IN THE SUPREME COURT OF IOWA
Supreme Court No. 22-0813
Cass County No. PCCV025884

TIMOTHY DUANE SMITH,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR CASS COUNTY
THE HONORABLE GREG W. STEENSLAND, JUDGE

APPLICATION FOR FURTHER REVIEW

(Iowa Court of Appeals Decision: November 21, 2023)

BRENNA BIRD
Attorney General of Iowa

GENEVIEVE REINKOESTER
SUSAN KRISKO
Assistant Attorneys General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
genevieve.reinkoester@ag.iowa.gov

VANESSA STRAZDAS
Cass County Attorney

ATTORNEYS FOR RESPONDENT-APPELLEE

QUESTIONS PRESENTED FOR FURTHER REVIEW

(1) Did the Court of Appeals err when it deviated from established law from both the Supreme Court and Court of Appeals and granted Smith a new trial simply because his trial counsel failed to preserve an issue for direct appeal?

(2) Did the Court of Appeals err when it determined the trial court abused its discretion when it denied Smith's motion to strike two potential jurors for cause?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

State Rules

STATEMENT SUPPORTING FURTHER REVIEW

Fifteen years ago, this Court reiterated that it had "made it clear that ineffective-assistance-of-counsel claims based on failure to preserve error are not to be reviewed on the basis of whether the claimed error would have required reversal if it had been preserved at trial." *State v. Maxwell*, 743 N.W.2d 185, 196 (Iowa 2008) (citing *State v. Broughton*, 450 N.W.2d 874, 876 (Iowa 1990)). Here, a two-judge majority of the Court of Appeals ignored this directive when it granted Applicant Timothy Duane Smith a new trial because it found he was prejudiced by his trial counsel's failure to preserve error for Smith's direct appeal. *Smith v. State*, No. 22-0813, 2023 WL 8069205 (Iowa Ct. App. Nov. 21, 2023). Not only does this conclusion conflict with long-standing law from the Supreme Court, it also conflicts with the rulings of all other panels of the Court of Appeals that have considered the same issue. Right now, Smith is grinning "like a Cheshire cat" because this two-judge majority gave him an undeserved "second bite at the apple—even though [Smith] committed the crime[.]" *Sothman v. State*, 967 N.W.2d 512, 532 (Iowa 2021) (quoting *State v. Straw*, 709 N.W.2d 128, 137 (Iowa 2006)).

On November 21, 2023, the Iowa Court of Appeals reversed the district court's order denying Smith's post-conviction relief application ("PCR") and granted him a new trial on two convictions for second-degree sex abuse. *Smith v. State*, 22-0813, 2023 WL 8069205 (Iowa Ct. App. Nov. 21, 2023). In this decision, a two-judge majority found the original trial court abused its discretion when it denied Smith's motion to strike two potential jurors for cause, and this failure prejudiced Smith because it failed to preserve error for direct review. *Id.* at *4, *6. The Court of Appeals committed two errors in its opinion that warrant granting further review and reversing that opinion.

First, the majority misapplied *Strickland* prejudice. The majority found Smith had failed to establish there was "a reasonable probability of a different verdict if additional strikes had been awarded" because "none of the [] challenged jurors sat on the jury[.]" *Id.* at *6. Despite this finding, the majority found Smith was prejudiced because trial counsel failed "to preserve error for appeal," because had error been preserved, the prejudice standard announced in *State v. Jonas*, 904 N.W.2d 566 (Iowa 2017), would have applied, making it "reasonably probable" that Smith would have been granted

a new trial on direct appeal. *Id.* at *6. While the majority claimed it was applying *Strickland* prejudice, it found prejudice was presumptively established under *Jonas* because Smith's trial counsel failed to "preserve error." *Id.* This conflicts with decades of Iowa precedent: *Sothman v. State*, 967 N.W.2d 512 (Iowa 2021), *State v. Lorenzo Baltazar*, 935 N.W.2d 862 (Iowa 2019), *State v. Maxwell*, 743 N.W.2d 185 (Iowa 2008), and *Ledezma v. State*, 626 N.W.2d 134 (Iowa 2001). It also conflicts with opinions by other panels of the Court of Appeals: *King v. State*, No. 22-1370, 2023 WL 8449408 (Iowa Ct. App. Dec. 6, 2023), *Jonas v. State*, No. 20-1180, 2022 WL 1100248 (Iowa Ct. App. April 13, 2022), *State v. Hampton*, No. 18-1522, 2020 WL 2968342 (Iowa Ct. App. June 3, 2020), *Powell v. State*, No. 18-0542, 2019 WL 2524264 (Iowa Ct. App. June 19, 2020), and *Dixon v. State*, No. 16-2195, 2018 WL 3471833 (Iowa Ct. App. July 18, 2018).

The majority also misinterpreted the remedy in *Jonas*; the opinion claimed that requesting additional peremptory strikes would have both given Smith "two additional strikes to shape the jury, [and Smith] would have been able on direct appeal to demonstrate prejudice and potentially have his conviction reversed and remanded

for retrial[.]" *Smith*, 2023 WL 8069205, at *5. This is incorrect. Under *Jonas*, a defendant does not get both remedies; he gets one or the other.

Second, the majority's decision that the original trial court abused its discretion when it denied Smith's motions to strike two jurors for cause is difficult to reconcile with decisions from both this Court and the Court of Appeals. Instead of deferring to the trial court's superior position of witnessing these jurors' answers in real time, on a cold record, it assigned emotions to a juror's response when it determined she had a fixed opinion on the merits of the case. The majority also failed to support its decision with any caselaw. *Smith*, 2023 WL 8069205, at *5.

These errors warrant further review because the two-judge majority's decision conflicts with decisions of both this Court and other panels of the Court of Appeals. Iowa R. App. P. 6.1103(1)(b)(1). This case also presents an issue of broad public importance because it misapplies *Strickland* prejudice for ineffective-assistance-of-counsel claims under *Jonas*. Because *Jonas* is newer precedent, this misapplication could be a harbinger of poor decisions to come as more *Jonas* claims are litigated in PCR. This Court should use this

case to clarify the correct prejudice standard for *Jonas* claims litigated in PCR. Iowa R. App. P. 6.1103(1)(b)(4).

STATEMENT OF THE CASE

Nature of the Case

The Court of Appeals held (1) the trial court abused its discretion when it failed to remove two potential jurors for cause; and (2) Smith was prejudiced by his trial counsel's failure to request additional peremptory challenges because this failed "to preserve error for appeal." These holdings conflict with Iowa precedent. The State seeks further review.[1]

Course of Proceedings

Smith was convicted of two counts of sexual abuse in the second degree, and this conviction was affirmed on direct appeal. *State v. Smith*, No. 18-1500, 2020 WL 1307693 (Iowa Ct. App. March 18, 2020). On June 8, 2020, Smith filed an application for PCR. App. 6–8. He also filed two amended applications. App. 9–14. The district court denied Smith's application in its entirety. App. 29–39.

[1] The State notes that Smith's original trial judge was Chief Justice Susan Christensen. *See* PCCV025884 Ex. 7 (Trial Tr.).

Statement of Facts

A jury found Smith guilty of two counts of sexual abuse in the second degree for repeatedly kissing, fondling, and orally and vaginally and/or anally raping his stepdaughter, H.R., when she was between the ages of six and ten. FECR015634 08-09-2018 Order of Disposition, Ex. 7 (Trial Tr.) at 176:3–9; App. 591–94. At trial, H.R. testified specifically to three different assaults. For the first, Smith and H.R. were in Smith's bedroom, and he began to touch her. Ex. 7 (Trial Tr.) at 178:11–179:12. Smith touched his penis to H.R.'s chest, mouth, and vagina. Ex. 7 (Trial Tr.) at 179:13–180:6. Smith then put his penis into H.R.'s mouth, and her vagina or anus. Ex. 7 (Trial Tr.) at 180:7–181:10.[2] When he finished assaulting her, Smith ejaculated on H.R., and she had to leave to clean herself up. Ex. 7 (Trial Tr.) at 181:6–23. H.R. described this as "something sticky all over" her. *Id.*

For the second, H.R. said she remembered she ate too much candy, got sick, and went into the bathroom to throw up in the bathtub. Ex. 7 (Trial Tr.) at 181:24–182:20, 204:12–18. Smith was in the bathroom, sitting on the toilet, with his pants down. Ex. 7 (Trial

[2] An expert testified at trial that young children often have difficulty differentiating between their vagina and anus. Ex. 7 (Trial Tr.) at 239:10–17.

Tr.) at 204:19–206:24. After H.R. was done being sick, Smith forced his penis into her mouth and ejaculated inside her mouth. Ex. 7 (Trial Tr.) at 182:10–183:14.

For the final assault, H.R. went into her parents' bedroom and found Smith lying under the blankets watching television. Ex. 7 (Trial Tr.) at 184:19–185:9. Smith turned the television channel "to Spongebob because that's what [H.R.] liked at the time." Ex. 7 (Trial Tr.) at 185:3–9. H.R. undressed, Smith then penetrated H.R.'s vagina or anus, and she felt "a sharp pain." Ex. 7 (Trial Tr.) at 185:3–186:7. At the end of the assault, Smith ejaculated on H.R.'s "stomach and chest area." Ex. 7 (Trial Tr.) at 186:14–25. On these facts, the jury convicted Smith of two counts of sexual abuse in the second degree.

ARGUMENT

I. The Court of Appeals erroneously found that failure to preserve error for appeal leading to potential success on direct appeal establishes *Strickland* prejudice.

For nearly 40 years, the standard for *Strickland* prejudice has been clear: "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland v. Washington*, 466 U.S. 668, 695 (1984). In *Ledezma v.*

State, this Court found that a "reasonable probability of a different result" requires "a showing of the reasonable probability of a different *verdict*, or *that the fact finder would have possessed reasonable doubt*." 626 N.W.2d 134, 144–45 (Iowa 2001) (emphasis added) (internal string citation omitted); *see also Dixon v. State*, No. 16-2195, 2018 WL 3471833, at *7 (Iowa Ct. App. July 18, 2018) (stating that *Strickland* prejudice "requires proof that the outcome of the proceeding—that is the determination of legal guilt or innocence—would have been different.").

Here, the majority found prejudice because Smith's trial counsel failed "to preserve error," which made it "reasonably probable" that Smith would have been successful on direct appeal. *Smith*, 2023 WL 8069205, at *6. This is an incorrect analysis. The likelihood of a particular result on appeal has no bearing on whether *Strickland* prejudice has been established. Rather, Smith was required to show that there was a reasonable probability of a different *jury verdict*. *Ledezma*, 626 N.W.2d at 144.

On this point, Smith has failed. Smith never argued, under *Strickland*, that it was reasonably probable the result of his jury verdict would have been different. Instead, he asserted the presumed-

prejudice standard under *Jonas* should apply to his ineffective-assistance-of-counsel claim. *See* Reply Br. at 14 ("When a court improperly refuses to disqualify a potential juror and defense counsel requests an additional strike of a particular juror after all peremptory challenges have been exhausted, prejudice will be presumed. No additional showing about the impartiality of the empaneled jurors is necessary.").[3] While the majority claimed it was applying *Strickland* prejudice, the result shows that the majority actually presumed prejudice as if Smith's claim were being raised on direct appeal. This is especially so considering the majority explicitly found Smith had failed to establish there was "a reasonable probability that there would have been a different verdict[.]" *Smith*, 2023 WL 8069205, at *6.

In *State v. Lorenzo Baltazar*, the defendant claimed his trial counsel was ineffective for failing to object to a jury instruction, which would have preserved error on this objection for appeal. 935 N.W.2d 862, 869 (Iowa 2019). *Lorenzo Baltazar* was originally routed to the

[3] Smith's original brief lacks any meaningful discussion of prejudice. App. Br. at 16–32. Only the reply brief asserts that *Jonas*'s presumed-prejudice standard should apply to Smith's PCR claim. Reply Br. at 14–15.

Court of Appeals, where a panel found the defendant was prejudiced by the failure to object because "[e]rrors in jury instructions are presumed prejudicial unless the record affirmatively establishes there was no prejudice." *State v. Lorenzo Baltazar*, No. 18-0677, 2019 WL 2144682, at *3 (Iowa Ct. App. May 15, 2019) (internal quotation marks and citation omitted). On further review, this Court overturned that ruling because "the presumed-prejudice standard applies to *preserved* errors in jury instructions." *Lorenzo Baltazar*, 935 N.W.2d at 871 (emphasis added). Because the defendant could not "show a reasonable probability that the outcome of his *trial* would have been different, [] we reject his claim." *Id.* at 872 (emphasis added).

In *Lorenzo Baltazar*, this Court followed *State v. Maxwell*, holding: "[I]neffective-assistance-of- counsel claims based on failure to preserve error are not to be reviewed on the basis of whether the claimed error would have required reversal had it been preserved at trial. Rather, a defendant must demonstrate a breach of an essential duty and prejudice." *Id.* at 872 (quoting *State v. Maxwell*, 743 N.W.2d 185, 196 (Iowa 2008)).

The majority holding here is in direct contravention of *Maxwell* and *Lorenzo Baltazar*. This Court has "made it clear" that *Strickland*

prejudice requires more than a showing that "the claimed error would have required reversal if it had been preserved at trial." *Maxwell*, 743 N.W.2d at 196. Despite this "clear" directive, this is precisely what the majority did; it found Smith was prejudiced simply because "the claimed error [might] have required reversal" on direct appeal had it been preserved.

Similarly, in *Weaver v. Massachusetts*, the United States Supreme Court found that if the defendant had preserved his objection to the closure of his trial courtroom, this structural error would have resulted in automatic prejudice on direct appeal. 582 U.S. 286, 300–02 (2017). But the United States Supreme Court found that when the challenge was raised as ineffective-assistance-of-counsel, the defendant was required to show *Strickland* prejudice because "the costs and uncertainties of a new trial are greater because more time will have elapsed in most cases. The finality interest is more at risk…These differences justify a different standard for evaluating a structural error depending on whether it is raised on direct review or raised instead in a claim alleging ineffective assistance of counsel." *Id.* at 302–03 (internal citation omitted).

If the majority's standard applies to ineffective-assistance-of-counsel claims under *Jonas*, then applicants will receive new trials on little more than proof counsel did not ask for additional peremptory strikes. This would render *Strickland* claims meaningless.

Not only does the majority's decision conflict with the precedent of this Court, it also conflicts with other decisions of the Court of Appeals. In *Dixon v. State*, a juror "had formed an opinion regarding Dixon's guilt," but inexplicably, Dixon's trial counsel neither moved to have the juror removed for cause, nor did he strike the juror with a peremptory challenge. No. 16-2195, 2018 WL 3471833, at *5 (Iowa Ct. App. July 18, 2018). The court found that these failures constituted a breach of duty. *Id.* After engaging in a detailed discussion about prejudice, the Court of Appeals found Dixon had established *Strickland* prejudice because "an actually biased juror served on the jury." *Id.* at *7–8.

In nearly identical subsequent cases, the Court of Appeals has generally followed the reasoning of *Dixon*. *See State v. Hampton*, No. 18-1522, 2020 WL 2968342, at *3 (Iowa Ct. App. June 3, 2020) ("…[N]o prejudice result[s] where trial counsel's for-cause objections were overruled but the challenged juror was nevertheless eliminated

via peremptory strike[.]"); *Powell v. State*, No. 18-0542, 2019 WL 2524264, at *8 (Iowa Ct. App. June 19, 2019) (finding Powell failed to establish prejudice "[b]ecause the biased juror was removed, [so] Powell received a fair trial."). And just two weeks after the majority issued its decision in *Smith*, a different panel of the Court of Appeals cited *Dixon* and found an applicant failed to establish prejudice "[b]ecause an actually biased juror did not serve on King's jury[]." *King v. State*, No. 22-1370, 2023 WL 8449408, *4 (Iowa Ct. App. Dec. 6, 2023).

The Court of Appeals took a more straightforward approach in Stephan Jonas's claim of ineffective assistance of counsel; it found he failed to establish prejudice because there was "no reasonable probability of a different result had Jonas' attorneys asked for an additional peremptory strike for one of the two identified jurors." *Jonas v. State*, No. 20-1180, 2022 WL 1100248, at *2 (Iowa Ct. App. April 13, 2022).[4]

Smith has never claimed that an actually biased juror sat on his jury panel—not in his PCR applications, during his PCR trial, or on

[4] According to the State's research, *Hampton*, *Powell*, *Jonas*, and *King* are the only cases to have contemplated ineffective-assistance-of-counsel claims of error under *Jonas*.

appeal. App. 6–14, App. Br. at 16–32, Reply Br. at 8–15. Smith did not elicit testimony from his trial counsel that counsel would have struck additional jurors if he had requested and been granted additional strikes. Trial counsel testified that the jurors he was concerned with were all struck from the jury. PCR Trial Tr. at 11:18–12:17. While trial counsel agreed he would have accepted additional peremptory challenges, he never testified how he would have used them. PCR Trial Tr. at 11:18–12:17.

In argument—his trial brief and his appellate brief—Smith identified some jurors a defense counsel might choose to strike using a peremptory challenge. *See* PCCV025884 D0083 (03-25-2022 Final Brief), App. Br. at 31–32. But he has never argued, or proven, that any of these jurors were biased or otherwise unfit to serve, possibly because nothing in their responses during voir dire demonstrated it. *See Estate of Wilson ex. rel. Wilson v. Iowa Clinic, P.C.*, No. 07-2102, 2009 WL 4114166, at *3 (Iowa Ct. App. Nov. 25, 2009) ("[] [A]lthough plaintiff's counsel pointed out traits of the seated jurors that might be disfavorable to plaintiff's case, the plaintiffs do not allege that these characteristics or viewpoints rendered the jurors not impartial.").

Finally, the majority misinterpreted the remedy in *Jonas* when it stated that if trial counsel had requested additional peremptory challenges, "Smith would have not only had two additional strikes to shape the jury, but would have been able on direct appeal to demonstrate prejudice and potentially have his conviction reversed and remanded for retrial by a new jury." *Smith*, 2023 WL 8069205, at *5. Had Smith's trial counsel requested additional peremptory challenges, Smith would only have been entitled to presumed prejudice under *Jonas* if the district court had *denied* the extra challenges. *See Jonas*, 904 N.W.2d at 583 (finding a defendant is entitled to presumed prejudice on direct appeal "[w]hen a defendant identifies a particular juror for an additional peremptory challenge *and* the district court *denies* the additional peremptory challenge[.]" (emphasis added)). If the district court had *granted* Smith the extra peremptory challenges, then Smith may have had "additional strikes to shape the jury," but he would *not* have been entitled to presumed prejudice on appeal under *Jonas*. In fact, because the district court would have given Smith an immediate remedy, he would have had no claim of error on appeal at all.

Perhaps based on this misunderstanding of the remedy in *Jonas*, the majority failed to contemplate whether, if trial counsel had requested the additional peremptory challenges, there was a reasonable probability the district court would have granted his request. In PCR, Smith failed to present any evidence of how the trial court may have ruled if the additional peremptory challenges had been requested. It is entirely possible that had the request been made by trial counsel, the court would have granted it. If so, then Smith would have been unable to meet even the majority's loose prejudice standard that he "would have been able on direct appeal to demonstrate prejudice and *potentially* have his conviction reversed," because he no longer would have had any error to complain of on appeal. *Smith*, 2023 WL 8069205, at *5 (emphasis added).

While there are rare and extraordinary cases that require the application of a slightly different prejudice standard—*Cuyler v. Sullivan*, 446 U.S. 335 (1980), *U.S. v. Cronic*, 466 U.S. 648 (1984), *Nix v. Whiteside*, 475 U.S. 157 (1986), *Lockhart v. Fretwell*, 506 U.S. 364 (1993), and *Krogmann v. State*, 914 N.W.2d 293 (Iowa 2018)—this is not one of them. These unique cases "do not justify a departure from a straightforward application of *Strickland* when the

ineffectiveness of counsel *does* deprive the defendant of a substantive or procedural right to which the law entitles him." *Williams v. Taylor*, 529 U.S. 362, 393 (2000). When, as Smith alleges, a trial counsel breaches a duty by failing to request additional peremptory challenges under *Jonas*, then trial counsel's actions will have deprived a defendant of a procedural right. Under these circumstances, our courts should apply *Strickland* prejudice to claims of error under *Jonas* – the applicant, here Smith, should have to prove a reasonable probability of a different result at trial because an actually biased juror sat on the jury, undermining our confidence that the verdict was reached on the evidence alone.

As this Court has stated, "[a] criminal defendant has 'no right to a trial before any particular juror or jury…All [they can] insist upon [is] a competent and impartial jury.'" *State v. Fenton*, No. 17-0154, 2018 WL 3057442, at *6 (Iowa Ct. App. June 20, 2018) (quoting *Summy v. City of Des Moines,* 708 N.W.2d 333, 339 (Iowa 2006), *overruled on other grounds by Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699 (Iowa 2016)). While a "principal reason for peremptories [is] to help secure the constitutional guarantee of trial by an impartial jury," the loss of a peremptory challenge, without more, does not

constitute "a violation of the constitutional right to an impartial jury." *U.S. v. Martinez-Salazar*, 528 U.S. 304, 313 (2000) (internal quotation marks and citation omitted). "So long as the jury that sits is impartial, [] the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." *Id.* (internal quotation marks and citation omitted). Smith's jury was fair and impartial. Not even he claims otherwise. Because no actually biased juror sat on his final jury, Smith has failed to establish *Strickland* prejudice. Had the Court of Appeals applied *Strickland* prejudice correctly, it would have affirmed the denial of his PCR application.

II. The Court of Appeals erred in finding the trial court abused its discretion when it denied Smith's motions to strike for cause—On a cold record, our courts should decline to interfere with a trial court's decision unless there is an unambiguous abuse of discretion and should decline to infer the tone of a juror's response.

The majority found the trial court erred when it denied Smith's motions to strike Juror K. and Juror A. for cause. *Smith*, 2023 WL 8069205, at *5. But the majority focused on Juror K. and did not meaningfully discuss the error it believed the trial court made

regarding Juror A. *Id.* at *3–5.[5] The majority primarily found fault with the trial court's "rehabilitation" of Juror K. *Id.* at *5. But rehabilitation is not forbidden. And it is difficult to categorize the trial court's statements as rehabilitation. Instead, the statements were aimed at educating Juror K., and the entire jury pool, about the burden of proof at a criminal trial. Ex. 7 (Trial Tr.) at 148:22–150:9.

Like *State v. Barrett*, "[t]he court's inquiry here was not aimed at persuading a juror to compromise a valid concern about disqualification for cause. The judge here was obviously bent only on learning the jurors' state of mind." 445 N.W.2d 749, 753 (Iowa 1989) (citing *State v. Beckwith*, 46 N.W.2d 20, 24–26 (1951)). And even "*Beckwith*['s] advice to judges to be cautious when there is a close question of disqualification for cause does not alter the requirement that the defendant establish a sufficient basis to support disqualification of a juror." *State v. Christensen*, 929 N.W.2d 646,

[5] At the end of the opinion, the majority stated it "need not address any error related to Juror A." *Smith*, 2023 WL 8069205, at *6. But earlier in the opinion, the majority found the trial court "abused its discretion when it refused to grant Smith's challenges for cause. Smith then had to use *two* peremptory strikes." *Id.* at *5 (emphasis added). These statements either undermine the majority's contention that it did not reach the question of error related to Juror A, or they misstate the holding.

658 (Iowa 2019). Smith failed to establish a sufficient basis here. *Compare* Ex. 7 (Trial Tr.) at 146:18–20, 148:19–21, 152:13–15, *with State v. Williams*, 285 N.W.2d 248, 267 (Iowa 1979) (finding the statement "we would challenge for cause" insufficient to preserve error on a juror challenge because "[i]t did not specify the grounds upon which it was based.").

During voir dire, both Juror K. and Juror A. expressed an opinion that they would need to hear from a defendant to render judgment against him. But when told the law was different than their opinion and does not require a defendant to testify, both jurors stated they could follow the law and the trial court's instructions. While it is understandable that Smith's trial counsel used peremptory strikes to remove these jurors, we should not conflate a defendant's desire to remove a juror with a district court's duty to do so.

And while Juror K. expressed some equivocation in her statements, the test to strike a juror for cause 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. Neuendorf*, 509 N.W.2d 743, 746 (Iowa 1993) (quoting *State v. Gavin*, 360 N.W.2d 817, 819 (Iowa 1985) (emphasis added)). By

definition, equivocal responses are not fixed opinions. *See State v. Simmons*, 454 N.W.2d 866, 868 (Iowa 1990) (rejecting the defendant's claim that the trial court erred in denying her challenges for cause simply because "two jurors [] expressed tentative prejudgment of her." A juror's "mere reservation" does not equate to a "fixed opinion" that required the jurors be struck for cause.).

Our appellate courts have refused to find an abuse of discretion under similar circumstances. *See State v. Hardin,* 498 N.W.2d 677, 682 (Iowa 1993) (in prosecution of defendant for intentionally disrupting a speech by President George Bush, the Supreme Court found no abuse of discretion when the trial court denied a motion to strike for cause a juror wearing a "Desert Storm T-shirt," and who had "obvious support for the troops in the Persian Gulf."); *State v. Lindemann*, No. 19-1632, 2021 WL 210986, at *6–8 (Iowa Ct. App. Jan. 21, 2021) (finding a juror did not express actual, unequivocal bias although he stated the defendant was "possibly" guilty because he'd been arrested and agreed he did not "believe [he] could be fair and impartial in this case," but he also agreed he could follow the court's instructions).

In finding the trial court abused its discretion, the majority also assigned emotions to Juror K.'s responses. It called her answer "tepid" and "lukewarm" and claimed the juror merely "parroted" the trial court's response. *Smith*, 2023 WL 8069205, at *5. Just recently, this Court cautioned against inferring a person's tone or intention from a cold transcript. See *State v. Church*, 997 N.W.2d 16 (Iowa 2023) ("The court of appeals took artistic license here, but the picture painted lacks fidelity to the record and the parties' arguments."). There is no support in the record that Juror K.'s response was tepid or lukewarm, and the record belies that she simply parroted the trial court's question. Ex. 7 (Trial Tr.) at 148:22–150:9.

Unless a juror expresses a clear and unequivocal bias toward a party, our appellate courts should, and usually do, defer to a trial court's superior vantage point. Unlike an appellate judge, alone in chambers, with a transcript many-months removed from trial, the trial court had the opportunity to hear the tone and inflection of the juror's answer in person and in real time, and to see the juror's facial expressions and body language. "Reviewing courts are properly resistant to second-guessing the trial judge's estimation of a juror's impartiality, for that judge's appraisal is ordinarily influenced by a

host of factors impossible to capture fully in the record—among them, the prospective juror's inflection, sincerity, demeanor, candor, body language, and apprehension of duty. In contrast to the cold transcript received by the appellate court, the in-the-moment voir dire affords the trial court a more intimate and immediate basis for assessing a venire member's fitness for jury service." *See Skilling v. United States*, 561 U.S. 358, 386–87 (2010) (internal citation omitted). The majority erred in failing to follow this established directive, so its opinion should be overturned.

III. There is no merit to Smith's other claims of ineffective assistance of counsel.

Because the majority decided Smith's appeal on his first claim of ineffective assistance of counsel, it did not reach the merits of his two other assignments of error. The State maintains those claims should be rejected for the reasons presented in its appellate brief and in the dissent. *Smith*, 2023 WL 8069205, at *9–10.

CONCLUSION

The State respectfully requests this Court to vacate the panel's decision and affirm Defendant's two convictions for sexual abuse in the second-degree.

REQUEST FOR ORAL ARGUMENT

The State requests that this case be submitted with oral argument.

Respectfully submitted,

BRENNA BIRD
Attorney General of Iowa

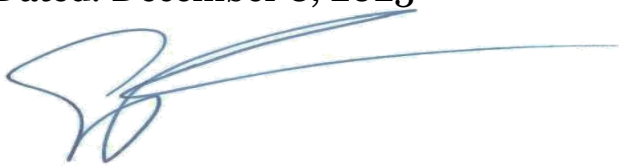
GENEVIEVE REINKOESTER
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
genevieve.reinkoester@ag.iowa.gov

CERTIFICATE OF COMPLIANCE

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

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **4,764** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: December 8, 2023



GENEVIEVE REINKOESTER
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
genevieve.reinkoester@ag.iowa.gov