No. 22-0813
Cass County No. PCCV025884

IN THE
SUPREME COURT OF IOWA

TIMOTHY SMITH,
Applicant-Appellant,

v.

STATE OF IOWA,
Respondent-Appellee.

ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR CASS COUNTY
GREG STEENSLAND, DISTRICT COURT JUDGE

BRIEF FOR APPELLANT

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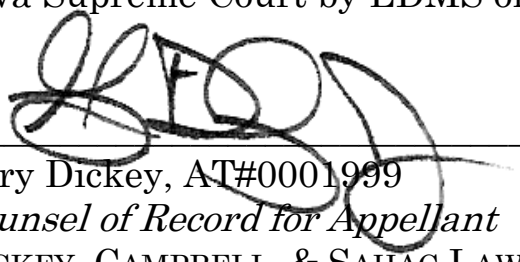
PROOF OF SERVICE & CERTIFICATE OF FILING

On February 23, 2023, I served this brief on all other parties by EDMS to their respective counsel, and I mailed a copy of this brief to Mr. Smith at the Clarinda Correctional Facility.

I further certify that I did file this brief with the Clerk of the Iowa Supreme Court by EDMS on February 23, 2023.



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ROUTING STATEMENT

Transfer to the court of appeals is appropriate. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Timothy Smith appeals from the denial of his application for postconviction in which he sought to set aside his 2018 conviction for two counts of sexual abuse in the second degree. (App. at 29). Smith asserts his trial counsel and appellate counsel provided ineffective assistance of counsel in several ways. (App. at 6, 9). Following a one-day evidentiary hearing, the district court denied Smith's application on all grounds. (App. at 29). Smith timely appealed. (App. at 40).

STATEMENT OF FACTS

On November 6, 2006, Timothy Smith married Sunny Escritt. (App. at 257). They divorced in the summer of 2013. (App. at 383). At the time, Escritt had a four-year-old daughter, H.R., from another relationship. (App. at 210, 257). According to H.R.'s trial testimony, she lived with Smith, her mother, her brother, and Smith's son in Anita, Iowa. When she was in fourth grade, the family moved to Exira, Iowa. (App. at 214-217). H.R. testified that Smith sexually abused her beginning in first or second grade. (App. at 223-225). According to H.R., the abuse

happened more than once at the house in Anita and continued when they moved to their new house in Exira. (App. at 226, 228-230). Smith testified at trial and directly denied H.R.'s sexual abuse allegations:

> Q. Did you ever ejaculate in [H.R.'s] presence at all?
> A. No.
>
> Q. Did your mouth ever come into contact with [H.R.'s] vagina?
> A. No.
>
> Q. Did your mouth ever come into contact with [H.R.'s] breasts?
> A. No.
>
> Q. Did your mouth ever come into contact with her anus?
> A. Absolutely not.
>
> Q. Tim, did you ever touch [H.R.'s] vagina with your hands or fingers?
> A. No.
>
> Q. Did you ever touch her anus?
> A. No.
>
> Q. Tim, did your penis ever come into contact with [H.R.'s] body in any manner?
> A. No.
>
> Q. Did you ever perform a sexual act with [H.R.] in any manner whatsoever?
> A. No.

(App. at 386).

On January 5, 2018, the State of Iowa filed a one-count trial information in the Iowa District Court for Cass County charging Smith with one count of sexual abuse in the second degree, a class "B" felony in violation of Iowa Code sections 709.1, 709.3(1)(b), and 903(B).1. (App. at 580). By agreement of the parties, the Cass County district court consolidated the case together with a second-degree sexual abuse charge pending in Audubon County against Smith arising from H.R.'s allegations. (App. at 582, 584).

Prior to trial, Smith filed a motion to introduce evidence under Iowa Rule of Evidence 5.412. (App. at 586). Specifically, Smith sought permission to offer evidence that H.R. also accused his son of sexual abuse, which resulted in criminal charges against him. (App. at 586). Smith intended to use the evidence to establish that H.R. had misremembered or confused memories about the events giving rise to the charges. (PCR Ex. 9 at 15-16). The court denied Smith's motion. (Amended Confidential App. at 29).

Following a three-day trial, the jury returned guilty verdicts on both counts. (App. at 589). On August 9, 2018, the district court sentenced Smith to consecutive indeterminate terms of incarceration not to exceed twenty-five years. (App. at 591).

On direct appeal, Smith challenged the district court's refusal to allow evidence regarding H.R.'s allegations against his son. *State v. Smith*, 2020 Iowa App. LEXIS 302 at *3-4 (Iowa Ct. App. Mar. 18, 2020). Additionally, Smith asserted that his trial counsel was ineffective for failing to request additional peremptory strikes following the trial court's refusal to strike four jurors for cause. *Id.* at *6. The court of appeals affirmed but preserved Smith's ineffective assistance of counsel claim "for a future postconviction-relief action in which counsel can respond." *Id.* at *7-8.

On June 8, 2020, Smith filed an application for postconviction relief asserting that trial counsel provided ineffective assistance counsel in the following ways:

- Failing to strike four jurors who stated they would find Smith guilty unless he testified at trial;

- Failing to strike the jury foreman that had a confrontation with Smith;

- Failing to properly investigate and litigate the case; and

- Failing to present evidence to the jury to show reasonable doubt.

(App. at 7). In addition, Smith asserted a claim of actual innocence based on a written statement from the Cass County Sheriff. (App. at 7). On September 14, 2021, Smith amended his application to assert additional grounds of ineffective assistance:

- Failing to call defense witnesses, including his mother who would have testified that the accuser had a reputation for untruthfulness;

- Failing to effectively cross-examine the accuser's mother to establish that she did not observe anything unusual between the accuser and Smith;

- Failing to elicit testimony from law enforcement witnesses that there was insufficient evidence to prosecute Smith;

- Failing to obtain the accuser's mental health records notwithstanding her admission to receiving mental health treatment;

- Failing to request a mistrial after observing a juror asleep during trial testimony; and

- Failing to request additional peremptory strikes following the court's refusal to strike jurors for cause.

(App. at 10). Smith also included new ineffective assistance claims against his appellate counsel for failing to appeal the district court's improper rehabilitation of potential jurors during voir dire and failing to challenge the imposition of consecutive sentences. (App. at 10-11). On February 3, 2022, Smith filed a second amended application asserting additional ineffective assistance of counsel claims arising from trial counsel's failure to seek a mistrial for juror misconduct and failing to file a motion in limine to prohibit the introduction of his 1993 conviction in Pottawattamie County for child endangerment. (App. at 13).

ARGUMENT

I. SMITH'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY CHALLENGE THE TRIAL COURT'S REFUSAL TO STRIKE JURORS FOR CAUSE AFTER EXPRESSING BIAS DURING VOIR DIRE

Error Preservation

Smith preserved error on this ineffective assistance of counsel claim by raising it in his application and briefing it in advance of the district court's ruling. (App. at 9, 17-20).

Scope and Standard of Review

Iowa appellate courts review ineffective assistance of counsel claims de novo. *State v. Feregrino*, 756 N.W.2d 700, 703 (Iowa 2008).

Analysis

A. Applicable legal principles

Iowa Code chapter 822 sets forth the statutory framework by which an individual convicted of a crime may seek to set aside the conviction. As relevant to this application, section 822.2 allows this Court to provide relief to any individual whose conviction "was in violation of the Constitution of the United States or the Constitution or laws of this state." Iowa Code § 822.2(1)(a). Here,

Smith claims that he received ineffective assistance of counsel in violation of the Sixth Amendment of the United States Constitution as well as the Iowa Constitution. U.S. Const. amend. VI; Iowa Const. Art. I § 10.

The law of ineffective assistance of counsel is well-settled. Persons accused of a crime have the constitutional right to be represented at trial by effective counsel. "A defendant receives ineffective assistance of counsel when: (1) the defense attorney fails in an essential duty; and (2) prejudice results." *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). To prove counsel failed in an essential duty, the defendant must prove the attorney's performance was outside the range of normal competency. *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994).

Erroneous trial strategies and professional judgments generally do not amount to ineffective assistance of counsel. *See State v. Wissin*, 528 N.W.2d 561, 564 (Iowa 1995). Instead, ineffective assistance is more likely to be established when the alleged actions or inactions of counsel are attributed to lack of

diligence as opposed to the exercise of judgment. *State v. Hischke*, 639 N.W.2d 6, 9 (Iowa 2002). Notwithstanding deference afforded to strategic decisions, defense counsel's tactics must still be reasonable given the totality of circumstances. *Jones v. State*, 479 N.W.2d 265, 272 (Iowa 1991).

"The crux of the prejudice component rests on whether the defendant has shown that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Kuhse*, 937 N.W.2d 622, 628 (Iowa 2020). That "does not mean a defendant must establish that counsel's deficient conduct more likely than not altered the outcome in the case." *State v. Maxwell*, 743 N.W.2d 185, 196 (Iowa 2008). "A defendant need only show that the probability of a different result is *sufficient to undermine confidence in the outcome*." *Id.* (emphasis added). As the Court *Strickland* observed, "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, *even if the errors of counsel cannot be shown by a preponderance* of the

evidence to have determined the outcome." *Strickland*, 466 U.S. at 694 (emphasis added).

The Court's prejudice analysis must consider the totality of the evidence, the factual findings that would have been affected by counsel's errors, and whether the effect was pervasive or isolated and trivial. *State v. Graves*, 668 N.W.2d 860, 883 (Iowa 2003). In evaluating the prejudice suffered by an applicant as a result of counsel's deficient performance, this Court must "look to the cumulative effect of counsel's errors." *State v. Clay*, 824 N.W.2d 488, 500 (Iowa 2012) (citing *Schrier v. State*, 347 N.W.2d 657, 668 (Iowa 1984)).

B. Four jurors demonstrated impermissible bias in their reluctance to return a not guilty verdict unless the defendant testified and denied the prosecution's allegations

During voir dire, Smith's trial counsel encountered four jurors who affirmatively expressed beliefs that they could not return a not guilty verdict without testimony from the defendant. Juror Huss, for example, declared that he would need to hear from the defendant before he could find him not guilty:

MR. BAXTER: Okay. Let me ask the question slightly differently. Let's say you hear from two or three witnesses that get up and give some evidence that demonstrates their reason and belief that the defendant committed this crime --

MR. HUSS: Yep.

Q. -- are you saying that you would need the defendant to get up and say, "No. I didn't do that"?

MR. HUSS: I would want more than that out of him.

Q. Okay.

MR. HUSS: I couldn't just go by him saying, "No, I didn't do it."

Q. But you would want to hear from him?

MR. HUSS: Yes.

Q. You think that it's necessary to hear from him to find him guilty?

MR. HUSS: I would.

Q. Is that something that you -- based on your life experience, that that's a strongly held belief that you would need to hear that from the defendant to come to that conclusion?

MR. HUSS: I would have to hear him tell his side of the story, yes.

* * *

Q. Mr. Huss, come back to you. We started this whole thing. Having heard those comments, do you feel that you would be able to follow an instruction against your strongly held belief to not hold the defendant to a requirement to present evidence?

MR. HUSS: I believe I'd still want him to. If I could actually go through without him being up there, it would be hard but I would try to make it through it, to be honest about it.

(App. at 188-189, 196). Thereafter, juror Knudsen expressed skepticism as to the presumption of innocence in the absence of the defendant's testimony:

Q. So let's talk with Ms. Knudsen. You heard the comments today. You heard these -- Mr. Huss's comments, heard Mr. Harris's comments. Would you agree with that statement that you feel it is necessary for the defendant to testify to come to a finding of not guilty?

MS. KNUDSEN: I think it's important to get on that stand and defend yourself if you truly believe that you are innocent. And I'll be completely honest. If that person did not get on the stand and there was enough, even if it was one person, I would most likely believe them because the more I think about what we've been talking about and the very first question you asked, I don't know if I firmly believe that innocence until proven guilty. I honestly believe if someone is arrested or charged for something, they probably damn well prove to me that they did not do it.

Q. So you would, if I'm understanding you correctly, the scale of one to ten, innocent until proven guilty, you would strongly disagree?

MS. KNUDSEN: Strongly be more towards the disagreeing. Yes. It's not what our rules are based on.

(App. at 189-190). Likewise, juror Anderson explained that testimony from the defendant would be a "necessity" for her:

> MR. BAXTER: Thank you, Your Honor. Ms. Anderson, I believe you gave your -- you had your hand up?
> MS. ANDERSON: Yes, I did.
>
> Q. Can you explain your thoughts having her, Ms. Knudsen, explain hers regarding what to hear from the defendant, if anything?
> MS. ANDERSON: I think it's important -- If I put myself in his position, I would want to defend myself. Okay. And I can't be here and not – You cannot, I don't think, look at something and not put yourself in that position to kind of think your way through it. From when I have talked to other inmates, they always wished they had gotten up and testified.
>
> * * *
>
> Q. Do you feel that that belief that you have that the defendant for lack of better word should get up and defend himself, that that's a necessity here?
> MS. ANDERSON: Yes, I do.
>
> Q. That it's a necessity? Is that a yes?
> MS. ANDERSON: Yes.

(App. at 194, 195). Finally, juror Downing expressed concern that she would automatically find the defendant guilty if he did not testify:

> MR. BAXTER: Correct. Would you feel that you could, if you didn't believe the evidence of the State --

MS. DOWNING: I know. It's hard. If I was him or the person or whoever, I would want to get up and show my innocence somehow some way. That's me.

Q. So without that, would you find -- automatically find him guilty?

MS. DOWNING: Well, I'm thinking, yes, because you have to -- Wouldn't you want to be up there saying something -- anybody can say, "No, I didn't do this." Say, I know the other person may be saying he did this, and it's not true. But I would want -- would hope that person would get up there and try to show us or tell us, you know.

* * *

Q. Okay. I appreciate that. I understand everyone's commentary regarding what may be prudent. I'm talking about what is required. So even based on that, you would still -- if the defendant didn't present any evidence, you would find him guilty?

MS. DOWNING: Probably. Because I need to see something besides -- "I'm not guilty" sitting there.

Q. That would be in the face of the judge giving you the instruction not to do that?

MS. DOWNING: I know. It's hard. I mean, you can't -- I don't know. I know. I know.

(App. at 198, 199).

Smith's trial counsel moved to strike the potential jurors for cause. (App. at 190, 196, 200). After questioning Knudsen and Downing about whether they could be "fair and impartial" or render a "true verdict after listening to the evidence and hearing

the law from the Court," the court denied the motion (App. at 194, 200). As for Huss and Anderson, the court denied Smith's challenge for cause without further inquiry. (App. at 196).

In Iowa, the criminally accused are "entitled to a fair and impartial trial before a jury of [their] peers, uninfluenced by any bias, prejudice, or preconceived notions." *State v. Meyer*, 164 N.W. 794, 797 (Iowa 1917); *see also State v. Larmond*, 244 N.W.2d 233, 235 (Iowa 1976). This right is a "bedrock component of our system of justice." *State v. Webster*, 865 N.W.2d 223, 232 (Iowa 2015). "Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by '*impartial*' jurors . . ." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991) (emphasis added). "Due process requires fundamental fairness in a judicial proceeding." *In re Detention of Morrow*, 616 N.W.2d 544, 549 (Iowa 2000). Fundamental fairness includes the right to trial before an impartial decision maker. *Singer v. United States*, 380 U.S. 24, 36 (1965).

Under the Sixth and Fourteenth Amendments, a trial court must remove a juror for the inability to be impartial if his or her

views "would prevent or *substantially impair* the performance of his [or her] duties as a juror in accordance with his [or her] instructions and his [or her] oath." *Wainwright v. Witt*, 469 U.S. 412, 420 (1985). Likewise, under Iowa Rule of Criminal Procedure 2.18(5)(k), the court must remove a juror who has "formed or expressed such an opinion as to the guilt or innocence of the defendant as would prevent the juror from rendering a true verdict upon the evidence submitted on the trial." Iowa R. Crim. P. 2.18(5)(k). The test under Rule 2.18(5)(k) is whether the juror "holds such a fixed opinion on the merits of the case that he or she cannot judge impartially the guilt or innocence of the defendant." *State v. Gavin*, 360 N.W.2d 817, 819 (Iowa 1985).

Any potential juror who expresses concern about his or her ability to be fair should be immediately excused. When a juror finds facts without the appropriate mindset, the viability of the jury system is seriously undermined. *In re Detention of Hennings*, 744 N.W.2d 333, 338 (Iowa 2008). When a defendant must remove the juror using a peremptory challenge, that defendant effectively loses that peremptory challenge to which he

or she is entitled by law. *See Montana v. Good*, 43 P.3d 948, 956 (Mont. 2002). If the impartiality of a potential juror is at all a close question, a trial court should excuse the juror. *State v. Jonas*, 904 N.W.2d 566, 575 (Iowa 2017) ("we have long cautioned trial courts against allowing close issues to creep into the record and threaten the validity of a criminal trial"). "[I]t should not be necessary for trial courts to skirt the brink of error in the selection of trial jurors." *Id.* (quoting *State v. Beckwith*, 242 Iowa, 228, 230, 26 N.W.2d 20, 26 (1951)). The American Bar Association, in guidelines dedicated to improving juries and jury trials, stresses the importance of striking jurors who might be biased:

> At a minimum, a challenge for cause to a juror should be sustained if the juror has an interest in the outcome of the case, may be biased for or against one of the parties . . . or may be unable or unwilling to hear the subject case fairly and impartially. There should be no limit to the number of challenges for cause.
>
> In ruling on a challenge for cause, the court should evaluate the juror's demeanor and substantive responses to questions. If the court determines that there is a reasonable doubt that the juror can be fair and impartial, then the court should excuse him or her from trial.

ABA, Principles for Juries & Jury Trials, at 14 (2005). With these principles in mind, the prospective jurors should have been removed for cause based on their statements expressing doubt they could find the defendant not guilty unless he testified. *See State v. Oliphant*, 56 So.2d 846, 850 (La. 1952) (holding that trial court erred in refusing to sustain defendant's challenge for cause when a prospective juror was not able to afford the defendant the presumption of innocence); *see also People v. Hancock*, 220 P.3d 1015, 1017 (Colo. Ct. App. 2009) (finding reversible error when trial court denied challenge for cause to prospective juror who refused to hold prosecution to its burden of proof); *People v. Blackmer*, 888 P.2d 343, 344 (Colo. Ct. App. 1994) (holding that when jurors communicate "difficulty applying the principles of law unless [they] hear[ ] the defendant testify at trial," they should be dismissed for cause").

The trial court only compounded the error by attempting to rehabilitate the prospective jurors. As the Iowa Judicial Bench Book cautions:

> Particular care should be taken if the court undertakes to rehabilitate a juror because of the juror's likely

> retreat from his/her position under the court's questioning. Therefore, the better rule would be to sustain the challenge when there appears to be an open question.

The Iowa Judicial Bench Book, vol. 5, Rule 187(f) (citations omitted). "[O]nce the genie of prejudice or bias is out of the bottle, it is a fool's errand to put it back in through persistent coaxing." *Jonas*, 904 N.W.2d at 571. A trial judge who seeks to rehabilitate a prospective juror may unconsciously become an advocate for the juror's impartiality and may create unreliable responses from the juror. *See McGill v. Virginia*, 391 S.E.2d 597, 600 (Va. Ct. App. 1990). "A juror's desire to 'say the right thing' or to please the authoritative figure of the judge, if encouraged, creates doubt about the candor of the juror's responses." *Id.* It is imperative that a court not become an advocate of any party's cause. *State v. Cuevas*, 288 N.W.2d 525, 531 (Iowa 1980). A court's rehabilitative efforts towards jurors may have such a residual effect. As one court has noted:

> A trial judge who actively engages in rehabilitating a prospective juror undermines confidence in the voir dire examination to assure the selection of fair and impartial jurors. The proper role for a trial judge is to remain detached from the issue of the juror's

> impartiality. The trial judge should rule on the propriety of counsel's questions and ask questions or instruct only where necessary to clarify and not for the purposes of rehabilitation.

McGill, 391 S.E.2d at 600 (emphasis added).

C. Trial counsel breached an essential duty in failing to request additional peremptory challenges following the denial of his attempted strikes for cause

At the close of voir dire, Smith struck Anderson and Knudsen while the State struck Huss and Downing. (PCR Ex. 20). Smith asserts that his trial counsel was ineffective for failing to request additional peremptory strikes to replace the strikes exercised for Anderson and Knudsen. In deciding whether Smith's trial counsel breached an essential duty, his performance must be measured "objectively by determining whether it was reasonable, under the prevailing professional norms, considering all the circumstances." *Clay*, 824 N.W.2d at 495. "The Supreme Court recognizes the American Bar Association Standards and similar documents reflect the prevailing norms of the legal profession." *Id.* (citing *Strickland* 466 U.S. at 687). As relevant to this case, the ABA standards for the defense function require that "[a]t every stage of representation, defense counsel should take

steps necessary to make a clear and complete record for potential review." ABA Standards for Criminal Justice, Defense Function 4-1.5 (4th ed. 2017). On top of that, "[d]efense counsel should be aware of the legal standards that govern the selection of jurors . . . including raising appropriate issues concerning the method by which the jury panel was selected and exercising challenges for cause and peremptory challenges." *Id.* at 4-7.3(a). Smith's trial counsel failed to live up to either standard.

Until 1993, prejudice was presumed if the trial court improperly denied a defendant's challenge to a potential juror for cause. *See Beckwith*, 46 N.W.2d at 232. In *State v. Neuendorf*, 509 N.W.2d 743 (Iowa 1993), the Iowa Supreme Court overruled *Beckwith* and held that prejudice would not arise from an improperly denied challenge if the juror was removed by exercise of a peremptory challenge. *Id.* at 747. More recently, the Court refined the framework for demonstrating prejudice. In *Jonas*, the court set forth a three-pronged approach that requires a defendant to show (1) the district court improperly refused to disqualify a potential juror; (2) the refusal caused the defendant to expend a

peremptory challenge; and (3) the defendant specifically requested additional strike of a particular juror after his peremptory challenges had been exhausted. *Jonas*, 904 N.W.2d at 583. In this case, Smith's trial counsel failed to request any additional peremptory challenges. His failure was not due to trial strategy. Instead, he simply had not reviewed the *Jonas* decision prior to Smith's trial:

> Q. There's also an allegation which was discussed on direct examination about your failure to request additional strikes after the Court's refusal to strike jurors for cause. Had you read the Jonas case prior to this trial?
> A. Prior to the trial, no.

(PCR Trial Tr. 25:16-21)(App. at 514). Had trial counsel simply requested additional peremptory challenges, then Smith would have demonstrated prejudice under the *Jonas* framework.

The record is sufficient to demonstrate actual prejudice from the unnecessary use of peremptory challenges apart from *Jonas.* Smith could have used the additional strikes for several jurors who ended up on the jury. Juror Kopp, for example, stated that on the issue of innocence until proven guilty on a scale of one to ten, he was only a five (App. at 178). Juror Page worked as a 911

operator for the Iowa Department of Public Safety and certainly would have been a candidate to be stricken if Smith had additional strikes. (App. at 116). Furthermore, juror Christensen—who ultimately served as the foreperson—agreed with the statement, "Criminals have too many rights." (App. at 169, 429). Not surprisingly, Smith's trial counsel admitted that he wished he had additional strikes to use:

> Q. Your recollection is correct. The point was made that four jurors that you specifically took up with Judge Christensen ends up that you struck two and the State struck two. And hence my question, could you have used additional strikes?
> A. To replace the two that I would have used if those jurors would have been struck by the judge?
>
> Q. Right.
> A. Absolutely.

(PCR Trial Tr. at 12:9-17)(App. at 501).

Smith's trial counsel failed to perform an essential duty which resulted in prejudice to the client. Accordingly, Smith's PCR application should have been granted. The Court, therefore, must reverse the decision of the district court and remand with instructions to grant the PCR application.

II. SMITH'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO JUROR MISCONDUCT PRIOR TO THE CLOSE OF EVIDENCE

Error Preservation

Smith preserved error on this ineffective assistance of counsel claim by raising it in his application and briefing it in advance of the district court's ruling. (02/03/22 Second Amended PCR Application; 03/25/22 Final Arg. at 6-9)(App. at 13, 20-23).

Scope and Standard of Review

Iowa appellate courts review ineffective assistance of counsel claims de novo. *Feregrino*, 756 N.W.2d at 703.

Analysis

Smith's first wife, June Weinbrandt, was present for the third and final day of his trial. She was outside smoking when she saw the mother of the accuser smoking near the jurors. She heard one of the jurors say, "Oh, he's guilty, no matter what, he's guilty," while the other jurors were shaking their heads in agreement. (App. at 525-529). Upon her return to the courtroom, Weinbrandt notified Smith's trial counsel of the juror's statement. (App. at 530). Despite being armed with this information, Smith's

trial counsel did not bring the issue to the court's attention – let alone move for a mistrial. (App. at 530).

Smith's mother, Linda Sabartinelli, corroborated Weinbrandt's account. Sabartinelli also remembers being outside while Weinbrandt was smoking near the jurors. She also confirmed that Weinbrandt reported the jurors' conduct to Smith's trial attorney. (App. at 538-539). Smith himself was able to confirm that the accuser's mother was outside with the jurors because he observed her as he went down the back stairway in the Courthouse. From his position, however, he could not see Weinbrandt outside. (App. at 559).

In order to be entitled to a new trial based upon juror misconduct, the (1) evidence from the jurors must consist only of objective facts as to what actually occurred in or out of the jury room bearing on misconduct; (2) the acts or statements complained of must exceed tolerable bounds of jury deliberations; and (3) it must appear the misconduct was calculated to, and with reasonable probability did, influence the verdict. *State v. Cullen*, 357 N.W.2d 24, 27 (Iowa 1984). The jurors' discussion prior to the

close of the evidence false squarely within the definition of juror misconduct. It is central to the standard admonition given to jurors at every adjournment:

> The jury, whether permitted to separate or kept together in charge of sworn officers, must be admonished by the court that it is their duty not to permit any person to speak to or communicate with them on any subject connected with the trial, and that any and all attempts to do so should be immediately reported by them to the court, and that *they should not converse among themselves on any subject connected with the trial, or form or express an opinion thereon, until the cause is finally submitted to them*.

Iowa R. Crim. P. 2.19(5)(d)(emphasis added). It is hornbook law that conduct by the jury that raises the specter of outside influence on the jury's deliberations threatens a defendant's right to a fair trial before an unbiased decision-maker as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, sections 9 and 10, of the Iowa Constitution. *Parker v. Gladden*, 385 U.S. 363, 364 (1966). Confronted with this information, Smith's trial counsel had an obvious duty to move for a mistrial. And, his failure to do so is sufficient to undermine the confidence in the jury's verdict. As the

United States Supreme Court explained in *Remmer v. United States*, 347 U.S. 227 (1954):

> In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Id. at 229. For this reason, Smith was entitled to postconviction relief.

III. SMITH'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT EVIDENCE AT TRIAL FAVORABLE TO SMITH'S THEORY OF DEFENSE

Error Preservation

Smith preserved error on this ineffective assistance of counsel claim by raising it in his application and briefing it in advance of the district court's ruling. (App. at 9, 23-27).

Scope and Standard of Review

Iowa appellate courts review ineffective assistance of counsel claims de novo. *Feregrino*, 756 N.W.2d at 703.

Analysis

Developing a plan for the examination of key witnesses requires "careful preparation and painstaking effort." *State v. Clark*, 814 N.W.2d 551, 568 (Iowa 2012)(Appel, J., dissenting) (quoting John A. Burgess, *Persuasive Cross-Examination*, 59 Am. Jur. Trials 1, 25 (1996)). Without preparation, examining a witness is "like fishing through the ice. Something may be there, but the fisherman has no clue as to what is there, where it is, or which bait will attract it." *Id.* "Thorough preparation is essential in order not only to determine what questions to ask, but what questions not to ask." *Id.*

The prosecution's case was far from the proverbial slam dunk. There was no crime scene, no physical evidence, no bruises, no semen, no DNA evidence, no confession, no eyewitnesses and not even a specific date for the alleged offenses. The State was not even able to establish a firm date when these happened. The amended trial information alleged events occurring any time between January 1, 2005 and December 31, 2013 – an eight year span. (App. at 584). It was the quintessential she-said/he-said

case. Against this backdrop, Smith's trial counsel breached an essential duty in failing to call witnesses who had evidence favorable to Smith's defense.

June Weinbrandt

As previously noted, Weinbrandt was present on the last day of trial, and therefore, she was obviously available to testify on Smith's behalf. In her PCR deposition, Weinbrandt testified that that she was aware that H.R. had made up stories in the past to gain attention. (App. at 483-485). She also could have testified that while she lived with Smith and Escritt in Anita, she never observed anything inappropriate between Smith and H.R. (App. at 485-486). She also could have testified about text messages from H.R. to Smith that said, "I love you, I miss you." (App. at 489).

Desiree Dilthey

Desiree Dilthey is Smith's daughter. She testified by deposition in the PCR action that she was ready to testify on Smith's behalf, but his trial counsel never contacted her. (PCR Ex. D at 26). Had she been called, Dilthey would have testified

that she saw Smith together with H.R. and never observed anything inappropriate between the two of them. (PCR Ex. D at 31).

Linda Sabartinelli

Smith's mother, Linda Sabartinelli, also testified by deposition in the PCR matter. She talked to Smith's trial counsel about testifying on his behalf, but he stated that he did not need any witnesses at the time. (App. at 480). She also would have testified that in her time with Smith and H.R., she never saw or heard anything inappropriate of a sexual nature between them. (App. at 481).

Deputy Cory Larsen

Cory Larsen was a deputy sheriff for Cass County, Iowa. In February 2017, Deputy Larsen interviewed H.R. at which time she claimed that Smith sexually assaulted her. (App. at 477). He also interviewed Smith who denied H.R.'s allegations. (App. at 477). Following the initial investigation, Deputy Larsen concluded, "at this point there isnt enough evidence to pursue charges against Tim or Donavvan." (App. at 478). This evidence

was important to evaluate the context of sheriff's investigation. Deputy Larsen's interviews took place in February 2017, yet the State did not bring charges against Smith until December 1, 2017. (App. at 578). The investigation did not produce any additional evidence. Rather, the only apparent intervening event was H.R.'s father pressured the sheriff to pursue charges against Smith. (PCR Trial Tr. at 66:5 through 67:21)(App. at 555-556).

CONCLUSION

As explained above, each of trial counsel's errors is sufficient on its own to satisfy the prejudice prong *Strickland*. Considered together, their cumulative impact on the outcome of Smith's trial was overwhelming. *See Clay*, 824 N.W.2d at 501 (Iowa 2012) (noting that a court must look at the cumulative effect of counsel's errors when multiple claims of ineffective-assistance are alleged). The best illustration of the prejudice flowing from trial counsel's multiple errors is to compare Smith's actual trial with the one he would have received if he had adequate representation. Suppose, for example, Smith did not have to unnecessarily use to peremptory challenges to remove jurors with obvious biases.

Instead, he could have used at least one to remove the juror who believed that the criminally accused have too many rights. Had trial counsel called Smith's family members, it would have undermined the reliability of H.R.'s allegations. At the very least, the improvements to Smith's otherwise skeletal defense would have seriously undermined an already weak case. For these reasons, Timothy Smith asks this Court to reverse the district court's denial of his application for postconviction relief.

REQUEST FOR ORAL ARGUMENT

Timothy Smith requests to be heard in oral argument.

COST CERTIFICATE

I hereby certify that the costs of printing the Appellant's brief was $15.75, and that that amount has been paid in full by me.

CERTIFICATE OF COMPLIANCE

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

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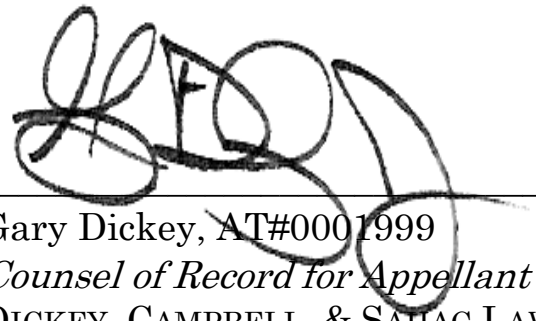

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