Vol. I, 342, Crim. Tr. 192:3-6]. He placed the jury in Clark's shoes—how do you defend yourself against something like this? [App. Vol. I, 342, Crim. Tr. 192:14-15]. He explained how one allegation caused every aspect of Clark's life to be wielded against him—his benign classroom choices, his private sex life. [App. Vol. I, 342, Crim. Tr. 192:20-24]. He asked the jury to consider the investigating officer's neutrality, and why he went to great lengths to try to construct a narrative. [App. Vol. I, 343, Crim. Tr. 193:2-9].

Robertson explained the window covering, arguing Clark was reasonable to try to protect his students' privacy. [App. Vol. I, 344,

Crim. Tr. 194:3-5]. And wanting to protect students doesn't make anyone a sex abuser. [App. Vol. I, 344, Crim. Tr. 194:11-15].

Robertson emphasized all the problems with C.B.'s credibility. Robertson reminded the jury C.B.'s problems arose long before Clark's counseling, with evaluations starting in second grade. [App. Vol. I, 345, Crim. Tr. 195:1-7]. C.B.'s grades didn't dip until seventh grade—two years after the alleged abuse and in stark contrast with the prosecution's theory that C.B.'s life immediately deteriorated. [App. Vol. I, 345, Crim. Tr. 195:16-21].

Robertson directed the jury to the timing of C.B.'s disclosure. [App. Vol. I, 346, Crim. Tr. 196:7-14]. C.B. was having a terrible time at the Academy—kids were "masturbating into their hands and wiping it on other kids' faces." [App. Vol. I, 347, Crim. Tr. 197:4-6]. So just three weeks into the Academy, C.B. writes to his parents and tells them he was abused, he's ready to talk about it, and he doesn't need the Academy anymore. [App. Vol. I, 346, Crim. Tr. 196:15-25].

Robertson told the jury that C.B. needed someone to pin it on, and Clark was the obvious target. [App. Vol. I, 347, Crim. Tr. 197:14-23]. After all, C.B.'s parents told him Clark got himself into trouble for sex acts before. [App. Vol. I, 347, Crim. Tr. 197:16-19]. "Now, the child is desperate. He's in a bad place. He wants an

escape hatch and he makes an allegation." [App. Vol. I, 347, Crim. Tr. 197:21-23].

Robertson emphasized the presence of doubt—"None of us were there. We don't know what happened." [App. Vol. I, 350, Crim. Tr. 200:1-4]. In closing, "If you hesitate, as you add it up, if you hesitate, you must acquit." [App. Vol. I, 350–51, Crim. Tr. 200:25–201:1].

The day after closing arguments, the jury found Clark guilty of Sexual Abuse in the Second Degree. *Clark* II, 814 N.W.2d at 560. Clark was sentenced to an indeterminate term not to exceed 25 years in prison. *Id.*

Clark's Conviction Is Affirmed on Appeal

Clark appealed. *Clark I*, 2011 WL 5515221. Clark's appellate counsel argued that Clark was deprived of a meaningful defense when the district court refused his request for a continuance and denied his request to re-depose C.B. and C.B.'s parents. *Id.* at *3.

A divided panel of the Iowa Court of Appeals affirmed the district court, finding "the email itself was thoroughly explored by defense counsel at trial during his cross-examination of the child and in closing arguments." *Id.* Judge Mullins dissented from the panel, emphasizing Robertson's decision-making. *Id.* at *5. "While it might have been reasonable for defense counsel to interpret the

initial disclosure that the alleged victim was 'hearing voices' as a serious mental health condition, it might also have been reasonable for counsel to initially discount such remarks made by an obviously troubled young man." *Id.*

After learning that the email disclosed possible schizophrenia, Robertson "immediately requested a copy of the email. The State failed to provide a copy of that email until . . . only five days before trial, and then provided only a redacted version." *Id.* Significantly, "[t]he late disclosure *was not a problem of the defendant's making*. . . . it is the State that failed to make timely disclosure." *Id.* (emphasis added).

The Iowa Supreme Court granted further review and affirmed the conviction. *Clark II*, 814 N.W.2d at 567. "The right to present a defense does not afford a criminal defendant the right to depose witnesses," and thus Clark had no constitutional right to pretrial discovery at all. *Id.* at 561. According to this Court, the email "did not dramatically change the direction of the case." *Id.* at 562. Nor did the court "believe the record supports a conclusion that the verdict was based simply on C.B.'s word against Clark's." *Id.* at 566. Instead, evidence showed C.B.'s behavioral issues worsened after he saw Clark, Clark made incriminating statements to the investigating officer, and Clark admitted he covered his window. *Id.* Thus, the conviction was affirmed. *Id.* at 567.

Justice Appel, joined by Justice Hecht, dissented. *Id.* According to the dissent, Clark was deprived of effective assistance of counsel when the district court denied the motion to continue. *Id.* at 568; *see also* Jon M. Woodruff, Note, *Plain Error by Another Name: Are Ineffective Assistance of Counsel Claims a Suitable Alternative to Plain Error Review in Iowa?*, 102 Iowa L. Rev. 1811, 1820–33 (2017) (discussing other Iowa precedent finding ineffective assistance despite no clear error by counsel). And Justice Appel similarly emphasized Robertson's limited options after the State's late disclosure. *Clark II*, 814 N.W.2d at 570.

Still, Clark's conviction was affirmed and his sole avenue for relief was through PCR.

Clark Receives PCR Relief

Robertson unexpectedly died in 2013. *Clark III*, 955 N.W.2d at 462 n.1. Thus, the remaining record—including all allegations of Robertson's purported strategy, "admissions," and decision-making—were made without Robertson here to defend himself, explain his reasoning, or dispute the account.

Clark filed for PCR relief, arguing newly discovered evidence required a new trial, Robertson inadequately investigated his defense, Robertson failed to obtain a continuance, and Robertson failed to exclude evidence of Clark's prior bad acts. *Id.* at 462. The district court granted PCR relief, finding both newly discovered

evidence and Robertson's ineffective assistance required a new trial. *Id.* The county attorney did not appeal the PCR ruling and declined to reprosecute Clark. *Id.*

Clark Sues the State for Negligent Representation and Argues PCR Ruling Is Preclusive

In 2017, Clark sued the State for legal malpractice, alleging Robertson was negligent and fell below the standard of care for licensed Iowa attorneys. App. Vol. I, at 9, ¶ 11.

During summary judgment, Clark forcefully argued that the PCR ruling declaring Robertson ineffective was preclusive, requiring judgment on the duty and breach elements of his negligence claim. Attach. to D0033, Pl. MSJ Brief, at 11–12 (05/08/2019). He argued "the legal issue of duty and breach are identical in the context of a post-conviction case and a legal malpractice case." *Id.* at 12. Indeed, "the legal standard for duty and breach is *more* arduous in the post-conviction case than the professional negligence case because of the strong presumption that in post-conviction that the challenged action 'might be considered sound trial strategy.'" *Id.* at 12 (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). Clark believed that any finding in this negligence action that Robertson did not breach his duty would functionally "overrule the post-conviction court and explicitly

challenge the finding that Clark was entitled to a new trial." *Id.* at 15.

Clark believed there was no way to separate his negligence claim and the ineffective-assistance ruling, and the district court agreed. D0052, Order (Aug. 29, 2019). The court found "[t]he issue of a breach of Robertson's duty to Clark was both raised and was central to the post-conviction matter." *Id.* at 3. The district court was skeptical that "the State would have worked harder or differently at defending the actions of defense counsel in the context of a malpractice action than it would have in defending its conviction in the post-conviction relief action." *Id.* at 5. Thus, the district court agreed the PCR ineffective-assistance ruling and Clark's negligence claim could not, and should not, be separated. So it granted Clark partial summary judgment for the duty and breach elements of his negligence claim. *Id.* at 11.

The Iowa Supreme Court reversed, emphasizing the nuanced distinction between PCR and malpractice actions. *Clark III*, 955 N.W.2d at 472. Relevant here, the court explained "adjudication of ineffective-assistance claims under Iowa law can turn on considerations beyond whether defense counsel's actions fell below an acceptable level of competence." *Id.* at 470. PCR inquiries are not meant "to pass judgment on the abilities of a defense lawyer. Rather, the overall concern is limited to whether our adversary

system of criminal justice has functioned properly." *Id.* (quoting *Noske v. Friedberg*, 670 N.W.2d 740, 746 (Minn. 2003)). Because "ineffective-assistance findings do not always track directly from counsel's actions," nor was the State in privity with the PCR prosecutors, Clark's PCR ruling was not preclusive on the issues of duty or breach in his negligence action. *Id.* at 472.

On remand, the parties prepared for trial. The district court prohibited the parties from discussing the PCR ruling and the State's decision not to reprosecute. D0225, Order, at 10–11 (09/19/22). The court instructed "[n]either the district court's postconviction ruling or the State's subsequent dismissal of the criminal case are relevant to the independent decisions that the jury must make on the legal malpractice claim." *Id.* at 10. And admitting the PCR decision—including findings of ineffective assistance of counsel or constitutional deprivations—"would be confusing to the jury and run the risk of misleading them." *Id.*

Clark's Negligence Trial

Since this action turned on the underlying criminal trial, the jury was read the transcript from Clark's criminal case. [9/21/22 Tr. 30:5]. Clark then put his expert, the Hon. Mark W. Bennett, on the stand.

After dutifully establishing Judge Bennett's credentials, Clark immediately flouted the *in limine* order. Bennett first told the

jury that negligence and ineffective-assistance are "first cousins." [9/22/22 Tr. 37:9-14]. Bennett then told the jury "in this kind of case where Mr. Clark is alleging that his court appointed lawyer John Robertson is negligent. *He can't bring that claim*, as I understand it, *unless there's been a determination by a judge*, that Mr. Robertson *violated the Sixth Amendment* and *provided ineffective assistance of counsel*." [9/22/22 Tr. 37:9-23] (emphasis added).

The State moved for a mistrial. [9/22/22 Tr. 37:24–38:20]. The State emphasized "[t]he jury now knows that the Court has made a finding," which is materially different from a witness claiming to have overheard Robertson say he subjectively believed he was ineffective. [9/22/22 Tr. 40:14-23]. And the State emphasized that the jurors wrote down Bennett's statement. [9/22/22 Tr. 44:1-2].

Clark, for his part, reiterated his belief that jurors should know Robertson was held ineffective. [9/22/22 Tr. 44:4-13]. The district court said it was a "close call," but denied the mistrial motion. [9/22/22 Tr. 47:24-25]. The court instead instructed the jury to "disregard, in its entirety, the last answer given by the witness. You are not to give any weight or attention to that testimony and disregard it in its entirety." [9/22/22 Tr. 49:2-6].

The trial continued. Bennett criticized Robertson for not knowing about C.B.'s email to his parents sooner, for not affirmatively obtaining it sooner, and then not investigating the

substance of the email sooner. [9/22/22 Tr. 65:12-18, 67:178-24, 68:9–69:9]. Bennett specifically emphasized Robertson's lack of investigation of the crime scene, and in turn his inability to more thoroughly cross the prosecution's witnesses about the classroom and hallway. [9/22/22 Tr. 71:16-23]. And he lambasted Robertson for not giving Clark the prosecution's photos ahead of time so Clark could dispute them. [9/22/22 Tr. at 99].

Notably, Bennett wanted to see the scene himself when preparing his report, but saw "no value" in viewing the school because construction had "completely changed" it. [9/22/22 Tr. at 91]. And Bennett agreed Clark's testimony corroborated some of the scene's description. [9/22/22 Tr. at 128–29].

Bennett also critiqued Robertson for not having Clark attend the depositions. [9/22/22 Tr. at 100]. Bennett was concerned Clark was never told about them, and thus Robertson may have deprived Clark of his right to be there. [9/22/22 Tr. at 101].

And Bennett thought Robertson should have pursued character witnesses for Clark. [9/22/22 Tr. at 103]. According to Bennett, had Robertson interviewed Clark's list of possible helpful witnesses, he would have known their helpfulness outweighed the risk of opening the door to bad character evidence. [9/22/22 Tr. at 103]. Bennett also blamed Robertson discussing Clark's history of sexual aggression at trial. [9/22/22 Tr. at 116]. But he conceded

Clark voluntarily told the officer this information. [9/22/22 Tr. at 118].

Clark's remaining witnesses focused on the alleged lack of investigation, the crime scene, and character evidence. An investigator for the State Public Defender, Steven Exley-Schuman, testified. [9/26/22 Tr. 4:8]. Exley-Schuman was the investigator assigned to assist Robertson for Clark's case. [9/26/22 Tr. 8:16-19].

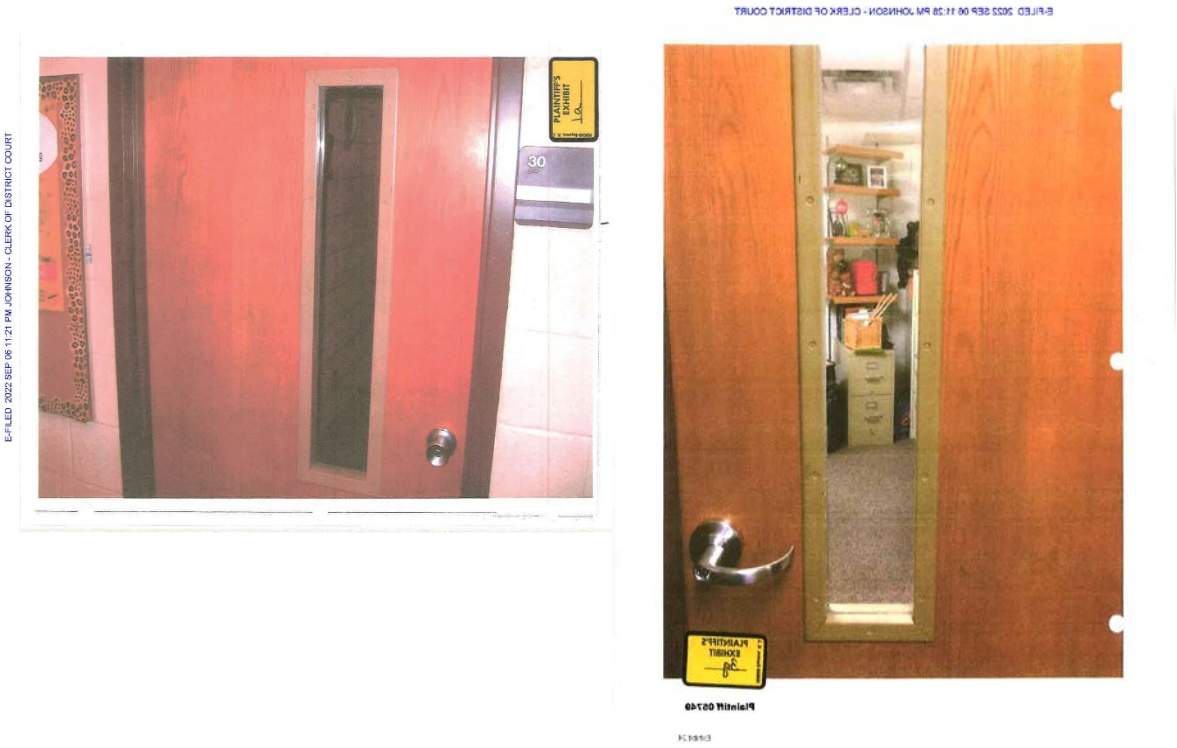
According to him, Robertson was a "seat-of-the-pants kind of guy" who took "pride" in not preparing for cases. [9/26/22 Tr. 15:13–16:3]. He said investigators only perform work when directed by counsel, and Robertson never directed him to investigate anything. [9/26/22 Tr. 16:10-14]. Yet Exley-Schuman also testified that he visited Clark in jail several times. [9/26/22 Tr. 19:18-22, 26:14-24]. And Robertson indeed told him to investigate why Clark was banned from a gym. [9/26/22 Tr. 32:22-25].

Still, Exley-Schuman told the jury that Robertson believed he "had everything under control" and rebuffed all offers to investigate C.B.'s allegations. [9/26/22 Tr. 34:12-16]. Exley-Schuman did not know whether Robertson called any witnesses or went to the scene himself. [9/26/22 Tr. 21:2–22:9]. He didn't attend Clark's trial. [9/26/22 Tr. 22:15-16].

Least tenably, Exley-Schuman told the jury that a week or two after Clark's conviction, Robertson said to him, "in a very

somber" tone: "I was ineffective." [9/26/22 Tr. 35:2-7]. Indeed, according to Exley-Schuman, Robertson said he "would testify to [being ineffective] in court." [9/26/22 Tr. 36:7-9]. Again, the deceased Robertson could not dispute that account or defend himself.

Clark next focused on the crime scene. Clark's PCR law firm took photographs of the scene ten years after the crime, and the photographer testified. [9/26/22 Tr. 61:7-10].



The prosecution's photo is on the left, and the PCR photographer's photo is on the right. *See also* Exs. 11, 24; App. Vol. II, at 5, 18.

The photographer acknowledged the "classroom was different" after construction, with a new furniture configuration.

[9/26/22 Tr. 61:12-16]. Still, she believed her photos fully disproved the prosecution's description of what was visible to an outside observer. [9/26/22 Tr. 62:5-13]. Of course, the decade-later photo depicts what was visible in the room with the lights on, and the victim testified that the lights were off. [9/26/22 Tr. 73:15-19]. Nor does the photo show what was visible when Clark covered it with paper. [9/27/22 Tr. 57:9-20]; *see e.g.*, Ex. 22, App. Vol. II, at 7.

The photographer testified to hearing a teacher next door, who was instructing her class. [9/26/22 Tr. 72:3-12]. She believed that because she could overhear a teacher speaking to a class,[2] the victim's alleged abuse must have been overheard by others. [9/26/22 Tr. 72:16-18]. Yet the photographer never went into the classroom filled with students and a teacher to see whether she could hear a person speaking in Clark's classroom at any volume. [9/26/22 Tr. 71:20–72:1].

She also testified to the current atmosphere near classroom, telling the jury: "there was a constant flow of children and teachers walking by the classroom, you could hear other classrooms. It was right in the center of what seemed like a lot of action." [9/26/22 Tr.

[2] *See, e.g.*, 9/26/22 88:20 (Clark's counsel telling a witness to "use your first grade teacher voice" when she wasn't speaking into a microphone); 9/26/22 180:17-19 (same).

68:25–69:2]. The photographer could not testify about the atmosphere near Clark's classroom during the crime.

Another witness did claim to know about Clark's classroom around the time of the abuse. A Lemme teacher testified both that the hallway was so busy that it resembled Kinnick Stadium on game day, but also so quiet that if a child cried out while being muffled by a stuffed animal, no one could ever miss that muted sound. [9:26/22 90:2-7; 94:6-14].[3]

Indeed, two teachers testified it was "impossible" for abuse to *ever* happen, because anything said at any time inside the classroom—even the muffled sounds of a young child—would be heard in the hallway or seen through the partially covered, six-inch door window. [9/26/22 94:13–95:6; 186:10-16].

Because Clark only sought emotional distress damages, Clark's therapist testified. The therapist shared her view—informed only by Clark's account and without ever assessing the victim—that Clark was innocent. [9/26/22 128:12-17]. She also told the jury that Clark suffered significant emotional injury because of

[3] The teacher previously testified that the hallway was occupied every 10 to 25 minutes. [9/26/22 99:21-23]. At trial, she changed her story, stating that the hallway was occupied every 5 to 6 minutes. [9/26/22 99:16-19].

"the community's perception of him and his reputation" after his conviction for abusing C.B. [9/26/22 129:19-20].

But Clark had already been convicted of a sex offense at the time C.B. came forward. In 2008, Clark was arrested for an OWI and inappropriately touched another inmate while in jail. [9/26/22 Tr. 156:9-12]. He pled down to indecent exposure and lost his teaching license. [9/26/22 Tr. 156:13-16, 157:6-11]. And at the time of C.B.'s allegation, Clark had already been fired. [9/26/22 Tr. 163:23–164:1; 9/27/22 64:20-22].

As in his criminal trial, Clark took the stand. Clark testified that after someone mentioned they could overhear him in his classroom, he made an effort to "lower [his] voice." [9/27/22 Tr. 29:17-27]. He confirmed he intentionally spoke in a low voice in his classroom, and his students "a lot of times" spoke "even lower" because "they didn't always want to be there." [9/27/22 Tr. 29:25–30:4].

Clark testified he was not shown the classroom photos before his criminal trial, and that he had just assumed Robertson went to the school. [9/27/22 Tr. 50:23–51:8].

Clark then changed his story about his window. Contrary to his criminal testimony, Clark testified he left open "a little bit on top, a little bit in the middle, and a little bit at the bottom, that seemed to work well. And it still gave plenty of – plenty of way[s] to

look in my room for anybody going by." [9/27/22 Tr. 57:14-20]; Ex. 22, App. Vol. II, at 7 (showing the window mostly covered, with small slits of visibility).

Clark next relayed his frustration with Robertson not returning his calls. [9/27/22 Tr. 71:21-23]. And Clark described his efforts to mount a defense, including compiling a list of possible witnesses. [9/27/22 Tr. 72:1-9]. Clark was confident he wasn't told about the depositions, nor did he receive the transcripts after they were completed. [9/27/22 Tr. 76:10-12, 78:13-17]. In all, he believed he spent "from two and a half to three hours" total with Robertson prior to his trial. [9/27/22 Tr. 80:7-8].

Clark recounted his experience in prison, in particular his fear of being harmed. [9/27/22 Tr. 106:7–115:54]. He told the jury he had a "non-consensual" relationship with a murderer, though he conceded that after he was released, he continued to visit the inmate. [9/27/22 Tr. 159:23–162:9]. In fact, after Clark was barred from visiting the inmate in the prison, Clark sued the Department of Corrections to regain visitation. [9/27/22 Tr. 161:9-16].

Clark also described the time he missed with his family. [9/27/22 Tr. 135:23–141:11]. And he testified to the difficulties he continues to have because of his incarceration. [9/27/22 Tr. 141:19-22]. Clark's father also testified, detailing the changes he's observed in Clark. [9/27/22 190:19-25].

Finally, the State's expert—F. Montgomery Brown—testified. Brown has represented over 2,000 criminal defendants in his career. [9/28/22 Tr. 14:2-3]. Defending sex crimes committed against children is singularly challenging, and Clark's case was even more difficult given the child's willingness to testify, the impact of live victim testimony, and the years-later accusation limiting the available evidence. [9/28/22 Tr. 27:15–28:20].

What doomed Clark's case was not Robertson's decisions, but Clark's "disaster" of an interview with the police, which occurred before Robertson was appointed. [9/28/22 Tr. 28:22-23]. Clark "basically confessed to everything, other than sexually touching the child. He confessed that he had the opportunity on multiple occasions to be with a child alone. . . . [H]e ultimately admitted that he may have touched the child on the leg. He effectively admitted the first part of grooming." [9/28/22 Tr. 29:6-12].

Nor did the crime scene matter. The only "material facts in question" for the criminal case was "whether Mr. Clark had the means and opportunity to be with" C.B. "alone, and at last on one or more occasions to touch in him in a sexual" manner. [9/28/22 Tr. 33:13-17]. And the hallway was never consistently described, even by Clark's own witnesses—"which is it? A busy hallway with a bunch of screaming kids or is it a cathedral" where no one would miss a sound? [9/28/22 Tr. 35:10-13].

More importantly, Clark told the investigating officer that he had been alone in his room, undisturbed with the child, on multiple occasions. [9/28/22 Tr. 38:12-15]. Photographs of the door window don't change that. [9/28/22 Tr. 38:8-13]. And Clark's own photos showed his window mostly covered, which would have bolstered the prosecution's case. [9/28/22 Tr. 39:16-21].

"This offense doesn't take very long." [9/28/22 Tr. 42:18]. So even proving that there was frequent traffic outside the classroom wouldn't have mattered. [9/28/22 Tr. 42:13-25]. "A lifetime of things can happen in 10 minutes." [9/28/22 Tr. 43:6].

Brown also explained the problem with pre-trial depositions—you're showing your hand. Had Robertson asked the investigating officer more questions during the deposition, it would have tipped off the officer and given him time to prepare. [9/28/22 Tr. 45:10-22].

And Brown educated the jury on character evidence. [9/28/22 Tr. 49:17–52:4]. It was unlikely any judge would have allowed his character evidence at trial. [9/28/22 Tr. 52:5-11]. Nor would the witnesses add value, as it would have prolonged the discussion of Clark's prior bad acts, which painted him as sexually aggressive. [9/28/22 Tr. 52:15–53:18].

Ultimately, Robertson's strategy was clear: discredit C.B., give C.B. a motive to create a false accusation, and explain why Clark was the obvious target. [9/28/22 Tr. 46:5-18]. And by giving

the jury C.B.'s email as an exhibit, rather than reading it, he gave the jury "an aha moment" during deliberation. [9/28/22 Tr. 62:2-8].

After Brown, the State rested. [9/29/22 Tr. 46:23–90:21]. The jury deliberated, found Robertson negligent, awarded Clark $12 million in emotional distress damages. App. Vol. II, at 72–73.

The State moved for judgment notwithstanding the verdict and in the alternative a motion for new trial. App. Vol. II, at 74–86. The district court denied the motions, finding emotional distress damages available in this legal malpractice action and that Bennett's improper discussion of the PCR ruling did not prejudice the jury. App. Vol. II, at 87–98.

The State timely appealed. App. Vol. II, at 101.

ARGUMENT

I. Emotional distress damages in legal malpractice cases depend upon both the nature of the attorney–client relationship *and* the attorney's specific conduct, and are not compensable unless the attorney's conduct was illegitimate.

A. Error preservation and standard of review.

The State preserved error by contending emotional distress damages were unavailable both in its "motion for directed verdict and again in its posttrial motion for a new trial" that also sought judgment notwithstanding the verdict. *James v. Burlington N., Inc.*, 587 N.W.2d 462, 464 (Iowa 1998); [9/28/22 Tr. 168:10–169:6]; App. Vol. II, at 76–81. The State sought judgment notwithstanding the verdict based on Iowa Rule of Civil Procedure 1.1003(1) and (2). App. Vol. II, at 76.

Review is "for the correction of errors at law." *Godfrey v. State*, 962 N.W.2d 84, 99 (Iowa 2021); *accord Ferguson v. Exide Techs., Inc.*, 936 N.W.2d 429, 431 (Iowa 2019) (per curiam).

B. *Lawrence* and *Miranda*.

The default rule is that emotional distress damages are not recoverable in legal malpractice cases. *Miranda*, 836 N.W.2d at 14. The Court has characterized this as "[t]he majority view among American jurisdictions." *Lawrence*, 534 N.W.2d at 422. Indeed, in *Lawrence*, a legal malpractice plaintiff's request for emotional

distress damages arising from his bankruptcy attorney's alleged negligence—which caused him to be charged with a federal crime—should not have been submitted to the jury hearing the later malpractice case. *Id.* at 420, 423.

Even so, *Lawrence* borrowed from the medical malpractice context to posit that an exception to the general rule against emotional distress in legal malpractice cases *could* exist depending on the nature of the relationship between the parties. *See id.* at 420. But it didn't stop there. *Lawrence* also cited cases in which a plaintiff was not entitled to emotional distress damages "because the actions" of the defendant "did not rise to the level required." *Id.* at 421. That illuminated a second, crucial, point: the defendant's *conduct* rather than just the relationship. In other words, under *Lawrence*, emotional distress damages are only recoverable "in situations which involve both a close nexus to the action at issue and extremely emotional circumstances."

Lawrence essentially asks two questions. First, was the nature of the attorney–client relationship sufficiently charged with emotions such that emotional distress was foreseeable? Second, if it was, did the attorney's direct actions or conduct "rise," *id.*, to a level of culpability justifying liability for emotional harm? *Lawrence* only needed to resolve the first question, because "[a] bankruptcy attorney's duty to competently manage the bankruptcy process"

was not sufficiently charged with emotions and mental solicitude. *See id.* at 423.[4]

Lawrence confirmed or perpetuated some uncertainty in the law; it demonstrated that "the line between [allowing and disallowing] an award for emotional damages in legal malpractice was not sharply defined." *Miranda*, 836 N.W.2d at 25. Years later, *Miranda* applied the *Lawrence* framework while attempting to bring some sharper definition to its contours.

In *Miranda*, a divided court recognized a narrow exception to the general prohibition on emotional distress damages in legal malpractice cases. Indeed, *Miranda* was the first time this Court ever held emotional distress damages were available for legal malpractice. *See Miranda*, 836 N.W.2d at 24 ("[W]e have thus far refrained from actually holding emotional distress damages may be awarded for legal malpractice."). "[D]eciding whether damages for emotional harm are compensable in negligence claims" requires the Court "to determine when a duty of care exists to protect against such harm." *Id.* at 28. Whether that duty exists "will turn on the

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[4] Although "question one" was dispositive, *Lawrence* nevertheless observed a remoteness problem because "the claimed emotional distress [wa]s too far removed from the defendants' negligent conduct." *Lawrence*, 534 N.W.2d at 423. Remoteness is another consideration in determining whether the attorney's acts authorize emotional distress damages under the *Lawrence* framework.

nature of the relationship between the parties, as well as the nature of the transaction or arrangement responsible for creating the relationship." *Id.* Even still, a duty of care "is not predicated on the existence of a highly emotional relationship alone." *Id.* at 29; *accord Millington v. Kuba*, 532 N.W.2d 787, 793 (Iowa 1995) (declining to authorize certain categories of damages based on "the inherent emotion involved in certain situations"). So while facing criminal charges "may be one of the most difficult circumstances of [criminal defendants'] lives," *State Pub. Defender v. Amaya*, 977 N.W.2d 22, 24 (Iowa 2022), that does not alone indicate whether emotional distress damages are available.

Miranda noted "[n]ot all negligence is very likely to cause severe emotional distress, and a duty of care to protect against emotional harm does not arise unless negligence is very likely to cause severe emotional distress." *Miranda*, 836 N.W.2d at 30. The way to measure whether negligence is very likely to cause emotional distress is to consider the connection "between the negligent *conduct* and the harm to the plaintiff." *Id.* (emphasis added). The defendant–attorney's conduct matters in the equation. For legal malpractice, often "the emotional harm to the client . . . results from an adverse decision by a court or other entity that was influenced by the earlier alleged negligent act of the attorney." *Id.*

In contrast, negligent conduct qualifies for emotional distress damages "when the plaintiff is in the direct path of the course of conduct"—or in other words, when the conduct is "specifically directed at the plaintiff" rather than at some other entity. *Id.* That comparison illustrates the remoteness inquiry *Lawrence* contemplated. *See Lawrence*, 534 N.W.2d at 423.

Miranda ultimately held emotional distress damages were available to the legal malpractice plaintiff who was separated from his family "across international borders because of egregiously bad legal advice." *Miranda*, 836 N.W.2d at 36 (Waterman, J., dissenting) (cautioning that *Miranda* should be limited its specific facts). *Miranda*'s outcome turned on both the nature of the *relationship* and the nature of the attorney's *conduct*.

There, the immigration lawyer pursued an "illegitimate course of conduct that had no chance of success if [an] independent decision-maker followed the law." *Id.* at 33 (majority op.). It was thus "very likely that [the attorney's] *conduct* would result in emotional harm"—not just that if his legal work was ultimately unsuccessful, the clients would suffer emotional harm. *Id.* (emphasis added). The court drew the line not just at the nature of the relationship, but also at the likelihood of emotional harm from "undertaking the illegitimate course of action." *Id.*

Put another way, the nature of the relationship may have unlocked the door, but the conduct itself determined whether the plaintiff could pass through it. The nature of the attorney–client relationship answered "question one" of *Lawrence*, so the court necessarily proceeded to evaluate the attorney's acts and thereby answer "question two." And *Miranda* answered question two by concluding the attorney's conduct of pursuing an impossible and legally prohibited path for his clients, with banishment from the country as a foreseeable consequence, justified emotional distress damages.

Emotional distress damages were thus available because the lawyer's conduct was "doomed" to failure—it wasn't merely unwise, incomplete, or unsuccessful in retrospect, but indeed condemned to fail as a matter of law.[5] The nature of the relationship was relevant, but it was only step one of the analysis; step two examined the attorney's conduct. *See id.* As the court put it, the duty to avoid

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[5] Importantly, *Miranda* also authorized punitive damages, because the attorney acted willfully or wantonly "by pursuing a course of action with knowledge that it [wa]s contrary to the plain language of the governing statute." *Miranda*, 836 N.W.2d at 34. Those actions were "enough to at least infer [the attorney] was reckless" and not merely negligent. *Id.* The additional discussion of punitive damages demonstrates that *Miranda* did not authorize "emotional distress awards based on an attorney's simple negligence"—because the attorney's conduct was worse than that. *Id.* at 36 (Waterman, J., dissenting).

causing emotional harm "arises when [the attorney's] acts are illegitimate and, if pursued, are especially likely to produce serious emotional harm." *Id.*

Miranda means a malpractice plaintiff seeking emotional distress damages must show not only that the lawyer was negligent, but that the lawyer "pursued an illegitimate course of conduct that had no chance of success if the independent decision-maker followed the law." *Id.* at 33. Merely losing at trial is insufficient. The exception also requires evidence that demonstrates the lawyer's conduct was especially likely to cause severe emotional distress. *Id.*

C. The meaning of "illegitimate."

This Court has not expressly defined "illegitimacy" for the purpose of determining whether emotional distress damages are available to a legal malpractice plaintiff. But the facts of *Miranda* show that "illegitimate" means exactly what *Miranda* discusses: conduct that has no chance of success if a neutral decision-maker follows the law. *See id.* It means more than negligence; it means conduct that is doomed, that forecloses relief, and that goes against law rather than unwise or incomplete. It takes conduct that would grade out on a report card as an automatic F, not merely a

milquetoast, if perhaps uninspiring, B-minus or C-plus. [9/28/22 Tr. 32:12-24].

In *Miranda*, the lawyer was representing a family who wanted to become United States citizens. *Miranda*, 836 N.W.2d at 11. The family were citizens of Ecuador but were now residing in the United States. *Id.* The lawyer directed his clients to return to Ecuador and file a form I-601 at the Ecuadorian consulate. *Id.* at 11–12. But as an unequivocal matter of law, the clients did not qualify to use the I-601 Form. *Id.* at 12. Worse yet, the clients were subject to a ten-year ban on reentering the United States because they had left voluntarily. *Id.* The clients were thus separated from their family who remained in the United States. *Id.* At trial the lawyer admitted he knew his clients did not qualify for citizenship with the I-601 Form, but had them leave the country and pursue the plan anyway. *Id.* at 13.

Thus, *Miranda*'s facts show that "illegitimate" refers to acts which are contrary to law, known to the attorney, and have no chance of success. The standard is higher than negligence and may require intentional acts rather than omissions. The strategy the lawyer in *Miranda* prescribed for his clients *could never* succeed because it was proscribed by existing law. Moreover, by directing his clients to return to Ecuador, the clients were banished from the

United States and separated from their family for ten years—the opposite of their objective.

Miranda also shows that a lawyer's conduct must be especially likely to cause severe emotional distress for emotional distress damages to be compensable. The lawyer in *Miranda* "knew it was very likely that his conduct would result in emotional harm." *Miranda*, 836 N.W.2d at 33. In reaching that conclusion, the court noted the lawyer authored a memorandum in which he specifically noted his clients would suffer emotional distress if the government denied their I-601 application. *Id.* at 32. In all events, the lawyer knew his clients would not qualify, yet still told them his strategy had a "ninety-nine percent chance of success" when it really had zero chance. *Id.*

The Iowa Court of Appeals has also applied the illegitimacy standard. In *McFarland*,[6] the plaintiffs retained a lawyer to represent them in adoption proceedings. 2019 WL 2871208, at *1. The plaintiffs assumed physical care of the newborn child. *Id.* Just over three weeks later, the lawyer petitioned to terminate the birth

[6] Below, Clark contended *McFarland* is not controlling because it is unpublished. While it's true an unpublished decision is not controlling standing alone, *see* Iowa R. App. P. 6.904(2)(*c*), "not controlling" may still be persuasive. And *McFarland* faithfully applies the principles of the published *Lawrence* and *Miranda* decisions.

parents' rights. However, the birth mother had not yet signed a release of custody. *Id.* Two months later, the birth mother notified the parties she wanted to back out of the adoption and subsequently retook custody of the baby. *Id.* Although the court of appeals opinion does not discuss this fact, after returning to the birth parents, the child died. *See* Appellees'/Cross-Appellants' Final Brief, *McFarland v. Rieper*, No. 18–0004, 2018 WL 11370569, at *19 (Oct. 19, 2018) (asserting that because of the lawyer's negligence, "part of the McFarlands died," and so did the baby, because "[h]e was later murdered by his birth father").

The plaintiffs sued their lawyer for malpractice and obtained a jury verdict that included emotional distress damages. Like Clark here, "the plaintiffs sought and received damages only resulting from emotional distress." *McFarland*, 2019 WL 2871208, at *2. But applying *Miranda*, the court of appeals held that emotional distress damages were unavailable because the lawyer's conduct was not illegitimate. *Id.* at *3.

While the adoption lawyer "may have unnecessarily delayed finding [guardians ad litem] and ensuring they obtained signed releases of custody, these actions were not illegitimate." *Id.* at *3. Those acts did not foreclose the adoption from being completed. They were unwise, unnecessary, and dilatory, but not illegitimate.

Id. Accordingly, the defendant–attorney was entitled to judgment notwithstanding the verdict. *Id.* at *4.

Just as in *Miranda*, *McFarland* shows that to obtain emotional distress damages in a legal malpractice case, a plaintiff must prove more than just mere negligence. A plaintiff must demonstrate the lawyer's conduct was illegitimate, which requires proof that the lawyer's conduct was contrary to law, had no chance of success, and was particularly likely to result in severe emotional distress. *See id.* at *3. In other words, *Miranda* "requires more than ordinary negligence and an emotional personal relationship to permit recovery for emotional distress in legal malpractice." *Id.*

The illegitimacy standard is consistent with an approach at least one federal court follows. In *dePape v. Trinity Health Systems, Inc.*, the United States District Court for the Northern District of Iowa considered a claim of legal malpractice against a lawyer who represented a client in an immigration matter. *See* 242 F. Supp. 2d 585, 589 (N.D. Iowa 2003). The lawyer represented a Canadian doctor seeking to immigrate to the United States for employment. *Id.* at 591. Yet when completing immigration forms for the doctor, the lawyer knowingly (and without consulting the doctor) provided false information on the immigration paperwork. *Id.* at 597–600. The United States denied the doctor entry to the country as a result. *Id.* at 600.

In concluding emotional distress damages were available, the federal court found it important that the lawyer advised lying and falsification, rather than drafting truthful application paperwork and advising the client to make a legitimate entry attempt. The lawyer "would not be liable for the mental distress that might have accompanied a failed *legitimate* entry attempt because it would be unfair under those circumstances to hold a lawyer responsible for the independent government entity." *Id.* at 616. Liability was instead appropriate because the lawyer counseled his client "to lie to INS," a plainly illegitimate course of conduct. *Id.*

Thus, like *McFarland*, *dePape* is "consistent with *Miranda* in that it requires more than ordinary negligence and an emotional personal relationship to permit recovery for emotional distress in legal malpractice." *McFarland*, 2019 WL 2871208, at *3. By evaluating the attorney's conduct—not just the representation as a whole or its overall stakes, but specific conduct undertaken within that representation—and only authorizing emotional distress damages if the conduct is illegitimate, *Miranda*'s standard avoids placing "an unnecessary burden on the defense bar," *Barker*, 875 N.W.2d at 171 (Zager, J., dissenting).

D. Robertson's representation was not illegitimate.

Because Robertson did not engage in any illegitimate conduct, emotional distress damage are not available here. The evidence the jury heard and the jury instructions flowing from that evidence do not support emotional distress damages under *Miranda* and the illegitimacy standard.

The jury considered whether specific alleged acts or omissions by Robertson were negligent in 2009 and 2010. The five specifications in Jury Instruction No. 11 were:

1. Not investigating or understanding the details of the scene of the alleged sexual assault;
2. Not introducing fact evidence related to the scene from fact witnesses on Clark's behalf during trial;
3. Not properly notifying Clark about depositions;
4. Waiving Clark's attendance at depositions without his permission; or
5. Not reasonably communicating and consulting with Clark before trial to prepare a defense.

App. Vol. II, at 66–67.

Those specifications do not justify emotional distress damages under *Miranda* and *McFarland*. Those acts, even if negligent, are not illegitimate. *See McFarland*, 2019 WL 2871208, at *3 (concluding emotional distress damages were unavailable when specific negligent acts the plaintiffs asserted did not involve the

attorney advising them "to pursue an illegitimate strategy" or act "contrary to Iowa law").

None precluded the 2010 criminal jury from acquitting Clark. Clark may contend Robertson's actions made acquittal more difficult, but they did not make it impossible. By contrast, in *Miranda*, the lawyer's clients *could not* obtain the outcome they sought—legal residency in the United States—because the lawyer prescribed a course of conduct that could not succeed as a matter of law. *See Miranda*, 836 N.W.2d at 33. That's what made the conduct illegitimate and therefore authorized emotional distress damages under the circumstances.

McFarland, with neither the attorney lying nor encouraging his client to lie, is a closer analog to this case. There, the lawyer's delay in obtaining signatures and releases, while perhaps negligent and certainly not optimal, nevertheless did not preclude or foreclose the adoption from occurring successfully. *See McFarland*, 2019 WL 2871208, at *3. Clark does not allege and the record does not demonstrate that Robertson embarked on a course of conduct that, as a matter of law, prevented the jury from acquitting Clark at his criminal trial. Without that kind of allegation and that kind of evidence, emotional distress damages are unavailable.

And the PCR finding of ineffective assistance cannot establish illegitimacy. Concluding otherwise would contradict both the

previous decision in *Clark III* and the jury instructions the district court gave. By ruling that a finding of ineffectiveness in PCR proceedings was not preclusive, this Court anticipated attorney conduct could be ineffective but not negligent. *See Stewart v. Elliott*, 239 P.3d 1236, 1243 (Alaska 2010) (finding that the conduct justifying postconviction relief, while ineffective, was not negligent).

In turn, because "*Miranda* . . . requires more than ordinary negligence," negligence and illegitimacy aren't interchangeable either. *McFarland*, 2019 WL 2871208, at *3. Put another way, attorney conduct in criminal malpractice cases falls on a spectrum of: ineffective, to the worse → negligent, to the worse yet → illegitimate. And because ineffectiveness does not equal negligence, it cannot equal illegitimacy either.

That continuum reflects the fundamental structure of criminal malpractice claims and tracks with *Lawrence*, *Miranda*, and *McFarland*. It shows that illegitimate conduct is something more than ineffective conduct. Illegitimate conduct precludes or forecloses the relief sought, or pursues or advises a course of action that *cannot*—not just did not—succeed.

Florida provides an illustrative comparison of the difference. The Florida Supreme Court authorized emotional distress damages in a criminal malpractice case when the attorney held "the key to

freedom" in the form of indisputable exonerating evidence "that [his client] was innocent of the crime charged," but delayed filing it or delivering it, causing the client to spend extra time in prison. *Rowell v. Holt*, 850 So. 2d 474, 480–81 (Fla. 2003). The Florida court emphasized that while emotional distress damages were available under those circumstances, they would not be in every scenario—and specifically mentioned "negligence arising from insufficient preparation, incomplete investigation, legal ineptitude, or any other subjective indicia of a lawyer's performance." *Id.* at 481. Insufficient preparation or incomplete investigation would not authorize emotional distress damages, but failure to deliver indisputably exonerating evidence would. *See id.*

Florida does not expressly follow an illegitimacy standard, but the dichotomy *Rowell* discusses nevertheless fits that standard.[7]

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[7] Several other courts, in a variety of legal malpractice contexts, analogously conclude some heightened level of conduct is required to authorize emotional distress damages. *See, e.g.*, *Boros v. Baxley*, 621 So. 2d 240, 244–45 (Ala. 1993) (requiring legal malpractice plaintiffs to show *both* "affirmative wrongdoing" and a predominantly personal nature of the attorney–client relationship); *Lickteig v. Alderson, Ondov, Leonard & Sween, P.A.*, 556 N.W.2d 557, 561–62 (Minn. 1996) ("It is simply not the case that professional malpractice and willful indifference to another's rights are always one and the same. . . . [A]s in other negligence actions, emotional distress damages are available in limited circumstances. There must be a direct violation of the plaintiff's rights by willful, wanton or malicious conduct; mere negligence is not sufficient.");

Alleged insufficient preparation or inadequate investigation may be ineffective or even negligent but is not illegitimate, because it—unlike withholding indisputably exonerating evidence—does not preclude the relief sought. It is not grounds for emotional distress damages in this case under the standard identified in *Lawrence*, developed further in *Miranda*, and applied recently in *McFarland*.

Here, all the specifications of alleged negligence submitted to the jury discussed only insufficient preparation or inadequate investigation, and those do not rise to the level of illegitimacy. Indeed, "a claim that certain witnesses should have been called" fails even to state a criminal malpractice claim as a matter of law in at least one other jurisdiction, because it "is nothing but an assertion that another lawyer might have conducted the trial differently." *Simko v. Blake*, 532 N.W.2d 842, 848 (Mich. 1995).

Selsnick v. Horton, 620 P.2d 1256, 1257 (Nev. 1980) ("Appellant's suit was premised solely upon ordinary negligence; she did not allege nor attempt to prove extreme and outrageous conduct causing . . . anguish or distress. Absent such proof, appellant may not recover damages for mental anguish or emotional distress."); *Long-Russell v. Hampe*, 39 P.3d 1015, 1018–20 (Wyo. 2002) (concluding legal malpractice litigants may not "present an emotional damages claim to a jury" if the claim is "based solely on an allegation of negligence" in giving advice related to divorce and child visitation proceedings); *see also Miranda*, 836 N.W.2d at 41 (Waterman, J., dissenting) ("We should continue to disallow emotional distress awards in a legal malpractice action in which the attorney is merely found negligent.").

Below, the district court denied the State's motion for judgment notwithstanding the verdict, finding illegitimacy was a sufficient but not a necessary condition to awarding emotional distress damages in legal malpractice cases. App. Vol. II, at 93. But the district court did not address or cite *McFarland* and its directly contrary conclusion that "*Miranda* . . . requires more than ordinary negligence." *McFarland*, 2019 WL 2871208, at *3.

The district court exclusively focused on the nature of the attorney–client relationship in the criminal defense context, and the inherent liberty risks associated therein. App. Vol. II, at 94. But *Miranda* contains no indication its principles should be applied differently in criminal litigation. *See Dombrowski v. Bulson*, 971 N.E.2d 338, 340 (N.Y. 2012) (finding emotional distress damages were unavailable in a criminal malpractice case and rejecting the argument "that a different result should obtain" based on the unique nature of criminal malpractice claims).

Dombrowski is strikingly similar to this case. The plaintiff in *Dombrowski* obtained habeas relief but "was not reprosecuted and the indictment was dismissed." *Dombrowski*, 971 N.E.2d at 339. The plaintiff then alleged his defense attorney committed malpractice because he "failed to investigate or present evidence concerning an allegedly meritorious defense." *Id.* Even so, New York's highest court conclude that allowing nonpecuniary damages

"would have, at best, negative and, at worst, devastating consequences for the criminal justice system." *Id.* at 340–41. It would discourage attorneys from practicing criminal defense when "[t]he need to attract competent criminal defense attorneys is great." *Barker*, 875 N.W.2d at 172 (Zager, J., dissenting). Combined with *Miranda*'s requirement of egregious or illegitimate conduct, *Dombrowski* illustrates that emotional distress damages are unavailable here.

In all, the district court misapplied *Miranda*,[8] failed to consider whether Robertson's actions were legitimate, and erroneously expanded the scope of liability in legal malpractice actions. Because the jury heard, at most, evidence of, mere negligence; Robertson's trial strategy was not inescapably doomed to fail as a matter of law; and Clark disclaimed any other category of damages, the State's motion for judgment notwithstanding the

[8] To be sure, emotional distress damages are unavailable here under *Miranda*. But if this Court disagrees, *Miranda* should be limited or overruled. Indeed, the *Miranda* dissent presciently predicted a case like this, noting that despite the majority opinion's emphasis on its own purported limits, it would be difficult under its reasoning "to draw the line in the next malpractice case against a criminal defense attorney." *Miranda*, 836 N.W.2d at 40 (Waterman, J., dissenting). Clark seizes on this analogy, seeking to once more chip away at the default rule prohibiting emotional distress damages. This Court should clarify that *Miranda* does not authorize further erosion of the rule.

verdict should have been granted. Thus, the district court should be reversed and judgment should be entered for the State.

Because the damages issue is dispositive, the Court need not proceed further. However, if the Court finds that Clark's damages are cognizable, then it must consider whether the district court got the "close call" wrong and that a mistrial should have been granted. [9/22/22 Tr. 47:24].[9]

II. Telling a malpractice jury that a public defender violated the plaintiff's constitutional rights and provided ineffective assistance of counsel was prejudicial as a matter of law and the State is entitled to a new trial.

A. Error preservation and standard of review.

The State preserved error on Judge Bennett's prejudicial statements by immediately objecting, moving for a mistrial, and renewing its motion for a new trial after the jury's verdict. *State v. Cornelius*, 293 N.W.2d 267, 269 (Iowa 1980) ("A mistrial motion must be made when the grounds therefor first became apparent."). *See* [9/22/22 37:16–47:25]; App. Vol. II, at 83–86.

Evidentiary rulings and denials of mistrials are reviewed for abuse of discretion. *Shawhan v. Polk Cnty.*, 420 N.W.2d 808, 809 (Iowa 1988). This Court is "slower to interfere with the grant of a

[9] *See also* [9/27/22 103:23–131:14] (the district court noting "a lot of error in this trial" and that "win or lose, [the court is] not sure anybody can be confident in whatever happens").

new trial than with its denial." *Bryant v. Parr*, 872 N.W.2d 366, 375 (Iowa 2015) (quoting *Cowan v. Flannery*, 461 N.W.2d 155, 157 (Iowa 1990)).

B. Judge Bennett's testimony was per se prejudicial and tainted the proceeding.

There are some prejudicial statements that a defendant can't come back from. We see this in other areas of the law. For example, it is impermissibly prejudicial to tell a jury that a criminal defendant was previously convicted of the same offense. Informing a jury that a criminal defendant previously committed the same crime leads to "inevitable pressure on lay jurors to believe that 'if he did it before he probably did so this time.'" *State v. Daly*, 623 N.W.2d 799, 802 (Iowa 2001) (quoting *Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967)).

It's the type of error that instructions can't cure. The information "could very likely have a substantial effect on a jury, which, although instructed not to do so, could reasonably be expected to misuse the evidence as substantive proof of guilt." *Id.* at 803.

Here, the jury heard information that was even more prejudicial. Judge Bennett told the jury "Mr. Clark is alleging that his court appointed lawyer John Robertson is negligent. *He can't bring that claim*, as I understand it, *unless there's been a*

determination by a judge, that *Mr. Robertson violated the Sixth Amendment* and *provided ineffective assistance of counsel*." [Tr. 9/22/22 37:17-23] (emphasis added). Bennett was the first witness, so his testimony colored every other piece of evidence at trial.

It would have been unduly prejudicial if Bennett had told the jury that Robertson had been previously found ineffective while representing other clients. Like same-conviction evidence, that statement would have posed an unacceptable risk that the jury would infer Robertson provided subpar representation here, too.

But Bennett's testimony went further. He told the jury that a court already found Robertson's representation to have violated *Clark's constitutional rights* and was thus ineffective as a matter of law. There is no inference for the jury to make—the jury was told Robertson did it. It's precisely the type of statement that "could very likely have a substantial effect on a jury, which, although instructed not to do so, could reasonably be expected to misuse the evidence as substantive proof of" liability. *Daly*, 623 N.W.2d at 803. And it provides little or no "reassurance to defense attorneys who worry that Iowa's broad conception of ineffective assistance of counsel may cost them in the form of civil liability." Woodruff, 102 Iowa L. Rev. at 1833.

The prior appeal in this case proves this point—the distinction between Sixth Amendment violations and professional negligence

is sufficiently nuanced that a jury of lay people cannot reasonably be expected to separate the two. There, Clark's lawyers forcefully argued that Sixth Amendment and negligence inquiries were "virtually indistinguishable." Appellee Brief, at 41 (*Clark III*, No. 19-1558). Indeed, Clark believed that "the standard for ineffective assistance of counsel is arguably *more onerous* than that of breach in a legal negligence claim," since negligence actions carry no presumption of competence. *Id.* at 45. (emphasis added). And if the State's arguments about Robertson's representation "failed to convince the district court in the post-conviction relief action that Robertson breached his duty, what justifies now allowing the State of Iowa to get a second bite at the apple on the very same issues with the very same arguments that failed in the postconviction?" *Id.* at 30–31.

It wasn't just Clark's seasoned lawyers who believed the Sixth Amendment decision rendered the negligence case open-and-shut. A district court judge also agreed, opining "the issues are identical for purposes of issue preclusion." D0052, at 2. The court echoed Clark's argument—and the jury's doubtless assumption—that if Robertson provided reasonably competent representation, an ineffective-assistance outcome is impossible. "Any manner in which the State could prove that defense counsel had done his job to the appropriate professional level of competence should have been set

forth and argued at the post-conviction relief trial." *Id.* at 5. Thus, the court found that a Sixth Amendment violation conclusively established that Robertson breached his duty to Clark. *Id.* at 11.

If Clark's sophisticated counsel and a seasoned district court judge all conflated Sixth Amendment violations with negligence, then a jury of lay people cannot be expected to separate the two, regardless of their instruction.

The Court of Appeals of Oregon has recognized this inevitability. *See Stevens v. Horton*, 984 P.2d 868 (Or. App. 1991). There, the criminal defendant was convicted of raping a minor. *Id.* at 870. He obtained PCR relief from the Oregon Supreme Court, after showing that his criminal defense lawyers failed to interview potential witnesses and failed to investigate his medical background. *Id.* He then sued his defense attorneys for legal malpractice, and the district court's *in limine* order restricted references to the PCR ruling. *Id.* He lost his trial, and argued on appeal his expert should have been able to reference his PCR decision, if only to establish the governing standard of care. *Id.* at 873. The court disagreed.

"Though relevant, there can be little doubt that the jury could easily be prejudiced, or at least confused, by evidence that the Supreme Court had already concluded that [the lawyer's] representation of [the criminal defendant] was inadequate." *Id.* at

874. Allowing an expert to discuss the prior adjudication of ineffective-assistance poses "a very real likelihood that the jury would have given the [PCR ruling] preclusive effect, effectively circumventing and subverting the trial court's correct conclusion" that PCR effectiveness rulings are not preclusive. *Id.*

So too here. Bennett was presented as an expert jurist. And then he told the jury that Robertson was already adjudicated to have violated Clark's Sixth Amendment rights. His declaration stands apart from Exley-Schuman's uncorroborated testimony that Robertson purportedly confessed to being ineffective—Bennett left no room for doubt, motive, or weighing of credibility. And, as the prior appeal shows, there is a very real likelihood that lay jurors will view constitutional violations as complete proof of negligence, subverting this Court's contrary conclusion and depriving the State of the fair consideration of its evidence. Thus, the State is entitled to a new trial.

CONCLUSION

Because Clark exclusively sought disallowed emotional distress damages, the district should be reversed and judgment should be entered for the State. Alternatively, even if emotional distress damages are permissible, Clark's expert witness's testimony undermines the fairness of the proceedings, and thus this Court should remand for a new trial.

REQUEST FOR ORAL SUBMISSION

Appellant State of Iowa respectfully requests to be heard in oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Century Schoolbook in size 14 and contains 11,945 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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CERTIFICATE OF FILING AND SERVICE

I, David M. Ranscht, hereby certify that on November 2, 2023, I, or a person acting on my behalf, filed this brief and served it on counsel of record to this appeal with via EDMS.

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