IN THE SUPREME COURT OF IOWA
Supreme Court No. 23-0568

Donald Lyle Clark,
Plaintiff-Appellee,

v.

State of Iowa,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County
The Honorable Lars G. Anderson
District Court No. LACV079404

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether *Miranda v. Said*, 836 N.W.2d 8 (Iowa 2013), reaffirmed and applied the framework set out decades ago in *Lawrence v. Grinde*, 534 N.W.2d 414 (Iowa 1995), under which emotional distress damages are available where, as here, an attorney-client relationship involved a transaction charged with emotions in which negligent conduct by the attorney was likely to cause severe emotional distress, or rejected the *Lawrence* standard in favor of a new test under which emotional distress damages are only available if the attorney acted "illegitimately," a term the State claimed means "unlawfully," and with "no chance of success," an illusory standard no criminal malpractice plaintiff could ever meet.

Case Law

Barker v. Capostosto, 875 N.W.2d 157 (Iowa 2016)

Barnhill v. Davis, 300 N.W.2d 104 (Iowa 1981)

Boros v. Baxley, 621 So. 2d 240 (Ala. 1993)

Cowan v. W.U. Tel. Co., 122 Iowa 379, 98 N.W. 281 (1904)

dePape v. Trinity Health Sys., Inc., 242 F. Supp. 2d 585 (N.D. Iowa 2003)

Denny v. Chi., R.I. & P. Ry., 130 N.W. 363 (Iowa 1911)

Dombrowski v. Bulson, 971 N.E.2d 338 (N.Y. 2012)

Godfrey v. State, 962 N.W.2d 84 (Iowa 2021)

Gristwood v. State, 990 N.Y.S.2d 386 (N.Y.App.Div. 2014)

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In re M.S., 889 N.W.2d 675 (Iowa Ct. App. 2016)

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Long-Russell v. Hampe, 39 P.3d 1015 (Wyo. 2002)

McClure v. Walgreen Co., 613 N.W.2d 225 (Iowa 2000)

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State v. Shackford, 952 N.W.2d 141 (Iowa 2020)

Tisserat v. Peters, 99 N.W.2d 924 (Iowa 1959)

Wagenmann v. Adams, 829 F.2d 196 (1st Cir. 1987)

II. Whether the district court acted within its broad discretion in denying the State's motion for a mistrial where the court promptly instructed the jury to disregard a witness' brief reference to his understanding of Iowa law that a plaintiff alleging malpractice by a public defender must first obtain post-conviction relief on ineffective-assistance-of-counsel grounds; and further instructed the jury that testimony it was instructed to disregard was not evidence and could not be a basis for its decision in the case, that "ineffectiveness is not the same as negligence," that the case did not involve

ineffectiveness, and that the jury must determine negligence in accordance with the court's instructions, where the challenged testimony did not violate the court's liminal ruling, and the State did not object to or even challenge other testimony that the attorney admitted that he was ineffective and would have testified to his ineffectiveness in court.

Case Law

Fry v. Blauvelt, 818 N.W.2d 123 (Iowa 2012)

In re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970)

Lawson v. Kurtzhals, 792 N.W.2d 251 (Iowa 2010)

State v. Daly, 623 N.W.2d 799 (Iowa 2001)

State v. Fontenot, 958 N.W.2d 549 (Iowa 2021)

State v. Jackson, 587 N.W.2d 764 (Iowa 1998)

State v. Keys, 535 N.W.2d 783 (Iowa Ct. App. 1995)

Steven v. Horton, 984 P.2d 868 (Or. Ct. App. 1991)

ROUTING STATEMENT

The Iowa Supreme Court should retain this case under Iowa R. App. P. 6.1101(2)(d) and (f). The case presents a fundamental issue of broad public importance: Whether a criminal defense attorney who negligently defended his client against a particularly opprobrious felony charge, thereby causing his wrongfully convicted client to languish for years in prison, is liable for his client's foreseeable, inevitable, and severe emotional suffering. It also presents a substantial question that will allow the Iowa Supreme Court to reaffirm its

decades-old ruling that emotional distress damages are available where the attorney-client relationship involved a transaction charged with emotions in which negligent conduct by the attorney was very likely to cause severe emotional distress.

STATEMENT OF THE CASE

In 2009, Donald Clark, an elementary school counselor, was charged with the odious crime of molesting a young boy in his office during the school day. Clark relied on public defender John Robertson to defend him. There could be no doubt about the severe emotional distress that Clark, a gay man, would suffer if sent to prison for child molestation for *at least* 17 ½ years—the mandatory minimum sentence.

It was, by all accounts, a "he said, he said" case: because there were no witnesses or physical evidence, the two critical issues were credibility and the configuration and visibility of Clark's office, including whether it was in a remote location, whether the office door window was covered, whether Clark's office lights were off, and whether it was easy to hear voices and sounds emanating from the office. Robertson's abject failure to prepare; to consult Clark; to visit, photograph, or investigate the scene; to obtain important records; and to contact a *single* fact or character witness, including the multiple potential witnesses who could testify that the prosecutor's characterization of Clark's office was incorrect

and misleading, led to a swift and wrongful conviction in 2010. In 2016, after Clark spent nearly six and one-half years in prison for a crime that he did not commit, a post-conviction relief (PCR) court determined that Robertson violated Clark's constitutional right to effective assistance of counsel, and Clark was freed.

Clark sued the State for the damages caused by Robertson's negligent representation in the criminal case. A jury found that Robertson was negligent, and that his negligence caused Clark's conviction and severe emotional distress. The State challenged the jury's award of emotional distress damages, arguing that (1) emotional distress damages were not available; (2) the evidence was insufficient to support the verdict; (3) the State was entitled to qualified immunity; and (4) a new trial was warranted. The district court rejected the State's arguments, correctly ruling first that, under *Lawrence v. Grinde*, 534 N.W.2d 414 (Iowa 1995), which was followed and not altered by *Miranda v. Said*, 836 N.W.2d 8 (Iowa 2013), emotional distress damages were available because the attorney-client relationship involved a transaction charged with emotions in which negligent conduct by the attorney was very likely to cause severe emotional distress:

> Clark was accused of child molestation and formed an attorney-client relationship with Robertson for the purpose of defending himself from that charge. From the outset, Clark and Robertson knew that Clark's liberty was at stake. If convicted, Clark would face a seventeen and one-half year mandatory minimum sentence. They further knew or reasonably should have known that a breach of duty resulting in conviction would cause Clark severe emotional distress, considering that he would be viewed by society as a child predator and face

> especially heightened stigma because he is a gay man. The underlying subject matter of their attorney-client relationship inherently made severe emotional distress a "particularly likely result" in the event of any negligent breach of duty.

App. Vol. II, at 90-92. The district court further ruled that a new trial was not warranted because the challenged testimony did not violate the court's liminal order; it was "brief, promptly objected to, and stricken from the record"; and multiple curative instructions were provided. *Id*. at 11-12.

The State timely appealed, raising the first and fourth arguments presented below. *See* Appellant's Br., Issues Statement.

STATEMENT OF THE FACTS

The State admittedly "spill[s] some ink" in reciting a version of evidence viewed in the light most favorable to the State to suggest that Clark was guilty and caused his conviction, and that Robertson was not negligent in defending him.[1] It

[1] The malpractice jury obviously rejected the State's evidence and strenuous arguments that Robertson was not negligent, and that Clark—not Robertson—caused Clark's conviction and severe emotional distress. *See* App. Vol. II, at 72-73. But because the State has abandoned its sufficiency-of-the-evidence challenge to the jury's verdict in this appeal, its heavy reliance on its version of the evidence—including the criminal trial transcripts and its expert's testimony, as well as its characterization of Clark's evidence—must be rejected to the extent the State seeks to challenge the jury's findings that (1) Robertson was negligent; (2) Clark would not have been convicted if Robertson had not been negligent; (3) Robertson caused Clark's conviction and resulting damages; and (4) Clark suffered severe emotional distress. *See id*. and *id*. at App. Vol. II, at 66-67. Relatedly, the State withdrew its proposed comparative fault jury instructions, *see and compare* State's Proposed Statement of the Case, Jury Instructions, and Verdict Form (filed 9/6/22), Jury Instruction Nos. 17, 25, and the failure to raise or request a

also relies heavily on the fact that Clark's conviction was affirmed on appeal—even though the appellate court did not rule on the sufficiency of evidence underlying the guilty verdict, but affirmed on a procedural matter.[2] The evidence must be viewed in the light most favorable to Clark, of course. *Miranda*, 836 N.W.2d at 14. Because this appeal concerns attorney negligence, and the State's argument that emotional distress damages are unavailable unless an attorney acted "unlawfully," Clark provides the facts supporting his negligence claim and entitlement to emotional damages under *Lawrence/Miranda*, and the PCR court's conclusion that Robertson violated Clark's constitutional right to counsel (i.e., that Robertson acted "unlawfully").

The PCR Proceedings

A key point of contention in the criminal trial was the line of sight into and layout of Clark's office, including whether the office was remote or in a busy area, and whether his office door window was covered. App. Vol. I, at 32.[3] And in this

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comparative fault instruction at the jury conference which is another reason for rejecting its attempt to blame Clark for his conviction. [9/29/22 Tr. 39:23 - 41:23].

[2] The court ruled that it was not improper for the district court in the criminal proceedings to disallow a continuance and additional depositions, s*ee generally State v. Clark*, 814 N.W.2d 551 (Iowa 2012), but left Clark's ineffective-assistance-of-counsel claim for resolution in a PCR proceeding, *id*. at 567.

[3] The PCR Order is subject to judicial notice. Iowa R. Evid. 5.201.

"he said, he said" case, Clark's character and credibility were crucial to his defense. *Id*. at 35. The PCR court determined that Robertson's serious errors with respect to these critical issues denied Clark his Sixth Amendment right to counsel under the rigorous two-pronged analysis of *Strickland v. Washington*, 466 U.S. 668 (1984), which requires a showing that (1) trial counsel was deficient, and (2) the deficiency prejudiced the defendant. *State v. Ross*, 845 N.W.2d 692, 697–98 (Iowa 2014). The first prong requires the defendant to overcome a strong presumption that the attorney was not deficient. *Id*. at 698; *Strickland*, 466 U.S. at 689. The second prong requires a showing that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Halverson*, 857 N.W.2d 632, 639 (Iowa 2015).[4]

The PCR court found several serious errors. Robertson failed to visit or photograph the scene despite "the clear and serious importance" of the configuration and visibility of the office. App. Vol. I, at 31-32. Clark did not see the State's photographs of his office until trial, at which time he tried to convey to

[4] The extreme difficulty of satisfying *Strickland* is reflected in the Iowa Office of the State Public Defender report that in fiscal year 2018, "public defender offices closed 82,117 charges, . . . and there was a final *finding of ineffective assistance of counsel in less than .001% of these charges*." Office of the State Public Defender FY 2018 Performance Report, Introduction, 3 *available for at* https://data.iowa.gov/Accountable-Government-Act/Iowa-Office-of-the-State-Public-Defender-FY-2018-P/8j9z-nqbx (last visited August 21, 2023) (emphasis added).

Robertson that the photographs were misleading and did not accurately represent his office. *Id*. at 33. Robertson did not object to the State's misleading photographs, nor did he use Clark's more accurate photographs. *Id*. Also, Clark was not notified of depositions in which the layout of his office was discussed. *Id*. Had he been present, he would have been able to refute the deponents' testimony, including by showing that his office was not remote, and lacked blind spots where the alleged abuse could have occurred. *Id*. The court again noted that "[i]n this type of 'he said, he said' case involving a serious claim of sexual abuse in a room with windows in a public area of an elementary school, investigation . . . and photography of the scene" was "critical" to Clark's defense. *Id*. at 32. Robertson's failure to investigate and inform Clark of important depositions prejudiced the defense. *Id*. at 33.

Also, Robertson failed to investigate and introduce character evidence in Clark's favor. *Id*. at 35. Clark's proposed character witnesses would have been important fact witnesses, as well, as they would have countered testimony that Clark's office was in a remote location. *Id*. Robertson failed to even speak to these potential witnesses. *Id*. His abject failure to investigate and introduce character evidence resulted in prejudice. *Id*. The court also noted that Robertson admitted that he had been ineffective in his representation. *Id*. at 17, 30-31.

Each of these serious errors, coupled with the probability that the result of the trial would have been different had each not occurred, resulted in the court finding that Robertson's representation violated Clark's constitutional right to counsel.[5] *Id*. at 32-34, 35, 39. The State did not appeal, and declined to prosecute Clark again, citing a lack of evidence. App. Vol. II, at 4.

The Legal Malpractice Trial

Mark Bennett, a retired federal judge who had reviewed hundreds of ineffective-assistance-of-counsel claims and presided over more than 250 criminal trials, testified that Robertson was negligent and caused Clark's damages. [9/22/22 Tr. 8:1-9:5, 21:5-8, 50:1-18]. Judge Bennett testified, without objection, that an investigator with the public defender's office reported Robertson's admission that he had been "ineffective" in representing Clark, [*id*. at 36:1-7]. Clark's counsel tried to elicit testimony distinguishing ineffectiveness from negligence:

> Q. Now help us understand this: Is ineffective assistance of counsel in the Sixth Amendment standpoint, the same standard as negligence, the standard that we have in this particular court?
> A. No, but they're first cousins in my view.

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[5] Relief was also warranted due to newly discovered evidence. After the criminal trial, the alleged victim, C.B., filed a lawsuit against Clark and the school. In that case, C.B. testified that he knowingly lied while under oath in the criminal proceedings, both during his deposition and at trial, and that he knew he was lying under oath when he did so. App. Vol. I, at, 37-38. Where the new evidence challenged C.B.'s credibility, and the discrepancy in C.B.'s testimony called into question whether the timing and specific allegations of abuse could have taken place in Clark's office, it was probable that the new evidence would have changed the outcome of the criminal trial. *Id*.

> Q. Explain that so we understand it.
> A. Well, there's an overlap of --particularly, in this kind of case where 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 Robertson violated the Sixth Amendment and provided ineffective assistance of counsel.

[*Id*. at 37:9-23]. Upon the State's objection, the district court promptly instructed the jury to disregard Judge Bennett's answer, and "not to give any weight or attention to that testimony and disregard it in its entirety." [*Id*. at 48:1-7, 49:1-7]. Clark's counsel thereafter emphasized that the relevant standard for the jury was negligence, and not ineffectiveness: "Q. . . . So, we were talking about two different topics because of what an investigator said Robertson said – ineffective assistance of counsel. What we're talking about in this case, though, is negligence." [*Id*. at 49:21-25].

Judge Bennett testified that Robertson negligently investigated and prepared, and this negligence infected the criminal trial. [*Id*. at 56:4-57:17]. Robertson failed to obtain a "confession letter" written in C.B.'s journal and failed to obtain an important email from C.B. to his parents until a couple of days before trial, even though the email was referenced in a report produced to him months earlier, and he should have sought it out much sooner. [*Id*. at 66:25-69:9].[6] Robertson failed to

[6] Oddly, the State relies heavily on the Iowa appellate courts' comments regarding the email and Robertson's attempt to obtain it, Appellant's Br. 20-21, perhaps to suggest that these comments have some kind of preclusive effect, or to somehow undermine Judge Bennett's testimony. But the State never argued that

investigate the scene, take photographs, determine whether Clark's office was soundproof, interview fact witnesses who would have testified that Clark's office was in a high-traffic area, and interview character witnesses, all of which were critical failures in this case. [*Id*. at 70:1-71:10, 92]. These failures prevented Robertson from examining C.B. and the detective at trial, and it "absolutely" interfered with his ability to examine Clark. [*Id.* at 70:23-72:1, 92] ("But in this case, where the scene was going to be a paramount issue in the case, . . . I just can't imagine not visiting the scene. It's so important to understand this scene so that it aid[s] you in your ability to cross-examine."). Robertson failed to investigate C.B.'s psychiatric condition, including possible schizophrenia—a crucial consideration in the case. [*Id*. at 78-79]. Judge Bennett declared that Robertson's "deposition" of the State's investigator—the "core" transcript of which was 4 pages—was the "worst deposition [he] had ever seen." [*Id.* at 79-80]. Robertson did not ask this key witness *anything* about the journal entry, various emails, or communications with C.B.'s counselors, in the deposition or at trial. [*Id*. at 80, 88]. The counselors were never deposed, and their records were never even requested. [*Id*. at 82-83]. Robertson did not request letters between C.B. and his parents, which was another violation of the standard of care. [*Id.* at 85-6, 88].

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the comments rendered it improper for the jury to decide the issue or for Judge Bennett to opine with respect to it.

Clark gave Robertson a list of many potential witnesses, but Robertson did not contact a single one. [*Id*. at 102]. He did not contact any of the witnesses who could have established that the office was in a high traffic area, and that there was a lack of soundproofing in the building. [*Id*. at 91-2; 140-41]. He did not use any character witnesses at trial, [*id*. at 102-03], even though such witnesses are "very powerful" and can "make a huge difference" in the defense of a "he said, he said" case. [*Id*. at 104]. Judge Bennett was further astounded that Clark did not see the State's misleading photographs until trial; Robertson's failure to show Clark the State's evidence was "so far below the standard of care that I just simply can't imagine a lawyer not showing their client the opposing parties' evidence and going over that evidence with the client and trying to learn if there are any ways to rebut it. It's – to me it's inconceivable that a lawyer would not do that." [*Id*. at 99]. That Robertson only met with Clark for 2 to 3 hours in the five months leading up to the trial, was similarly egregious:

> It's so grossly inadequate in my opinion that it's -- it strikes me as inconceivable. I mean, most lawyers spend more time than that even when a client appears or wants to plead guilty and there's a 30-minute guilty plea proceeding. But when you're going to trial, it's -- it blows my mind that that's all the time the lawyer would spend with the client.

[*Id*. at 100; *see also id*. at 106] (describing the amount of time as "astoundingly jaw-dropping, shocking to me."). Judge Bennett was incredulous that Robertson not only waived Clark's right to attend important depositions without Clark's

permission (which is "absolutely impermissible"), [*id*. at 101], he failed to review the depositions with Clark afterwards ("And to me that's -- in my wildest dreams I can't imagine that happening."), [*id*. at 102]. Robertson's many failures negatively affected "every aspect" of the criminal trial—from the opening statement, to the examination of the witnesses, to the closing argument. [*Id*. at 90, 107].

As for the foreseeability of the severe consequences of Robertson's negligence, Judge Bennett testified that "*every* [criminal defense] lawyer understands the magnitude of their duty and their relationship with the client and why you have to meet the standard of care and not be negligent because the consequences involve someone losing their liberty, and I don't know if any duty that a lawyer has in other types of cases that create such significant consequences because in criminal cases, a defendant can be sentenced to very lengthy punishment as was the case here." [*Id*. at 58:11-19, 61:11-18]. The foreseeable consequences to a criminal defendant facing a serious charge would "weigh heavy" on every criminal defense lawyer "because the consequences can be so severe." [*Id.* at 61:11-18]. While less investigation might be permissible in a misdemeanor case, a felony charge carrying a mandatory minimum sentence of 17.5 years demands a much more thorough investigation, [*id*. at 68:1-8], which Robertson failed to do. Judge Bennett concluded that Robertson violated the standard of care in investigating, preparing for, and conducting the criminal trial, and that

Robertson's negligence caused Clark's wrongful incarceration and damages. [*Id*. at 50:1-18, 56:4-57:17, 71:2-72:1].

The State's expert, Mr. F. Montgomery Brown—who initially reacted to several aspects of Robertson's performance, such as failing to gather C.B.'s counseling records, understand the scene, and delve into an incriminating email during the trial, with the acronym "WTF"[7]—conceded that failing to investigate and understand the scene, and spending only 2 ½ to 3 hours with Clark prior to trial, breached the standard of care. [9/28/22 Tr. 84:14-85:23; 89:1-23; 94:3-95:17; 125:23-126:14; 140:11-141:18; 142:1-10; 149:4-150:4]. He testified that not only would Robertson's failure to return Clark's calls be "concerning," it would also be a violation of Robertson's duty. [*Id*. at 125:7-22]. Brown did not know that the records Robertson failed to obtain indicated that C.B. was seen by a psychiatrist just a couple of months before the criminal trial, and that he had been seeing and hearing things since he was little, nor did he know that Robertson failed to obtain emails showing the use of derogatory words towards gay people. [*Id*. at 102:9-103:22]. Brown admitted that Judge Bennett's review of the case file was much

[7] Brown made notes critical of Robertson's defense on the criminal trial transcript, including writing, "guessing[,] he should know exactly[;] doesn't say where room is[;] doesn't understand layout?[;] high traffic area?"; "WTF Midwest records counseling records," "WTF nothing about room/location high traffic," "WTF go through the letter make him read the letter," "nothing about the layout," and "you can see into room by adult[.]" App. Vol. II, at 21, 47-48.

more thorough than his own. [*Id*. at 151:6-14]. Brown conceded that Robertson "should have tried" to obtain C.B.'s counseling records and that his failure to do so "certainly could be negligent." [*Id*. at 94:13-95:17]. Brown agreed that Robertson should have at least contacted the potential witnesses to determine whether they could be helpful. [*Id*. at 147:2-13].

An investigator with the Iowa Public Defender's Office for over twenty years, Steven Exley-Shuman, testified that he repeatedly asked Robertson if he could investigate and photograph the scene, but Robertson repeatedly told him no. [9/26/22 Tr. 21:15-17; 23:16-25]. On the evening of Clark's conviction, Robertson admitted to Exley-Shuman that he had been ineffective, and that he would testify to that in court:

> **[H]e just told me** in a very somber kind of tone, very serious kind of tone, that I never – rarely saw from him that, um, **"I was ineffective."** And it just hit me like a bombshell. . . . I'd never heard in our office before any attorney ever say I was ineffective representing a client. . . . **When he told me he was ineffective, he did say he would testify to that in court**. . . . [I]t's him admitting I messed up in the most --- in the biggest, most fundamental way that I could mess up. Um, **it was him saying that he was willing to be honest and put** Clark's – **his ineffectiveness of Clark's case above his own reputation and go into court and say "I really messed up."**

[*Id*. at 35:4-36:17].[8] Exley-Shuman told two other public defenders about Robertson's admission. [*Id*. at 38:5-10]. The State did not object to this evidence,

[8] Unfortunately, Robertson died in 2013, so he was unable to make good on his promise to admit to his errors in court.

nor did it attempt to dispute it—even though it had two employees it easily could have asked (and possibly did ask) to confirm or deny Exley-Shuman's account.[9]

Samantha VonSpreecken, Clark's investigator in the PCR proceedings (now an Illinois Public Defender), photographed the scene, and testified that there were no "blind corners" in Clark's office, which was "not at all" secluded or remote, and that one could easily see through the window in the office door. [*Id*. at 56:1-60:25, 61:23-62, 67:23-68:3]. Clark's office was in a very busy area of the school:

> There wasn't anything hidden or remote about his office at all. . . [T]here was a constant flow of children and teachers walking by the classroom, you could hear the other classrooms. It was right in the center of what seemed like a lot of action.

[*Id*. at 68:22-69:4]. VonSpreecken testified that even with Clark's office door closed, she could easily hear sounds from the corridor and neighboring classrooms. [*Id*. at 72:3-18]. The criminal allegations regarding Clark using an angry voice and C.B.'s cries were simply not plausible. [*Id*. at 72:13-25].[10]

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[9] The State was aware of Exley-Shuman's testimony since at least 2016. App. Vol. I, at 17, 30-31.

[10] In his statement to the police, C.B. wrote that Clark "was being very angry and violent with me," and that "[h]e was talking in a very angry manner to me like a raised voice not shouting but very stern almost like a scolding talk and he kept telling me to shut up and I was crying really loud[.]" App. Vol. II, at 61. Had Robertson investigated the scene or asked a *single* witness proposed by Clark, he would have learned that the school building lacked soundproofing, and occupants of the rooms next door and passersby in the heavily trafficked area would have easily heard a loud voice and crying.

Two teachers at the school, potential witnesses that Robertson failed to contact, Susie Thrams and Carrie Gordon, testified to Clark being an outstanding counselor who would never mistreat a child. [*Id*. at 78:21-24; 81:25; 85:15-23; 86:21-87:15; 173:14-22]. They confirmed that Clark's office was not secluded but was in a very busy area with continual traffic. [*Id*. at 89:11-22; 90:1-3; 182:12-183:10; 186:2-187:2]. Gordon further confirmed that at time of the alleged incident, "you could hear everything going on" in the small rooms, such as Clark's office, which had dropped ceilings. [*Id*. at 177:6-178:16]. Thrams testified that Clark's office light would only be off when Clark was not in the building; his office door window was not covered up in a way that would prevent adults from seeing into his office; and one could see the entire room, which was small and had no blind corners, from the window. [*Id*. at 93:21-94:5; 96:12-15; 97:23-98:2]. Gordon and Thrams testified that due to the characteristics, configuration, and location of Clark's office, the allegations against Clark were not even plausible or possible. [*Id*. at 94:6-14; 186:2-187:2].

Clark confirmed that his office light was always on if he were in the building. [9/27/22 Tr. 47:2-48:1]. When his light was off, staff members knew that his office could be used for other school programs, and they would not even knock before entering because they would have known he was gone. [*Id*. at 47:2-48:1, 49:11-22]. As for allegations that he was molesting a child in the dark in his office

during the school day, that "would have been more than risky . . . it would have been stupid." *Id*.

Clark's counselor, Katie Doyle-Errthum, testified that while he was in prison, he was in a state of "extreme fear"; "[h]e's a gay man who has been convicted to a child sex crime, um, and he was scared to death. There were multiple instances . . . where he thought he was going to be killed," including one particular inmate who threateningly "came at him" a few times. [9/26/22 Tr. at 129:25-130:13; 133:10-17]. He was forced to "befriend" a convicted murderer to protect himself. [*Id*. at 133:17-134:19.][11] After his release, he was "extremely anxious" about being in public and running into former students or colleagues. [*Id*. at 132:13-18]. Clark suffered from post-traumatic stress disorder and was receiving cognitive behavior therapy. [*Id*. at 136:7-9; 137:14-22]; App. Vol. III, at 23-56. When it came to Clark's memories, nightmares about prison and about his safety, "[h]e will grieve this loss for a lifetime," he would always need therapy to manage his anxieties, and he would never fully recover. [9/26/22 Tr. at 138:5-24]. Fears for his safety, shame, and anxiety would be a lifelong struggle. [*Id*. at 140:13-141:6].

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[11] After his release, Clark occasionally visited that person, as he believed the non-consensual relationship saved his life while he was in prison, and he was in a way grateful for it—though he agreed that his feeling of gratitude was not really "the healthiest place to be." [9/27/22 Tr. 169:22-170:11].

Clark testified that within a half hour of entering the prison system, other inmates told him, "we know what you are." [9/27/22 Tr. at 106:14-107:21]. The feeling of being scared to death lasted from the moment he entered prison until the day he left, over six years later. [*Id*. at 109:3-8]. He witnessed violence almost every day. [*Id*. at 111:3-6]. He always walked up against a wall, "so there was only one shoulder I had to look over." [*Id*. at 112:10-24]. The only time he felt safe was when his cell door closed for the night, but even that did not keep the nightmares away. [*Id*. at 116:2-10]. He still either cried or came close to crying every day due to what he had been through and continues to go through, including the stain of being labelled a child molester, which will never go away. [*Id*. at 144:7-145:6]. Clark's father described visiting Clark in prison, and watching him lose weight, becoming more withdrawn, depressed, and anxious, and losing his "spirit" and "light"—despite Clark making an effort to hide his suffering. [*Id*. at 184:5-185:24; 187:25-188:5].

After the close of evidence, the jury was instructed that "[i]neffectiveness is not the same as negligence. The case does not involve ineffective assistance of counsel. This is a negligence case and you must determine negligence in accordance with these instructions." App. Vol. II, at 66. It was also instructed that its verdict could only be based on evidence, and that "[a]ny testimony [the court] told you to disregard" was "not evidence[.]" App. Vol. II, at 63-64.

In the end, the jury rejected the State's version of events, its expert's testimony and other evidence, and its attacks on Clark's evidence that the State presents in its opening brief: The jury found that Robertson was negligent and caused Clark to suffer severe emotional distress. App. Vol. II, at 72-73. The jury reviewed the evidence, including the criminal trial transcripts, and found that Robertson negligently represented Clark by failing to use the skill, care, and learning ordinarily used by other attorneys in similar circumstances. App. Vol. II, at 66. The jury heard Brown's opinions that Robertson had a valid trial strategy and was not negligent, that Clark was to blame for his conviction, and that the various missing witnesses and evidence, the belated attempt to obtain an important email, and the failure to investigate the crime scene, did not matter—and rejected them, as it was allowed to do. App. Vol. II, at 65. (jurors may accept or reject expert testimony). The jury heard the State's cross-examination of Clark and his therapist, and its other evidence that the State hoped would show that Clark did not suffer severe emotional distress, or that, if he did, it wasn't because of Robertson's negligence. In awarding $12 million in emotional distress damages, the jury obviously rejected the State's defense in this regard, as well. App. Vol. II, at 66-67. (noting Clark's burden to prove that Robertson's negligence caused Clark's damages and to prove the amount of damages) App. Vol. II, at 72-73. The State does not challenge the sufficiency of the evidence supporting these jury findings.

ARGUMENT

I. Emotional Distress Damages are Available Where the Attorney-Client Relationship Involved a Transaction Charged with Emotions in Which Negligent Conduct by the Attorney was Likely to Cause Severe Emotional Distress.

Pursuant to the analytical framework set out almost 30 years ago in *Lawrence*, emotional distress damages are available because the relationship between Clark and Robertson was formed for the purpose of preventing Clark, a gay man, from being convicted of child molestation, a transaction undisputedly charged with emotions in which negligent conduct by Robertson was likely to cause severe emotional distress. The State has never argued that emotional distress damages are unavailable under *Lawrence*. Rather, the State claims that the Iowa Supreme Court in *Miranda* replaced the *Lawrence* negligence framework with a new test, one that purportedly requires a showing of "illegitimate"/unlawful conduct that has "no chance of success." The *Miranda* court did no such thing. In fact, it expressly and repeatedly stated that it was applying *and not departing from Lawrence*; all that was and is required is negligence.

In the unlikely event the Court determines that unlawful conduct must be shown, it has been: Robertson violated Clark's Sixth Amendment right to counsel.

A. Error Preservation and Standard of Review.

The State preserved its argument regarding the standard controlling the availability of emotional distress damages. Denials of directed verdict and

judgment notwithstanding the verdict (JNOV) motions are reviewed for the correction of errors at law, with all evidence viewed in the light most favorable to the nonmoving party, with the moving party deemed to have admitted the truth of the nonmoving party's evidence and every favorable inference that may fairly be deduced from it. *Godfrey v. State*, 962 N.W.2d 84, 99 (Iowa 2021); *McClure v. Walgreen Co.*, 613 N.W.2d 225, 230 (Iowa 2000).

B. *Miranda* Did Not Change the *Lawrence* Standard.

The *Miranda* court adhered to and applied the *Lawrence* framework—a framework that does not impose the State's proposed and ambiguous "illegitimate"/unlawful and "no chance of success" test.

1. *Lawrence*

Lawrence hired an attorney to pursue bankruptcy. 534 N.W.2d at 416. The attorney failed to disclose on the bankruptcy forms a settlement Lawrence had obtained from a former business partner. *Id.* Subsequently, in an unrelated matter, Lawrence sued various local businesses and the federal Small Business Administration. *Id.* During the discovery phase of that case, the United States learned of the undisclosed settlement, which led it to charge him with fraud (about five years after his bankruptcy proceedings). *Id*. at 417. Lawrence was acquitted, and sued the bankruptcy attorney for malpractice. *Id.* A jury found the attorney negligent and awarded emotional distress damages. *Id.*

On appeal, the court considered the availability of emotional damages Lawrence claimed were caused by "the *negligent* act of his bankruptcy lawyer." *Id.* at 420 (emphasis added). While emotional damages were generally unavailable in negligence actions in the absence of physical harm, there was an exception where the nature of parties' relationship—such as "a contractual relationship for 'contractual services that carry with them deeply emotional responses in the event of breach'"—gives rise to a duty to avoid causing emotional harm. *Id*. at 420 & 421 (quoting *Oswald v. LeGrand*, 453 N.W.2d 634, 639 (Iowa 1990)). The *Lawrence* court relied on cases recognizing recovery for emotional damages "when a party *negligently* performed an act which was 'so coupled with matters of mental concern or solicitude, or with the sensibilities of the party to whom the duty is owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering, and it should be known to the parties from the nature of the [obligation] that such suffering will result from its breach.'" *Id*. (quotation omitted) (emphasis added).[12] The emotional distress must be severe. *Id*. at 421. Finally,

[12] None of the cases cited by *Lawrence* in this passage conditioned the availability of emotional distress damages on a level of culpability higher than mere negligence. *See Oswald*, 453 N.W.2d at 639 n.2 (rejecting requirement of "outrageous conduct" in medical negligence case); *Barnhill v. Davis*, 300 N.W.2d 104, 105 (Iowa 1981) (son witnessed negligent driver hit his mother's vehicle , which caused her to be bruised); *Cowan v. W.U. Tel. Co.*, 122 Iowa 379, 98 N.W. 281, 281 (1904) (plaintiff not met at the station by relatives after her husband died due to the "mistake or negligence of the telegraph company"); *Mentzer v. W.U. Tel. Co.*, 93 Iowa 752, 62 N.W. 1, 1, 7 (1895) (plaintiff did not timely receive news

the court explained that while emotional damages are not reasonably foreseeable in certain types of legal malpractices cases, such as pecuniary or property-based cases, the majority of jurisdictions "recognize that emotional anguish may be a foreseeable damage resulting from attorney *negligence*" "in special cases involving peculiarly personal subject matters." *Id*. at 422 (emphasis added). The case before it was not one of those "special cases": "[a] bankruptcy attorney's duty to competently manage the bankruptcy process is not so coupled with matters of mental concern or solicitude . . . that a breach of that duty will . . . reasonably result in mental anguish[.]" *Id*. at 423 (quoting *Oswald*, 453 N.W.2d at 639). Additionally, the emotional distress was too far removed from the bankruptcy attorney's negligence, *id.*, an unsurprising result given the circuitous turn of events in that case.[13] The *Lawrence* court never discussed, recognized, or required a level of culpability higher than "mere negligence" in deeply emotional contract cases as a prerequisite to obtaining emotional distress damages. The State does not argue that emotional damages are unavailable under *Lawrence*.

2. *Miranda*

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of his mother's death due to "the negligence and carelessness" of the telegraph company); *Meyer v. Nottger*, 241 N.W.2d 911, 921 (Iowa 1976) (negligent performance of a contract for funeral services).

[13] The State has never argued that Clark's emotional damages were remote or too far removed from Robertson's negligence, nor does it challenge the sufficiency of the evidence supporting the jury's finding that Robertson caused Clark's conviction and severe emotional damages in this appeal.

The *Miranda* plaintiffs were two undocumented Ecuadorian citizens living in the United States who hired an immigration attorney to help them obtain citizenship after one of them received a removal order. 836 N.W.2d at 11. The attorney advised them to return to Ecuador and submit forms to the consulate that would purportedly allow them to enter the United States upon a showing of "extreme hardship" to a "qualifying relative," in this case, their soon-to-be U.S. citizen-son. *Id*. The attorney prepared statements detailing the "extreme hardship" that would result if the plaintiffs were unable to return to the United States. *Id*. The plaintiffs returned to Ecuador after the attorney assured them that the plan would work. *Id*. The attorney was wrong. The consular official informed the plaintiffs that not only was their son not a "qualifying relative," they were now barred from re-entering the United States for 10 years. *Id*. at 12-13 & 12 at n.2.

The plaintiffs sued for malpractice. The attorney stipulated that "no reasonable attorney" would have relied on the forms, though he claimed that he had successfully used a child as a "qualifying relative" in the past, and that consular officials had exercised their discretion when a child was listed on the form. *Id*. at 13. The plaintiffs' expert testified that the officials lacked discretion, and that the attorney's strategy "likely had no chance of success." *Id*. The district court disallowed the claims for emotional distress and punitive damages, and the

plaintiffs appealed. *Id*. The Iowa Court of Appeals reversed, and the attorney sought further review. 836 N.W.2d at 13-14.

> The *Miranda* court began its analysis by quoting the *Lawrence* rule:
>
> > [w]e have recognized recovery for emotional distress damages in actions which did not involve an intentional tort when a party negligently performed an act which was "so coupled with matters of mental concern or solicitude, or with the sensibilities of the party to whom the duty is owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering, and it should be known to the parties from the nature of the [obligation] that such suffering will result from its breach."

Id. at 14 (quoting *Lawrence,* 534 N.W.2d at 420–21). It painstakingly traced the history of the availability of tort damages in contract actions, beginning with *Hadley v. Baxendale*, (1854) 156 Eng. Rep. 145. *Id*. at 16.[14] The lesson from *Hadley*, implicit in *Lawrence*, was that "when parties to a transaction should reasonably have contemplated that emotional distress will naturally flow from a breach of the contract, the foreseeable consequential damages" recoverable included emotional distress damages. *Id*. at 178. *Lawrence* required more than foreseeability, however; the subject matter underlying the contract must also be one in which emotional distress "was a particularly likely result." *Id*. (citing Restatement (Second) of Contracts § 353 cmt. *a,* at 149 (1981)). Emotional distress was not "'a particularly likely result' or natural and probable consequence"

[14] "[L]egal malpractice actions sound in tort, yet owe their existence in part to contract law." *Id*. at 23.

of a breach of ordinary commercial contracts. *Id*. But "[w]here the contract is personal in nature and the contractual duty or obligation is so coupled with matters of mental concern or solicitude . . . that a breach of that duty will . . . reasonably result in mental anguish or suffering, and it should be known to the parties from the nature of the contract that such suffering will result from its breach," emotional distress damages were available. *Id*. at 19-20 (quoting *Meyer*, 241 N.W.2d at 921). Indeed, the subject matter of the contract and whether the nature of the interest invaded was pecuniary or personal was critical: Breaches of pecuniary contracts result in pecuniary damages, and breaches of non-pecuniary contracts result in non-pecuniary damages. *Id*. at 21-22 (citing *Mentzer*, 62 N.W. at 4), 23, 24 (noting the importance of the contract subject matter and the nature of the interest invaded).

The court emphasized that cases involving non-legal professional services, such as the ones allowing emotional distress damages for negligent delivery of a telegram announcing a death, or negligent provision of healthcare, or a funeral home's negligent preparation of a body, were important so as to overcome any perceived reluctance to expose lawyers to the liability faced by other professionals. *Id*. at 23 n.11. The court pointedly eschewed "creat[ing] a special rule benefiting negligent lawyers." *Id*. (quoting *Holliday v. Jones*, 264 Cal. Rptr. 448, 455 (Cal.Ct.App. 1989)). The *Miranda* court further noted,

> Indeed, as the California Court of Appeal explained, "[i]f as a result of improper psychiatric diagnosis an individual is mistakenly committed to a mental hospital [case law] plainly allows recovery of emotional distress damages against the negligent psychiatrist. If the same individual is mistakenly committed as a result of the negligence of his lawyer and suffers the same damages, defendants' argument would require that recovery be denied. In our view, not only is such a special interest rule unfair, but public perceptions regarding it poorly serve the broader interests of the legal profession."

Id. (quoting *Holliday*, 264 Cal. Rptr. at 455).

The *Miranda* court explained that courts throughout the country applied the *Lawrence* rule to legal malpractice claims: emotional distress damages were unavailable "in cases in which the attorney is retained for solely economic reasons," but were available "when emotional distress is a natural and foreseeable consequence of . . . attorney malpractice." *Id*. at 25-26. The court again recognized that a critical consideration is the nature of the interest invaded by the attorney's negligence, *id*. at 27, citing with approval *Holliday* (holding "emotional distress damages were appropriate when plaintiff had been wrongfully convicted of manslaughter because of his trial attorney's negligence") and *Lawson v. Nugent*, 702 F.Supp. 91, 95 (D.N.J. 1988) (holding emotional distress damages were available "in a legal malpractice action alleging plaintiff spent twenty extra months in maximum security prison because of his attorney's negligence"). The *Miranda* court also noted that the contrast between the *Lawrence* majority, which concluded that negligence in a bankruptcy matter was not likely to cause emotional harm, and

the dissent, which concluded that it was, "revealed that the line between an award for emotional damages in legal malpractice was not sharply defined." *Id*. at 25.

In *Miranda*, the line was easily drawn. The subject matter underlying the contract was obtaining citizenship and keeping the family together. *Id*. at 33 & 32 (noting the emotional distress that accompanies the prolonged separation of a parent and child). The attorney knew that emotional distress was a particularly likely result of his negligence: he authored the "extreme hardship" memorandum detailing the emotional distress the plaintiffs would suffer if they were not reunited with their children. *Id*. at 32. He also knew that a son was technically not a qualifying relative, yet he pursued the strategy anyway. *Id*. Under these circumstances,

> **[t]his is not a case that requires us to reconsider the rule we have developed over the years to determine if damages for emotional harm are recoverable in an action for negligence.** The exception to the rule, applied to the facts presented to the jury in this case, support emotional distress damages. **The relationship involved a transaction charged with emotions in which negligent conduct by the attorney was very likely to cause severe emotional distress.** Of course, it is not necessary to go further to decide just where the line between duty and no duty may be drawn. Here, we can draw the line at the nature of this attorney–client relationship and the likelihood that serious emotional harm would result from negligently undertaking the illegitimate course of action. While the relationship was formed for the purpose of establishing a path to citizenship and a means to keeping the family united, Said only pursued an illegitimate course of conduct that had no chance of success if the independent decision-maker followed the law. The negligent conduct was doomed to directly result in a separation of the family for a decade. In this light, **it was the type of relationship in which negligent conduct was especially likely to cause severe**

> **emotional distress**, supporting a duty of care to protect against such harm.

Id. at 33 (emphasis added). The court described the attorney's negligence in the case as pursuing an "illegitimate" course of conduct that likely had "no chance of success," *id*., but describing the attorney's negligence is not changing the *Lawrence* framework. Indeed, the *Miranda* court repeatedly emphasized that it was simply applying *Lawrence* – no more, and no less: "[w]e reiterate that our holding today is limited: [the plaintiffs'] claim for emotional distress damages is viable under the standard we set forth nearly twenty years ago in *Lawrence*. . .. We need not depart from this framework today to decide the issue presented." *Id*.; *see also id*., at 23 n.10 (recognizing that the claim for emotional distress damages "prevail[ed] under existing law"); *id*. at 26 n.12 ("[The plaintiffs] were entitled to present a claim for emotional distress damages to the jury under the reasoning announced in *Lawrence*."); *id*. at 33 ("This is not a case that requires us to reconsider the rule we have developed over the years to determine if damages for emotional harm are recoverable in an action for negligence.").

Turning to the issue of punitive damages, the court determined that the same facts supporting emotional distress damages also supported punitive damages. *Id*. at 34. Nevertheless, the court was clear that punitive conduct is not necessary to pursue emotional distress damages. *Id*. at 26 n.12 (refusing to consider out-of-state cases allowing emotional distress damages without inquiring into the subject

matter of the contract when the attorney's behavior satisfied a heightened culpability standard, stating that "[w]hile a reasonable jury could find that Said's conduct was willful or wanton, we need not consider this line of authority because [the plaintiffs] were entitled to present a claim for emotional distress damages to the jury under the reasoning announced in *Lawrence*.").[15]

C. The Iowa Supreme Court Does Not Require a Heightened Culpability Standard.

The Iowa Supreme Court has never limited the availability of emotional distress damages to cases in which the defendant's behavior met a heightened culpability standard beyond mere negligence. Rather, the rule is that such damages are available where "[t]he relationship involved a transaction charged with emotions in which negligent conduct by the attorney was very likely to cause severe emotional distress." *Miranda*, 836 N.W.2d at 33. The State's argument that the *Miranda* court replaced the *Lawrence* framework—where the *Miranda* court expressly and repeatedly stated that it was not—with a new, ambiguous, and

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[15] The conduct the State claims is required—"unlawful" with "no chance of success"—was deemed punitive by the *Miranda* court. The State's argument, taken to its logical conclusion, is that emotional distress damages are only available where an attorney's conduct is *at least* willful and wanton, if not even more culpable. But the *Miranda* court disavowed cases allowing emotional distress damages only where the attorney's conduct met a heightened culpability standard, such as willful and wanton conduct. It would make little sense for the court to assert that it need not consider punitive conduct cases in defining the negligence standard, and then require punitive conduct.

heightened culpability standard of "illegitimate"/unlawful with "no chance of success," should be rejected for several reasons.

First, neither *Lawrence* nor any of the Iowa cases on which it relied imposed a heightened culpability standard. The *Lawrence* plaintiff alleged only that his attorney acted negligently. 534 N.W.2d at 420. The primary reason emotional distress damages were unavailable in *Lawrence* was not because the attorney's conduct was insufficiently egregious; rather, it was because managing the bankruptcy process was not "'so coupled with matters of mental concern or solicitude . . . that a breach of that duty will necessarily or reasonably result in mental anguish or suffering.'" *Id*. at 422.[16] None of the cases on which *Lawrence* relied required anything beyond mere negligence. For example, *Oswald* allowed emotional distress damages in the absence of "illegitimate" or unlawful behavior of the healthcare providers who committed malpractice in their "negligent examination and treatment" of a pregnant woman, *id*. at 421 (and there was no "no chance of success" requirement, either). Likewise, emotional distress damages were available against a telegraph company for negligently failing to timely deliver a telegram; there was no requirement of illegitimate or unlawful behavior, and the

[16] A secondary reason was that the bankruptcy attorney's negligence was too far removed from the plaintiff's emotional distress suffered years later in a wholly unrelated proceeding, but the State has never made and could not make a remoteness argument here.

court did not impose a "no chance of success" requirement there, either. *Id*. (citing *Mentzer*). The same must be said about a funeral home's "negligent" provision of funeral services. *Id*. (citing *Meyer*). That none of the cases underlying Lawrence required a higher culpability standard is important for at least two reasons. One, *Lawrence* did not require a heightened culpability standard, and did not impose an illegitimate/unlawful and "no chance of success" requirement. Two, *Miranda* declared repeatedly that it was simply applying and not departing from *Lawrence*.

Second, the *Miranda* court specifically renounced the creation of "a special rule benefiting negligent lawyers." 836 N.W.2d at 23 n.11. Healthcare providers, telegraph companies, and funeral homes are not protected by a heightened culpability standard, and imposing such a standard or extra requirements here would create the proscribed "special rule benefiting negligent lawyers." This is particularly true where public defenders, unlike other attorneys, are already given special protections against malpractice claims: Iowa Code § 13B.9(2) directs that a person may not bring a malpractice claim unless a court first determines that the person's conviction resulted from ineffective assistance of counsel. Thus, a person convicted due to a public defender's negligence must satisfy the highly deferential *Strickland* standard before even bringing a legal malpractice case. There are very few successful ineffective-assistance-of-counsel claims against public defenders. *See supra* n. 4. As a result, most public defenders are already shielded from

liability. There is no need to create another "special rule" to provide even more protection than the Iowa legislature has seen fit to provide. Moreover, § 13B.9(2)'s screening function ensures that there will never be a flood of legal malpractice claims against public defenders. *See*, *e.g.*, *Barker v. Capostosto*, 875 N.W.2d 157, 166 (Iowa 2016) ("The prerequisite that the malpractice plaintiff obtain judicial relief from her or his conviction . . . serves as an important screen against unwarranted claims and 'preserves key principles of judicial economy and comity.'" (citation omitted)).

Third, the *Miranda* court repeatedly stated that it was preserving, applying, and not departing from *Lawrence*. If the court intended to replace the *Lawrence* framework with a new test creating a special rule protecting certain lawyers, surely it would have unambiguously done so. That *Miranda* did not do so is reflected in the State's inability to define the contours of the purportedly new requirements. Earlier, the State described the standard as "intentional or illegitimate (nearly, if not actually, reckless)." App. Vol. I, at 78. It then insisted, repeatedly, that "illegitimate" meant only "unlawful." App. Vol. II, at 78-79. Next, it declared that "illegitimate" meant "conduct that is doomed, that forecloses relief, *and* that is contrary to law," though it also contended that "illegitimate" meant "acts which are contrary to law *or* have no chance of success" and that "[t]he standard is higher than negligence *and may require intentional acts* rather than omissions." State's

Br. Addressing Standards for Nonpecuniary Damages, 9-10 (emphasis added).[17] Even on appeal, the State presents various iterations of its proposed test. *See* Appellant's Br. 43, 44, 47. *Miranda* did not announce a new, clear, and unambiguous test to replace the *Lawrence* framework – and nor does the State.

Fourth, while the State latches onto the term "illegitimate" to argue that this is a new, stand-alone requirement in all cases, that argument misconstrues the context in which the term was used. The *Miranda* court's discussion of the "illegitimate" conduct in the immigration case, *dePape v. Trinity Health Sys., Inc.*, 242 F. Supp. 2d 585 (N.D. Iowa 2003), was made in the context of analyzing remoteness with respect to causation, an issue the State has never raised here. *DePape* concerned a Canadian citizen who hired an immigration attorney to help him to move to the United States. 242 F.Supp.2d at 589. His legal malpractice claim was that the attorney failed to advise him about the limitations of a visa. *Id*. at 609. In determining that emotional distress damages were available, the *dePape*

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[17] According to the district court,

> Fixating on the term "illegitimate," the State claims the new test consists of three elements: "(1) the conduct is illegitimate; (2) has no chance of success; and (3) is especially likely to cause severe emotional distress." The State further argues that negligent conduct is only illegitimate if it is unlawful.

App. Vol. II, at 93 (citing State's Mot. JNOV, ¶¶ 15-16, 20). The State does not challenge this description of its argument.

court noted that "where the parties assume a relationship that is contractual in nature and deals with services or acts that involve deep emotional responses in the event of a breach, [Iowa courts] recognize a duty of care to protect against emotional distress." *Id*. at 615 (citations omitted). The *dePape* court further noted that in *Lawrence*, the emotional damages were too remote to be reasonably foreseeable. *Id.* at 616. The court contrasted the case before it, which presented no such remoteness problem: The attorney advised dePape to lie to a border official, which led directly to the official's denial of dePape's visa request, and accusation that dePape was a liar. *Id*. *Miranda* highlighted this analysis of the remoteness issue likely because both parties before it discussed *dePape* in their briefs, with the immigration attorney arguing that the emotional damages were too far removed from his services. Appellees' Br., *Miranda v. Said*, 834 N.W.2d 8 (Iowa 2013), 2012 WL 10008100, at *18-23. *Miranda* obviously rejected the attorney's argument. But while remoteness was a key issue in *Miranda*, the State has never raised here.

Fifth, adopting the State's test of requiring *something* "higher than mere negligence," i.e., what was colloquially described as "negligence plus" below, creates a conflict with the century-old rule that Iowa common law does not recognize gradations of negligence. *Denny v. Chi., R.I. & P. Ry.*, 130 N.W. 363, 364 (Iowa 1911); *see also Tisserat v. Peters*, 99 N.W.2d 924, 925–26 (Iowa 1959)

(recognizing that under the common law "there are no degrees of care or of negligence in Iowa").

Sixth, under the State's "no chance of success" argument, the only way to prove that Robertson's representation had "no chance of success"—literally, zero chance of success—is to show that Clark would, *as a matter of law*, have been acquitted in the absence of Roberson's representation.[18,19] And the only way to even begin to show that he would have been acquitted is to prove that he was actually innocent—a requirement that the Iowa Supreme Court has rejected. *See Barker*, 875 N.W.2d at 168 ("[W]e conclude that a client's showing of actual innocence is not a prerequisite to bringing a legal malpractice claim against a former criminal defense attorney."). Then, Clark would have to prove that he wouldn't have been convicted anyway. No criminal defendant could ever make such a showing. The State could always argue that a public defender's representation had at least a 1% chance of succeeding, which is more than "no" chance. This is untenable. No party has ever been held to such a standard in a negligence case. No party has ever been held to such a standard in *any* case. The

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[18] By refusing to try Clark a second time, the State effectively prevented Clark from obtaining an acquittal.

[19] The jury found, *as a matter of fact*, that Clark would not have been convicted in the absence of Robertson's negligence. App. Vol. II, at 66.

State's proposed test imposes a standard higher than "beyond a reasonable doubt," and far higher than "clear and convincing," which is "the highest evidentiary burden in civil cases." *In re M.S.*, 889 N.W.2d 675, 679 (Iowa Ct. App. 2016). *Miranda* did not impose an evidentiary burden no party could meet. There is no requirement that Clark prove the impossible, that Robertson had "no chance" of obtaining an acquittal.

D. The Cases on Which the State Relies Do Not Change the *Lawrence* Standard Applied in *Miranda*.

The cases the State relies on are incorrect or distinguishable and do not change Iowa law on the availability of emotional distress damages. For example, *McFarland v. Rieper*, No. 18-0004, 2019 WL 2871208 (Iowa Ct. App. 2019), is unpublished, and is not controlling legal authority. Iowa R. App. P. 6.904(2)(c) ("Unpublished opinions or decisions shall not constitute controlling legal authority."). Even unpublished Iowa Supreme Court decisions are not controlling, *id*., which is why that court generally does not cite them. *State v. Shackford*, 952 N.W.2d 141, 145 (Iowa 2020). The State's invitation to reject Iowa Supreme Court precedent in favor of a contrary, unpublished Iowa Court of Appeals decision should be rejected.

Moreover, *McFarland* mischaracterized the facts and the holding in *Miranda* and as a result, was wrongly decided. The *McFarland* court stated that the *Miranda* immigration attorney advised his clients "to pursue an *illegal* course

of conduct, that they should voluntarily leave the United States before applying for citizenship." 2019 WL 2871208 at *3 (emphasis added). There was not, in fact, anything "illegal" about the attorney advising his undocumented clients who were not lawfully present in the United States to leave the United States; it was not "illegal" for the plaintiffs to voluntarily leave the United States; the attorney did not advise his clients to lie, nor did he insert false information on the immigration forms; and the *Miranda* court never characterized the attorney's advice or acts as "illegal." *McFarland*'s misunderstanding and resulting misapplication of *Miranda* renders *McFarland* as unpersuasive as it is nonbinding.

The State's arguments regarding *Rowell v. Holt*, 850 So.2d 474 (Fla. 2003), are also unavailing. Rowell was wrongfully held in pretrial detention for several days despite giving his attorney a document showing that he was innocent. *Id.* 476-77. The court held that Florida's impact rule did not bar emotional distress damages given "the special professional duty created by the relationship between Rowell and his attorney, coupled with the clear foreseeability of emotional harm resulting from a protracted period of wrongful pretrial incarceration." *Id.* at 479. The court noted that its holding did not purport to allow recovery for emotional damages relating to ineffective-assistance-of-counsel claims. *Id.* at 481. Whatever the Florida court may have said about Florida's impact rule on the unique facts of the case, or whatever it may have said in dicta about the limitations of its decision,

it does not change the outcome here, as (1) *Rowell* did not involve a wrongful conviction of a particularly heinous crime and several years of imprisonment; (2) the court upheld emotional damages for the attorney's *negligence*; and (3) the court's analysis considering "the special professional duty created by the relationship" between the criminal defendant and his attorney, and "the clear foreseeability of emotional harm resulting from a protracted period of wrongful . . . incarceration" likely would result in the availability of emotional damages in this case. In any event, *Rowell* was neither bound by nor following *Lawrence*, and *Miranda* made clear that it was rejecting rules from other states that conflicted with *Lawrence*.

The State's other cases are similarly inapposite. *See* Appellant's Br. n.7. *Boros v. Baxley*, 621 So. 2d 240, 241 (Ala. 1993), involved an underlying pecuniary case (civil fraud in a real estate deal), not a personal one, as did *Selsnick v. Horton*, 620 P.2d 1256 (Nev. 1980) (negligent construction of a house). *Boros* and *Selsnick* were specifically noted by *Miranda* as two of several cases "arriv[ing] at the same result as the *Lawrence* majority in cases in which the attorney is retained for *solely economic reasons*," 836 N.W.2d at 25 (emphasis added), and so they carry no weight here. *Lickteig v. Alderson, Ondov, Leonard & Sween, P.A.*, 556 N.W.2d 557, 559 (Minn. 1996), also involved an underlying pecuniary case (damages from a car accident), and *Lickteig* was specifically rejected by *Miranda*,

see 836 N.W.2d at 26 n.12 (describing *Lickteig* as requiring a heightened culpability standard for legal malpractice involving *pecuniary* matters, but stating that "we need not consider this line of authority because [the *Miranda* plaintiffs] were entitled to present a claim for emotional distress damages to the jury under the reasoning announced in *Lawrence*"). *Long-Russell v. Hampe*, 39 P.3d 1015, 1018 (Wyo. 2002) involved an underlying divorce case and relied on *Lickteig* - but *Miranda* actually rejected *both* of these cases. 836 N.W.2d at 26 n.12. The Wyoming Supreme Court subsequently distinguished *Long-Russell*, quoted *extensively* from Iowa's *Lawrence* case, and adopted *Lawrence*'s framework, instead. *Larsen v. Banner Health Sys.*, 81 P.3d 196, 200-01, 202-03, 206 (Wyo. 2003); *see also id*. at 205 (noting that the claim "requires only negligence, not that the defendant intentionally or recklessly caused the emotional harm").

Finally, the State's reliance on *Dombrowski v. Bulson*, 971 N.E.2d 338 (N.Y. 2012), is also misplaced because New York's legal malpractice scheme is entirely different from Iowa's, as recognized in *Miranda*. 836 N.W.2d at 26 n.12 ("At least one state appears to have resisted the award of emotional distress damages in all circumstances. *The rule followed by New York courts differs*

significantly from our own." (collecting New York legal malpractice cases) (citations omitted) (emphasis added)).[20]

E. The Focus Is On the Nature of the Interest Invaded, and Not On the Attorney's Conduct.

The State's claim that courts should focus on the attorney's "actions," Appellant's Br. 38, should be rejected because it is based entirely on out-of-context quotes from *Lawrence*. Specifically, the State argues,

> *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. This illuminated a second focal 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."

Id. The State is flat wrong. In discussing whether "actions" "rise to the level required," the *Lawrence* court was not referring to a *defendant*'s "actions" or to any level of culpability, but instead was quite clearly referring to whether the emotional harm inflicted was sufficiently severe:

> In assessing the level of stress necessary to support a claim we have adopted the following test from the Restatement (Second) of Torts:

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[20] Moreover, New York's wrongful conviction statute allows for the uncapped recovery of nonpecuniary damages, such as mental anguish, loss of liberty, and humiliation, *Gristwood v. State*, 990 N.Y.S.2d 386, 390 (N.Y.App.Div. 2014), which stands in stark contrast to Iowa's analog, Iowa Code § 663A.1, the only provision of which that could include emotional distress damages is one that sets "liquidated damages" at $50 per day of wrongful imprisonment, § 663A.1.6(b), which, according to the jury and common sense, does not even come close to compensating Clark for his injuries.

> "whether the distress inflicted is so severe that no reasonable man could be expected to endure it." In several cases we have held that a plaintiff is not entitled to damages for severe emotional distress **because the actions did not rise to the level required** by our law following the Restatement.

534 N.W.2d at 421 (emphasis added) (citation omitted). The court then offered as examples cases describing the emotional distress as "upset," "confused," "broke," "grouchy," "nervous," "los[ing] sleep," "downhearted," and the like. *See id*. The State's claim that the focus is on the defendant's "action" must be rejected. The *Lawrence* rule – and the hundred years' worth of case law on which it relied – does not turn on a heightened culpability level of the defendant. And *Lawrence* most certainly does **not** ask, "did the attorney's direct actions 'rise,'. . . to a level of culpability justifying liability for emotional harm?" Appellant's Br. 38. There is no "second question" asking about a "level of culpability" beyond mere negligence in *Lawrence*, or any other Iowa case.

Miranda, too, focused on the nature of the plaintiff's interest invaded, as opposed to the nature of the defendant's conduct, *see* 836 N.W.2d at 27-28, including when quoting with approval the decisions allowing emotional distress damages when an attorney's *negligence* caused the loss of liberty. *See, e.g.*, *id*. at 27 (noting that the rule "ask[s] courts to consider the underlying interest invaded by the attorney's negligence. *See Lawson v. Nugent,* 702 F.Supp. 91, 95 (D.N.J.1988) (holding plaintiff was allowed to offer proof of emotional distress in

a legal malpractice action alleging plaintiff spent twenty extra months in maximum security prison because of his attorney's negligence)[.] . . . Stated best, 'The critical inquiry becomes whether the kind of interest invaded is of sufficient importance as a matter of policy to merit protection from emotional impact.' *Holliday,* 264 Cal.Rptr. at 456") (internal quotation marks omitted)); *id*. at 28 (quoting the observation in *Wagenmann v. Adams*, 829 F.2d 196, 222 (1st Cir. 1987), that "[a]ny attorney in Healy's position should readily have anticipated the agonies attendant upon involuntary (and inappropriate) commitment to [a state hospital] and the subsequent stigma and fear associated with such a traumatic episode" such that it would be "unjust" to limit the client to economic damages). In discussing these "loss of liberty" cases, the *Miranda* court made no mention of the attorney's level of culpability.[21] The State's argument that the focus is on the defendant's conduct is wrong, and, in any event, does not support the imposition of a higher culpability standard beyond negligence.

F. Robertson Acted Unlawfully by Violating Clark's Constitutional Rights.

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[21] The *Miranda* dissent "view[ed] incarceration and involuntary civil commitments as akin to a physical injury (loss of mobility and freedom)," *id*. at 40 n.15 (Waterman, J. dissenting). It is well established that emotional distress damages are available when there is a physical injury (regardless of the culpability level of the attorney, or whether the relationship and subject matter involve deeply emotional circumstances). *Id*. at 14.

In the unlikely event "unlawful" conduct must be shown, as the State argues, such a showing has been made. In fact, it was a prerequisite to filing this malpractice case. Iowa Code § 13B.9(2). The PCR court granted relief after concluding that Robertson violated Clark's constitutional right to counsel. If representation must be "unlawful," surely a constitutional violation is sufficient. Where Clark obtained PCR relief based upon Robertson's unconstitutional conduct prior to filing this negligence action, as he was required to do, a showing of unlawful conduct was made.

II. The District Court Acted Within Its Discretion in Denying the State's Motion For a New Trial Premised on Its Denial of the State's Mistrial.

A. Error Preservation and Standard of Review.

The State preserved part of its argument on this issue; it did not, however, argue below that matters related to a prior appeal, or Sixth Amendment testimony, established prejudice. *See* Appellant's Br. 58-61.

The denial of a new trial motion premised on a denial of a mistrial is reviewed for an abuse of discretion, *Fry v. Blauvelt*, 818 N.W.2d 123, 128, 132 (Iowa 2012), which only occurs when a ruling rests upon clearly untenable or unreasonable grounds, *Lawson v. Kurtzhals*, 792 N.W.2d 251, 258 (Iowa 2010). A district court has broad discretion due to its "better position to appraise the situation" at trial. *Fry*, 818 N.W.2d at 132. Even when it comes to evidence subject to a liminal order that is nevertheless presented to the jury,

> [g]enerally, an admonition to the jury to disregard inadmissible testimony is sufficient to cure any prejudice. A trial court's quick action in striking the improper response and cautioning the jury to disregard it, coupled, when necessary, with some type of general cautionary instruction, will prevent any prejudice.

Id. (cleaned up). Where evidence has been promptly stricken and the jury admonished to disregard it, it is "[o]nly in extreme instances where it is manifest that the prejudicial effect of the evidence on the jury remained, despite its exclusion, and influenced the jury" is a mistrial warranted. *State v. Jackson*, 587 N.W.2d 764, 766 (Iowa 1998) (quotation omitted). "A defendant who asserts such actions were insufficient bears a heavy burden of demonstrating a clear abuse of discretion[.]" *State v. Keys*, 535 N.W.2d 783,785 (Iowa Ct. App. 1995).

B. The State Has Failed to Carry its Heavy Burden of Showing that the District Court Abused its Broad Discretion in Denying its Motion For a Mistrial.

As a preliminary matter, though the State asserts that Judge Bennett "defied" and "immediately flouted" an *in limine* order, Appellant's Br. 7, 25, the district court disagreed, a point the State does not even acknowledge.[22] March 2, 2023 Order, 12. In any event, the district court promptly instructed the jury to disregard the challenged testimony. The jury was additionally instructed at the close of

[22] In its motion *in limine*, the State argued only that "admitting the PCR ruling as an exhibit, or *repeatedly discussing the PCR ruling*" would be improper. App. Vol. I, at 82. (emphasis added).

evidence that testimony the jury was told to disregard was "not evidence" and could not be a basis for its decision, and further instructed that "[i]neffectiveness is not the same as negligence. The case does not involve ineffective assistance of counsel. This is a negligence case, and you must determine negligence in accordance with these instructions." App. Vol. II, at 63-64, 66.[23] It is presumed that the jury followed these instructions. *State v. Fontenot*, 958 N.W.2d 549, 562 (Iowa 2021).

The State has not shown that the circumstances here present an "extreme instance" resulting in "manifest" prejudice. The brief, inadvertent reference to Judge Bennett's "understanding" that Clark could not bring his malpractice claim unless a judge determined that Robertson provided ineffective assistance of

[23] The State did not even mention the Sixth Amendment aspect of Judge Bennett's testimony during the conference on its objection, nor did it object to curative instruction No. 9 regarding ineffectiveness, or otherwise ask that the jury be instructed regarding the Sixth Amendment. [9/22/22 Tr. 38:3-40:23]; [9/29/22 Tr. 24:22-25:15]. Rather, the State challenged only the "ineffective assistance of counsel" aspect of the challenged testimony below. *See id*. Even its new trial motion made no mention of the Sixth Amendment. App. Vol. II, at 83-85. The State's current focus on the Sixth Amendment aspect of Judge Bennett's testimony, Appellant's Br. 58-61, must be rejected as waived. But even if it is not waived, it should be rejected for the same reason its complaint below regarding ineffectiveness should be rejected, namely, that the State failed to carry its heavy burden of showing that the district court abused its broad discretion, as set out in the text above.

counsel was isolated.[24] The court promptly admonished the jury to disregard it, and further instructed that ineffectiveness was different than negligence, the case did not involve ineffectiveness, but concerned only negligence, and the jury was only to determine negligence, and also that stricken testimony could not be a basis for the jury's decision. Clark's counsel prefaced his next question to Judge Bennett with the clarification that ineffectiveness and negligence were "two different topics." [9/22/22 Tr. 49:21-25]. While these actions were sufficient to cure prejudice, any possible prejudice was further mitigated by the strong, uncontroverted, and *unobjected-to* evidence that Robertson actually admitted that he was ineffective and would have testified to that in court, and that Exley-Shuman had never heard another public defender make such an admission. [9/26/22 Tr. 35:4-36:17, 38:5-10]. Surely uncontested evidence of an attorney's admission that he was ineffective is stronger than the stricken testimony of a retained expert as to his "understanding" of Iowa law that an ineffective-assistance-of-counsel finding was a prerequisite to suit.[25] This is particularly true where the jury understood that

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[24] The State's attempt to show prejudice by claiming that an unspecified number of jurors "wrote down Bennett's statement," Appellant's Br. 26, must be rejected as pure speculation. The State has no idea what these unspecified jurors were writing.

[25] Judge Bennett testified only to his "understanding" of Iowa law; he did not actually testify that a PCR judge *did* determine that Robertson was "ineffective." In any case, even giving credence to the State's speculation that the jury understood Judge Bennett's testimony to mean that a PCR judge actually made

the State could have so easily refuted the evidence of Robertson's admission if it were, in fact, refutable. The jury knew that Exley-Shuman reported the admission to two other public defenders—the State's own employees. *Id*. Because the State did not present evidence—evidence that it presumably would have presented if it could have—refuting Exley-Shuman's testimony, the jury was left with the unchallenged evidence that Robertson admitted that he was ineffective—an admission no other public defender had made before. This compelling and unchallenged evidence that Robertson was ineffective mitigates any possible prejudicial impact of Judge Bennett's testimony. At a minimum, it defeats any argument that this an "extreme instance" resulting in "manifest" prejudice. The State is not entitled to a mistrial based on evidence that Robertson was ineffective simply because it speculates that one form of the evidence was worse for it than another form of the evidence.

Moreover, the State's excessive handwringing about Clark's counsel and the district court supposedly "conflating" ineffectiveness and negligence standards in a prior appeal, which purportedly showed that a jury of lay people "cannot be expected to separate the two," Appellant's Br. 58-61, is a red herring. The jury was not tasked with having to "separate the two" – that job was done for it by the

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such a determination, Robertson's easily refutable but unrefuted admission that he was ineffective is much more compelling evidence than testimony that a judge so found.

jury instructions. The jury was instructed that ineffectiveness and negligence were different, and that it was to ignore ineffectiveness and determine negligence. The jury presumably did not read any prior court briefings and rulings, and likely was blissfully unaware of the "nuances" that are a legal professional's stock-in-trade. So, even if counsel and the district court "conflated" the standards, the jury, following its instructions, did not. Arguments and rulings made on a prior appeal, and of which the jury knew nothing about, do not establish prejudice.

The State's cases are inapposite. In *Steven v. Horton*, 984 P.2d 868, 873-74 (Or. Ct. App. 1991), the plaintiff's expert was permitted to support his opinion that the attorney breached the standard of care with testimony that similar conduct—the failure to investigate—had been found to violate the Sixth Amendment, so the district court did not abuse its discretion in precluding his expert from stating that the finding emanated from the plaintiff's own ineffective-assistance-of-counsel case. *Horton* had nothing to do with curative instructions. The standard governing the grant of a motion in limine is far different than the heavy burden the State bears in attempting to show an "extreme instance" of "manifest" prejudice in light of the multiple curative instructions and the unchallenged evidence from Exley-Shuman. *State v. Daly*, 623 N.W.2d 799, 801-03 (Iowa 2001), involved the use of prior convictions for impeachment purposes under Iowa Rule of Evidence 5.609, which is not at issue in this case, and employs a different probative value/prejudice

analysis than Rule 5.403. It also is a criminal case, and courts are far more concerned with protecting the rights of criminal defendants than civil ones. *See, e.g.*, *In re Winship*, 397 U.S. 358, 363 (1970) (requiring the highest burden of proof in criminal trials because criminal defendants have an "interest of immense importance"—their liberty). Finally, the *Daly* court determined that the evidence of prior convictions was prejudicial because the prior convictions were for the *exact same charge*. 623 N.W.2d at 802-03 (stating that the prior convictions "were for exactly the same crimes for which Daly was currently on trial[,]" and that "[t]his fact alone 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"). Here, of course, Judge Bennet's testimony related to an ineffective-assistance-of-counsel claim, and not negligence, and the jury was instructed that the two were different.

The State failed to carry its heavy burden of showing that the district court abused its broad discretion in denying the State's motion for a mistrial, considering the promptness of the court's admonition to the jury, the additional curative instructions, and the unchallenged evidence that Robertson was ineffective.

CONCLUSION

The attorney-client relationship between Robertson and Clark involved a transaction charged with emotions—the defense of a serious child molestation

charge against a gay man—in which negligent conduct by Robertson was very likely to cause severe emotional distress, and the State does not argue otherwise. Under the *Lawrence* standard, emotional distress damages are available. The State's only argument is that this is the wrong standard. *Miranda*, the argument goes, created an entirely *new* "test" requiring a showing that the attorney's conduct was both "illegitimate"/unlawful and had "no chance of success." Not only does *Miranda* not say what the State claims it says, *Miranda* also says what the State claims it does not say, namely, that *Miranda* did not set out a new test, but was only following and not departing from *Lawrence*. The *Miranda* court did not change the *Lawrence* framework by describing the attorney's negligence as pursuing an "illegitimate" strategy that likely had "no chance of success." Moreover, the State's argument creates a special rule protecting lawyers, a position that was not only pointedly rejected in *Miranda*, but is also, as a practical matter, unnecessary given the screening function of Iowa Code § 13B.9(2) and the dearth of successful ineffective-assistance-of-counsel claims against Iowa public defenders. If a showing of "unlawful" conduct is required, such a showing has been made: Robertson violated Clark's constitutional rights.

The district court acted within its broad discretion in denying the State's motion for a mistrial, given the multiple curative instructions, and the State's failure to carry its heavy burden to show an "extreme instance" resulting in

"manifest" prejudice, especially considering the unchallenged evidence that Robertson was ineffective.

The district court's rulings that emotional distress damages are available in this case and that a mistrial was not warranted should be affirmed.

REQUEST FOR ORAL ARGUMENT

Clark hereby requests oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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On this 2nd day of November, 2023, Clark served Appellee's Proof Brief and Request for Oral Argument on all other parties to this appeal by e-mailing one copy thereof to the respective counsel for said parties:

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