IN THE IOWA SUPREME COURT
No. 23–0568

DONALD LYLE CLARK,

Appellee,

vs.

STATE OF IOWA,

Appellant.

Appeal from the Iowa District Court
For Johnson County, LACV079404
Hon. Lars Anderson, District Judge

APPELLANT'S FINAL REPLY BRIEF

BRENNA BIRD
Attorney General of Iowa

TESSA M. REGISTER
Assistant Solicitor General

DAVID M. RANSCHT
Assistant Attorney General
Iowa Department of Justice
1305 E. Walnut Street
Des Moines, Iowa 50319
(515) 281-5112
(515) 281-7175
David.Ranscht@ag.iowa.gov
Tessa.Register@ag.iowa.gov

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

Clark's repeated conceptual conflation leads to confused results. He conflates legal conclusions (like "an attorney violated the Sixth Amendment") with the specific acts or omissions leading to that conclusion. He tries to replace the rule under Iowa law that actual innocence is not required as a prerequisite to a criminal malpractice suit with an alternative formulation. That unsupported alternative rule contends that actual innocence plays no role at any stage of a criminal malpractice case. Appellee Br., at 45.

Indeed, Clark's conflation exposes the core flaw in the case Clark presented at trial and his defense of the verdict on appeal. Despite this Court's express conclusion otherwise, Clark continues, even now, to argue the PCR ruling automatically establishes his entitlement to a verdict consisting solely of emotional distress damages. But because such a verdict is inconsistent with Iowa law both on emotional distress damages in legal malpractice cases and on the relationship between PCR and negligence, the Court should reverse. And it should either remand for a new trial, or remand with instructions to grant the State's motion for judgment notwithstanding the verdict because emotional distress damages are unavailable under the circumstances presented here.

I. *Miranda*'s illegitimacy standard builds on *Lawrence* without departing from it, and courts can apply that standard no matter what analogies a party uses to describe illegitimacy.

Lawrence v. Grinde recognizes both that emotional distress damages are generally unavailable in legal malpractice cases and that an exception makes them available in some circumstances. 534 N.W.2d 414, 421 (Iowa 1995). But whether emotional distress damages are conceptually available is different from whether they are recoverable in a given case. *See Miranda v. Said*, 836 N.W.2d 8, 33 (Iowa 2013) (recognizing it is important to apply legal principles "to the facts presented to the jury").

And the Court has authorized emotional distress damages in only one legal malpractice case: *Miranda* itself. *Miranda* involved an attorney who advised his immigration clients to do something (seek reentry to the United States using a qualifying relative) illegal (because the suggested relative could never qualify). *Id.* at 11–12. *Miranda* authorized emotional damages because of the attorney's own actions. *Miranda* did "not depart from" *Lawrence*, *id.* at 33—but it did not need to. Instead, *Miranda* further developed *Lawrence* by addressing emotional distress damages in malpractice cases.

Miranda both flows from *Lawrence* and supplies another aspect of the legal principles both cases examine. It is explanation,

not abrogation. *Miranda* confirms *Lawrence*'s recognition of an exception sometimes authorizing emotional distress damages and sets further contours shaping what those circumstances are.

Notably, none of *Lawrence*'s collected negligence cases raising emotional distress damages were legal malpractice cases—much less criminal malpractice cases. *See Lawrence*, 534 N.W.2d at 421. Clark relies on those distinguishable cases (Appellee Br., at 31 n.12)—yet criticizes the State for citing legal malpractice cases outside the criminal malpractice context (Appellee Br., at 48–49). That double standard ignores criminal malpractice cases' "unique context," *Clark v. State* ("*Clark III*"), 955 N.W.2d 459, 466 (Iowa 2021). Ignoring that distinction carries with it the risk of conflating PCR and negligence—a risk embodied in this case.

McFarland v. Rieper extended *Lawrence* and *Miranda* in denying emotional distress damages. 2019 WL 2871208 (Iowa Ct. App. July 3, 2019). Although indeed unpublished, it was not "wrongly decided" as Clark asserts, nor is it "contrary" to this Court's caselaw. (Appellee Br., at 46.) Instead, it faithfully applies *Miranda*. 2019 WL 2871208, at *3 (concluding emotional distress damages were not available because the legal malpractice plaintiffs did not show the attorney "engaged in illegitimate conduct" under *Miranda*). Clark attempts to distinguish *McFarland* in two ways, but neither distinction holds.

First, *McFarland* characterizing "voluntarily leav[ing] the United States" as advising an "illegal course of conduct" is immaterial and does not damage the court's reasoning regarding illegitimacy. *Id.* at *2. True, the illegitimate conduct in *Miranda* was not necessarily the advice to leave the country standing alone; it was the attorney's direction to leave and then apply for a waiver using a "qualifying relative" who did not qualify as a matter of law. *See Miranda*, 836 N.W.2d at 12–13 ("Form I-601 waivers are only available when the qualifying relative is the spouse or parent of the applicant. The Form I-601 applications prepared by [the lawyer] listed Cesar and Ronaldo—their children—as qualifying relatives. In truth, Klever and Nancy had no qualifying relatives." (citation omitted)). But while *McFarland* may not have pinpointed the exact illegitimate conduct from *Miranda*, it correctly distilled and applied the material conclusion that "*Miranda* . . . 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.

Second, Clark asserts *McFarland* should be ignored because it is unpublished. But unpublished cases have persuasive value based on the application of legal principles they contain—especially on relatively new, or seldom-litigated, issues. *See Sanon v. City of Pella*, 865 N.W.2d 506, 518, 520 (Iowa 2015) (Waterman, J.,

dissenting) (recognizing an unpublished case's reasoning "based on the operative statutory text and our rules of interpretation" surrounding Iowa Code chapter 135I, and opining that the unpublished decision "is directly on point"). *McFarland* is nonbinding, but persuasive, and that is why the State relies on it. *Cf. State v. Booker*, 989 N.W.2d 621, 629–30 (Iowa 2023) (agreeing "with the court of appeals' recent conclusion" on a particular issue set forth in two unpublished opinions).

McFarland also illustrates that the illegitimacy standard is workable and thus not as amorphous or impossible to prove as Clark suggests. (Appellee Br., at 42–43.) While the State used many different phrases or analogies to describe the illegitimacy standard over the course of litigation—indeed, Clark collects them (Appellee Br., at 42–43)—they were all in support of the same fundamental assertion: *Miranda* requires something more to assess damages. That is exactly what *McFarland* says and exactly what it applied—demonstrating that courts can reliably apply an illegitimacy standard without risking too much uncertainty or unpredictability. *See McFarland*, 2019 WL 2871208, at *3.

Clark's concern about a "1% chance of succeeding" making it impossible to demonstrate illegitimacy (Clark Br. at 45 & n.18) is overblown and based on an incorrect assumption. Illegitimacy does

not require a malpractice plaintiff to satisfy a burden higher than in any other case. (Appellee Br., at 45.)

Nor does this case present a situation where an attorney's course of conduct all but guaranteed defeat. Indeed, Robertson's allegedly negligent actions were not illegitimate nor did his strategy have a 99% chance of failure. Robertson effectively crossed C.B., twice moved for more time to adequately explore late-disclosed impeachment evidence, gave the jury a competing motive for C.B.'s accusation, and showed that the investigating officer did not fully investigate C.B.'s credibility before recommending criminal charges.

Clark's asserted specifications of negligence amount at most to "insufficient preparation, incomplete investigation, legal ineptitude, or . . . other subjective indicia of a lawyer's performance." *Rowell v. Holt*, 850 So. 2d 474, 481 (Fla. 2003). Insufficient preparation or incomplete investigation might make a lawyer imperfect—but imperfect does not mean illegitimate.

Requiring illegitimate conduct does not create a special rule benefitting only lawyers but merely recognizes that it is unfair to judge criminal defense lawyers operating in the trenches exclusively based on hindsight. *See Miranda*, 836 N.W.2d at 23 n.11. That requirement appropriately balances the need for that recognition with the notion that lawyers who pursue strategies that

cannot succeed if neutral decisionmakers follow the law should be responsible for pursuing that strategy.

Notably, illegitimacy is only required for emotional distress damages. Other forms of economic damages, such as lost wages or costs of medical treatment, including therapy—would not be subject to that standard, even in a criminal malpractice case. Clark could have pursued those damages but declined. That was his own litigation choice, not something the State forced. *See McFarland*, 2019 WL 2871208, at *2 ("The McFarlands sought and received damages only resulting from emotional distress.").

Nonpecuniary damages are recoverable in Iowa under a different (but related) statutory cause of action for wrongful imprisonment. *See* Iowa Code § 663A.1; *Cox v. State*, 686 N.W.2d 209, 212 (Iowa 2004) ("Iowa is one of many jurisdictions that has enacted legislation providing compensation for individuals who have been wrongfully convicted and incarcerated.").

Chapter 663A requires a prerequisite showing of actual innocence, unlike criminal malpractice actions. *See Barker v. Capotosto*, 875 N.W.2d 157, 167–68 (Iowa 2016). And even then, after that heightened showing of actual innocence, the Legislature has set forth liquidated damages compensable per day of wrongful imprisonment. *See* Iowa Code § 663A.1(6)(*b*).

By contrast, the verdict here does not indicate the civil jury thought Clark was actually innocent—it only establishes the civil jury thought the criminal jury would not have convicted Clark if Robertson acted differently. That could be because the civil jury believed Clark to be innocent, but it could merely be that the civil jury believed a different criminal defense strategy would have generated reasonable doubt in the criminal jury's mind.

While Clark objects that "common sense" says the Legislature's damages calculation for wrongful imprisonment is inadequate and thus his emotional distress must be recoverable here, he overlooks the key difference between statutory wrongful imprisonment claims and the verdict in this case: actual innocence is present in one, but not necessarily in the other. Even if the result seems counterintuitive, the Legislature's judgment is entitled to consideration. *Cf. Sherwin-Williams Co. v. Iowa Dep't of Revenue*, 789 N.W.2d 417, 427 (Iowa 2010) (observing this principle with respect to statutory definitions).

And the Court should not make chapter 663A a dead letter by making it unviable to pursue because much higher damages are available—upon a lesser showing—in a criminal malpractice lawsuit. The illegitimacy requirement appropriately preserves both chapter 663A and criminal malpractice claims as viable options for a plaintiff by providing a larger burden for a larger recovery.

One other state disallows all nonpecuniary damages in criminal malpractice actions, reasoning that the exclusive method for obtaining those damages is through a wrongful imprisonment statute. *See Smith v. McLaughlin*, 769 S.E.2d 7, 19–21 (Va. 2015). The illegitimacy standard does not go that far and is thus more favorable than the law in Virginia. The standard allows for emotional distress damages to be recovered in some criminal malpractice cases—it just requires that showing of illegitimacy first.

In sum, "*Miranda* . . . 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. That standard is capable of practical application, and it applies here to prohibit emotional distress damages based on the evidence presented.

II. Bennett's testimony is the kind of prejudicial statement that a jury is expected to misuse, so a new trial is required.

Clark also continues to conflate the PCR inquiry with a malpractice inquiry, showing why Bennett's testimony presents an unacceptable risk of prejudice and a mistrial should have been granted.

Clark first asks this Court to take judicial notice of the merits of the PCR action. (Appellee Br., at 14–16.) This evidence was excluded at trial and thus could not, and should not, play any role in the merits of Clark's malpractice action. Yet Clark continues to assert, through various theories, that the PCR findings be determinative of Robertson's malpractice—this time arguing that a finding of ineffective assistance necessarily equates to a finding of "unlawful" lawful representation. *Id.* at 52. That argument was soundly rejected in the prior appeal.

"[A]djudication of ineffective-assistance claims under Iowa law can turn on considerations beyond whether defense counsel's actions fell below an acceptable level of competence." *Clark III*, 955 N.W.2d at 470. And "a fair assessment of [this Court's] recent precedents is that they recognize a rather broad concept of what constitutes a failure to perform an essential duty for ineffective-assistance-of-counsel purposes." *Id.* (quoting *State v. Clay*, 824 N.W.2d 488, 504 (Iowa 2012) (Mansfield, J., concurring)).

Consider the initial appeal from Clark's sex-abuse conviction. Two Justices found that Clark had been deprived of ineffective assistance of counsel because the *district court* refused to continue the trial. *State v. Clark* ("*Clark II*"), 814 N.W.2d 551, 568–71 (Iowa 2012) (Appel, J., dissenting). Despite Robertson requesting the continuance, and indeed renewing the request after it was first

denied, our relief scheme nevertheless allocates fault to the public defender—even when the court was the one that got it wrong.

Under Clark's view, because this PCR did turn (in part) on Robertson's specific acts or omissions, there's no improper fault allocation, and so the PCR outcome must show he engaged in "unlawful" conduct. (Appellee Br., at 52). But this brings us right back to prejudice.

There are "dramatically different interests between the state in defending a conviction in a PCR proceeding and a defense attorney's interests in defending against liability in a criminal malpractice action." *Clark III*, 955 N.W.2d at 468. Most significantly, "the state acting as prosecutor in defending against an ineffective-assistance claim owes no duty to the criminal defendant's counsel just because he is a public defender." *Id.* The prosecutor defends the conviction and is ultimately tasked with seeing "that justice is done." *Id.* And "[w]hen PCR relief is granted, the State often elects not to retry the defendant on the same charges, even though a second conviction would eliminate a possible malpractice claim against the defense attorney." *Id.* Thus, the PCR relief scheme often requires allocating blame for any trial missteps to the public defender, and a public defender's professional interests play no role in the proceeding.

So "there can be little doubt that the jury could easily be prejudiced, or least confused, by evidence that [a court] already concluded that [the lawyer's] representation of [the criminal defendant] was inadequate." *Stevens v. Horton*, 984 P.2d 868, 874 (Or. App. 1991). Clark seeks to distinguish *Stevens*, but the case is indeed instructive. *Stevens* embraces the State's position that there is "a very real likelihood that the jury would have given [the prior ineffective-assistance ruling] preclusive effect." *Id.*

Clark also misses the material distinction between the jury weighing Exley-Shuman's testimony and the jury being told that another court had already found Robertson's representation constitutionally deficient. Exley-Schuman was tasked with investigating Clark's case, and thus had every motive to pin the lack of investigation on someone else. When deliberating, the jury can weigh his credibility, leaving room for motive and doubt. But even taking the testimony at face value, a lawyer's subjective (and defeated) view of his own performance stands apart from a final legal determination that a constitutional deprivation occurred. Where Exley-Shuman's testimony perhaps sheds light on Robertson's state of mind after losing a tough trial, Bennett's testimony tells the jury that their job has already been done—a court has already held Robertson violated Clark's constitutional rights.

Finally, *State v. Daly* indeed involved a criminal conviction, whereas this is a civil trial. 623 N.W.2d 799 (Iowa 2001). But for prejudice purposes, that is a distinction without a difference. Whether you tell a criminal jury that the defendant has already been found guilty of this same crime, or you tell a civil jury that this defendant had already been adjudicated to have provided subpar representation, the risk is the same: the jury "could reasonably be expected to misuse the evidenced as substantive proof" of liability. *Id.* at 803. And that risk persists even when the jury is "instructed not to do so." *Id.*

Here, Bennett went beyond informing the jury that Robertson had previously been held liable for malpractice or had previously been adjudicated ineffective when representing other clients. Bennett told the jury that this trial would not be happening but for an initial finding that Robertson violated Clark's constitutional rights. Even with instructions, it's the type of statement that a jury would reasonably be expected to misuse. While the burden for establishing the district court abused its discretion is rightly rigorous, Bennett's exceptionally prejudicial statement satisfies the purpose of the rule. The district court should have granted a mistrial.

CONCLUSION

The district court should be reversed, and judgment should be entered for the State because Clark's damages are not cognizable as a matter of law. Alternatively, Clark's expert witness's testimony was sufficiently prejudicial to undermine the integrity of the verdict, so this Court should remand for a new trial.

Respectfully submitted,

BRENNA BIRD
Attorney General of Iowa

/s/ David M. Ranscht
Assistant Attorney General

/s/ Tessa M. Register
Assistant Solicitor General
Iowa Department of Justice
1305 E. Walnut Street
Des Moines, Iowa 50319
(515) 281-5112
(515) 281-7175
David.Ranscht@ag.iowa.gov
Tessa.Register@ag.iowa.gov

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 Microsoft Word in 14-point Century Schoolbook font and contains 2,739 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ David M. Ranscht
Assistant Attorney General

CERTIFICATE OF FILING AND SERVICE

I certify that on November 2, 2023, this Reply Brief was electronically filed with the Clerk of Court and served on all counsel of record to this appeal using EDMS.

/s/ David M. Ranscht
Assistant Attorney General