IN THE SUPREME COURT OF IOWA

DONNIE LEE WYLDES, JR., Applicant-Appellant, v. STATE OF IOWA Appellee.	 S. CT. NO. 24-1123 WAYNE CO. NO. PCCV022960

APPEAL FROM THE IOWA DISTRICT COURT
FOR WAYNE COUNTY
HONORABLE ELISABETH REYNOLDSON, JUDGE

APPELLANT'S AMENDED BRIEF AND ARGUMENT
REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

This case should be transferred to the Court of Appeals because the issues raised involve applying existing legal principles. Iowa R. App. P. 6.903(2)(d) and 6.1101(3)(a).

NATURE OF THE CASE

Applicant-Appellant Donnie Lee Wyldes, Jr. files this appeal as a matter of right, having filed a timely notice from the final order entered in this case on June 11, 2024 (denial of Motion to Reconsider and Enlarge), the ruling denying Post-Conviction Relief ("PCR") on March 31, 2024, the partial granting of summary judgment ordered on April 20, 2022, and from all adverse rulings and orders included therein. Iowa R. App. P. 6.101; Iowa Code § 822.9 (2024); Iowa R. Civ. P. 1.904(2) (preserving issues for review upon filing a Motion to Reconsider and Enlarge); D0551, Order Deny Mtn. Reconsider (6/11/2024); D0548, Ruling Deny PCR (3/31/2024); D0129, S.J. Ruling (4/20/2022); D0205, Order Mtn. Quash (12/7/2022). Wyldes challenged his conviction for First Degree Murder under Iowa Code §§ 707.1 (1987) and 707.2 (1987) and Attempted Murder under Iowa Code § 707.11 (1987) alleging newly discovered evidence of material facts and actual innocence.

STATEMENT OF THE FACTS

Donnie Wyldes has spent nearly thirty-seven years in prison for a crime he did not commit. His conviction rests almost entirely on forensic testimony that the present-day scientific community now refutes, and the user community cannot defend. Wyldes was a stranger to the victim in this case, and nothing—not eyewitness testimony, biological evidence, or any evidence of motive—beyond the now discredited forensic evidence, ties him to this crime.

On October 15, 1986, Ronald Starnes was shot and killed outside his home just south of Corydon, in rural Wayne County, Iowa. D0413, Ex.I, Crim. Trial T.5:25-6:7, 67:12-19. His wife, Ruby Starnes, testified that not long after 10:00 p.m. they heard noises on their roof and Ronald went outside to investigate. D0412, Ex.J, Crim. Trial T.147:20-149:10. Ruby heard "a lot of popping noises outside," and "something hitting awfully hard on our house," when she opened the door, a man wearing a brown mask was coming up the steps in their entry way toward her. D0412 at T.151:7-152:23, 154:8-22. Ruby shut the door and held it closed, despite the man's attempt to kick it open. D0412 at T.154:23-155:10. The man left after Ruby told him she called the sheriff, not knowing that her phone lines were cut.

D0412 at T.155:22-156:12. Ruby, uninjured, went outside to check on her husband and found him dead. D0412 at T.158:18-159:10. Ruby told law enforcement that the intruder had a small build, wore dark clothes and a mask, and had dark eyes. D0412 at T.156:13-157:17. Ruby never identified Wyldes as the perpetrator. *See* D0412 at T.151:7-54:22.

Four days before Ronald's death, Wyldes's car slid into a ditch not far from the Starnes's residence during a rainstorm. D0408, Ex.N, Crim. Trial T.795:16-796:11. Wyldes walked to the nearest house—the Starnes's—to use the telephone to call his friend, Jay Kanney, to pick him up. D0408 at T.797:13-799:12.

In his lifetime, Wyldes owned .22 caliber rifles, including a Marlin Glenfield Model 70 rifle that was in his car when he drove into the ditch. D0413 at T.31:23-34:15, D0412 at 207:11-209:9. After Kanney picked Wyldes up, he transferred his Marlin Glenfield Model 70 rifle from his car to Kanney's. D0408 at T.799:22-800:5. Wyldes never saw this rifle after October 11th. D0412 at T.154:12-13.

The murder weapon was never located; yet, the State called Division of Criminal Investigation ("DCI") Criminalist Robert Harvey, who testified the type of gun that shot Ronald was a Marlin. D0409,

Ex.M, Crim. Trial T.628:16-23. Harvey opined "that the gun has on [stet] many occasions been dry fired … [t]hat firing pin has stuck that chamber enough times that it's actually produced this burr." D0409 at T.635:22-636:5. Harvey concluded, "[w]hen the ammunition is loaded into the gun, the cartridge case comes in contact with that burr, and it produces this deep gouge in the side of the casing." D0409 at T.635:22-636:5. "[W]hen the cartridge was discharged, this portion of the casing was weakened enough that, it actually split." D0409 at T.637:1-2.

Harvey examined over 18,000 cartridges gathered from shooting ranges in South Dakota, Cedar Rapids, Iowa, and Seymour, Iowa and isolated them based on his own determination and criteria that there were similarities between certain casings and the cartridge casings from the gravel road and the Starnes's residence. D0409 at T.643:1-14. Harvey speculated the casings he reviewed from these different locations showed what he imagined was, a *progressive deterioration* of one weapon over time. D0409 at T.647:2-649:25, 663:7-19. Harvey did not explain how he could isolate a specific marking amongst thousands of shell casings or what if any other rifles he eliminated as being the source of the casings. DO409 at T.625:15-689:23.

The State also relied on the opinion of DCI Criminalist Frank Tarasi, whose experience and training were in fingerprints and not on shoeprints. D0409 at T.598:5-600:4. Tarasi testified that shoeprints were not visible until he applied fingerprint powder and utilized a laser to illuminate the door the perpetrator kicked in an attempt to enter the Starnes's home. D0409 at T.603:8-604:20. Tarasi took five photographs while painting with light and concluded there were 3 partial shoeprints on the door. D0409 at T.603:8-604:20. Tarasi concluded that the footwear seized from Wyldes were similar in tread design to his test impression. D0409 at T.606:5-608:4.

During deliberations, the jury foreman—the father-in-law of another suspect—experimented with his own .22, test firing his weapon and reporting back to the rest of the jury on his examination of the cartridges. D0010, Amend. PCR pp.49, 51-52 (10/30/2020).

This action commenced on November 24, 2010, with Wyldes's *pro se* filing of his third PCR Application. D0003-07, PCR Application (11/24/2010). Wyldes filed amended PCR Applications on October 30, 2020 and March 3, 2022. D0010 at 1-53; D0107, 2nd Amend. PCR (3/3/2022). On April 20, 2022, the lower court issued a ruling

granting, in part, the respondent's Motion for Summary Judgment by dismissing most of Wyldes's claims due to time bars. D0129 at 29. The lower court's ruling only preserved the claim related to newly discovered evidence on the scientific validity of shoeprints and firearm toolmark matching. D0129 at 29. Trial was held on these surviving claims on June 27-30 and August 7, 2023. *See* DO558; DO559; DO562; DO563; DO565.

On March 31, 2024, the court denied Wyldes relief. D0548 at 28. The Ruling concluded the newly discovered evidence of the unreliability of firearm toolmark ("FATM") examination presented at the PCR trial would not have changed the outcome of Wyldes's criminal trial. D0548 at 22. By extension, because the methodology has not been *fully* discredited in the court's eyes, the court rejected the argument that the admission of the FATM evidence at Wyldes's trial violated his due process rights and rendered the trial fundamentally unfair. D0548 at 27-28. Further, the court dismissed Wyldes's claim related to shoeprint evidence, holding it was neither newly discovered nor material. D0548 at 25-26. Absent from the ruling was *any* discussion of Wyldes's claim of actual innocence; nor

did the court address Harvey's unscientific testimony about "progressive deterioration."

In response to Wyldes's Motion to Reconsider and Enlarge, the lower court acknowledged that it had wholly ignored Wyldes's claim of actual innocence in its original decision and amended the decision to include two short paragraphs dismissing the claim and summarily rejected any remaining arguments from the Motion to Reconsider. D0549, Mtn. Reconsider at 1-36 (4/15/2024); D0551 at 1-2.

ARGUMENT

The crux of the case against Wyldes consists of the testimony of two experts. First, Harvey, a purported firearm and toolmark ("FATM") examiner, who "matched" .22 shell casings (among the most common in the country) from the scene of the home-invasion murder to casings found on a nearby gravel road, where Wyldes's car had broken down in a storm, several days before the crime. D0409 at T.632:14-21. Harvey testified to total certainty, expounding that the markings on the casings were "very unique," occurred in only "five tenths of one percent" of casings, and, given the unique markings, that other casings found at firing ranges known to have been frequented by Wyldes also could have been fired by the same gun.

D0409 at T.623:14-21, 652:21-653:5. This testimony was bolstered by a footwear impression analyst, Frank Tarasi, who testified that Wyldes's shoes (a generic tennis shoe brand that shares a similar design with the Nike Air Jordan, the most popular sneakers in the world) could have made impressions found at the scene. D0409 at T.606:5-608:4.

However, as the lower court acknowledged when denying the State's summary judgment motion, there has been a significant shift in scientific consensus since the time of trial regarding the reliability of the firearm and footwear comparison analysis. D0129 at 19. The testimony presented at the PCR trial bears this out and demonstrates the forensic testimony admitted against Wyldes is now understood to be problematic and without foundational validity. *See* D0565 at Tr.154:21-155:23. Wyldes's jury, however, was presented with no competing scientific data and no error rates. Today, the State's purportedly scientific evidence would not be presented as infallible, instead it would be highly scrutinized, if not significantly limited, if offered at a new trial.

The Ruling denying Wyldes's PCR ignores significant evidence from the PCR trial, mischaracterizes the state of the law, and

overlooks record evidence going to the materiality of the new science. When properly analyzed, the court erred in finding that Wyldes was not entitled to a new trial. Moreover, a *de novo* review of the new evidence demonstrates that the use of the flawed forensic evidence violated Wyldes's due process rights and that he is actually and factually innocent.

Additionally, the court erred in its summary dismissal of Wyldes's *Brady*, *Napue*, and ineffective assistance of counsel claims as untimely, and violated his constitutional rights when it prevented Wyldes from developing alternative suspects by denying several discovery requests as provided under the Civil Rules of Procedure[1].

I. THE DISTRICT COURT ERRED IN DETERMINING THAT THE NEWLY DISCOVERED EVIDENCE DID NOT ENTITLE WYLDES TO A NEW TRIAL

Error Preservation

Wyldes argued there was newly discovered evidence entitling him to a new trial. D0544, Post-Trial Br. at 44-67 (11/9/2023). The lower court's original ruling denied this. D0548 at 28. Wyldes filed a

[1] Iowa Code chapter 822, which governs PCRs, instructs that "[a]ll rules and statutes applicable in civil proceedings including pretrial and discovery procedures are available to the parties." Iowa Code § 822.7 (2024).

timely Motion to Reconsider asking the lower court to reconsider the legal standards and critical and uncontradicted evidence of the invalidity of the purported scientific evidence from trial, which was denied. D0549 at 7-19, 24-36; D0551 at 1-2. Error was preserved. *Lamasters v. State*, 821 N.W.2d 856, 858-59 (Iowa 2012).

Standard of Review

In this appeal, Wyldes raises for review several errors of law related to newly discovered evidence of his innocence. This Court reviews the denial of a PCR Application for correction of errors at law. *Goosman v. State*, 764 N.W.2d 539, 541 (Iowa 2009). This Court is not bound by the lower court's determinations of law or prohibited from examining whether it applied erroneous rules of law that materially affected its decision. *Chariton Feed & Grain, Inc. v. Harder*, 369 N.W.2d 777, 782 (Iowa 1985); *see also* Iowa. Const. Art. V. § 4.

Merits

The Ruling below rests on significant factual and legal oversights and errors. D0548 at 8-27. Wyldes is entitled to a new trial because the evidence adduced at the PCR trial—evidence that the lower court accepts is new and could not have been discovered before

trial—probably would have changed the result. *More v. State*, 880 N.W.2d 487, 499 (Iowa 2016); D0129 at 19.

Today, in lieu of testimony that the cartridge casings at the scene, with total certainty, "matched" those found near where Wyldes's car broke down four days before the crime; that the "very unique" markings—found on less than "five tenths of one percent" of casings—found at ranges he was known to have frequented were like those at the scene as well; and that his shoes could have made prints found at the scene, *see* D0409 at T.623:14-21, 652:21-653:5, a jury would hear a vastly different slate of evidence—evidence the lower court failed to properly consider. This evidence—overlooked and otherwise misconstrued by the court—includes testimony *agreed to by both the State and Wyldes's witnesses* that: (1) unqualified individualization testimony of a "match" has been rejected; (2) the FATM examination did not comport with today's laboratory standards; (3) the so-called theory of "progressive deterioration" used to connect Wyldes and his missing rifle to the casings at the scene was fabricated and completely scientifically unsubstantiated; (4) the community of independent scientists has raised serious questions about the FATM field's reliability and scientific validity; (5) the low

error rates reported in FATM studies cannot be extrapolated to casework; and (6) the four-month delay between the crime and the seizure of Wyldes's shoes should have precluded any comparison to the shoeprints at the scene. The jury would hear this evidence in light of the other weak evidence tying Wyldes to the scene—evidence the court failed to properly consider. Taken as a whole, this new evidence probably would have changed the outcome of the trial. *More*, 880 N.W.2d 487. This Court should conclude the trial court erred in finding otherwise and grant Wyldes a new trial.

A. Unqualified Individualization Testimony Has Now Been Rejected Not Only by the Scientific Community at Large, but by the FATM Community Itself.

The Ruling overlooks the consensus among both Wyldes's and the State's witnesses that the unqualified individualization or "match" presented to the jury, though generally accepted at the time, is now understood to be misleading and scientifically unsupportable. It is undisputed that DCI criminalist Harvey's testimony that the "very unique" marks on the two sets of casings were definitively fired by the "same gun" is no longer acceptable even within the firearms community, but also that the methodologies he used at the time of

his examination are unreliable, casting further doubt on the integrity of his conclusions. Both State's firearm toolmark experts during the PCR proceedings, Victor Murillo and, by deposition, David Brundage, testified that unqualified individualization testimony, such as "same firearm," though a common conclusion at the time of Wyldes's trial, is no longer appropriate expert testimony. *See* D0565, PCR Tr.75:11-20 (8/7/2023); D0439, Ex.24, Murillo Deposition p.134:7-12 (stating that the phrase "to the exclusion of all others" is no longer used); D0440, Ex.25, Brundage Deposition p.92:5-8 (Q. "[Y]ou can't really say ['I know there's no other gun in the world that could have made this mark?'] A. I would agree with that."). These concessions by the State's own witnesses match the consensus of the larger, objective scientific community as reflected by the PCAST Report, as well as the testimony of Wyldes's expert. *See, e.g.*, D0426, Ex.6, PCAST p.19 (2016) ("[C]ourts should never permit scientifically indefensible claims such as … 'to the exclusion of all other sources.'"); D0558, PCR Tr.10:12-21 (6/28/2023). Both of the State's experts testified that the type of gouges described are not "very unique" as Wyldes's jurors were told, but common. *See* D0440 at p.177:16-19 ("Q. [T]he resulting damage from this practice for a Rimfire gun is actually

common; right? A. Well, yes, I did say it that way."); *see also* D0565 at Tr.17:3-21; 156:17-24. To the extent that the Ruling draws a distinction between the phraseology (i.e., "unique" and "same gun" versus "to the exclusion of all other guns") it is in error—the definition of "unique" and "same" is that no other gun could share the characteristics.

B. Using Today's Laboratory Protocols, It Is Clear That Harvey's Analysis Was Woefully Sub-Standard.

The Ruling does not consider the evidence from the State's own witnesses that Harvey's analysis failed to comport with today's mandatory laboratory standards—to be distinguished from optional guidelines—that would have resulted in an entirely different, documented and verified analysis as well as *precluded* the "progressive deterioration" testimony from tainting Wyldes's trial. As explained in detail by the State's firearm toolmark and laboratory experts, at the time of the examination in Wyldes's case, there was no laboratory accreditation process, *see* D0422, Ex.2, Hermsen Deposition p.19:18-22, that is, there was no external process in place to ensure that the lab was "meeting the same minimal standard" as other labs, D0422 at 18:6-25. The laboratory had not yet developed

standard operating procedures ("SOPs") for examiners to ensure "that everything gets done safely and as correctly as possible" and that "the methods, the tools, the equipment they use to get to the conclusion would be the same no matter who's doing the work." D0424, Ex.4, Chapman Deposition pp.17:9-21:7. Moreover, Harvey did not have to adhere to any documentation requirements, which are now in place to ensure that the examiner has a real and verifiable basis for his conclusions. *See, e.g.*, D0422 at 80:14-81:20. Harvey's conclusions were not verified by a second examiner, which, as Murillo explained, is a "good idea" and "a way to try to catch mistakes." D0565 at Tr.77:21-78:5. Additionally, because the concept of cognitive bias was not yet understood by the forensic community, *see* D0422 at 39:3-21, there were no procedures in place to protect examiners from the influence of irrelevant but potentially biasing contextual information. Finally, there was no proficiency testing program in place in the 1980s, so there was no meaningful way to monitor Harvey's performance as an examiner. *See, e.g.*, D0424 at 36:17-37:9 (stating they could not know if the analysis was correct "until accreditation came"). Due to the lack of standards at the time, Wyldes's jurors were compelled to simply accept Harvey's claims

because they had no objective way to measure how much weight to give to his testimony: no documentation; no error rates; no proficiency testing; no independent verification; and no critique from the mainstream scientific community.

C. Harvey's "Progressive Deterioration" Theory Was an Unvalidated Invention That Improperly Bolstered the FATM Evidence at Trial.

The Ruling fails to consider the uncontradicted evidence rejecting any scientific basis for Harvey's testimony that casings collected from firing ranges known to have been frequented by Wyldes "could have been" fired from the same gun used to shoot Mr. Starnes, based on his made-up theory of "progressive deterioration." This faulty and unsubstantiated testimony allowed the State to argue the shell casings from the road and the crime scene were fired by Wyldes's firearm. There are now requirements that all lab procedures be based on verifiable science, ad hoc procedures are precluded, and all statistical statements be based on appropriate sampling plans. D0424 at 154:17-25, 156:10-155:4; D0422 at 48:6-51:19. As the State's own witnesses made plain, Harvey's theory of "progressive deterioration" (used to determine that gouges along the sides of some of the over 18,000 casings collected from various firing ranges,

though not the same, could have been made by the same gun, just either earlier or later in time than gouges found on the casings at the scene) would not fly today. The State's experts testified the theory would not withstand today's more rigorous laboratory requirements. D0565 at Tr.154:21-155:23 (no studies on the creation of this kind of mark or theory of progressive deterioration; no SOPs addressing progressive deterioration; Association of FATM Examiners ("AFTE") theory of identification has no progressive deterioration; no proficiency testing on progressive deterioration).

D. Harvey's Statement of Statistical Rarity Lacks Any Scientific Support.

Similarly, the Ruling fails to address the undisputed fact—agreed to by all the State's witnesses—Harvey was not properly qualified to make the "statistical" calculation that gouge marks occurred in only "five tenths of one percent" of collected casings and that today's standards would not support such a statistic. *See, e.g.*, D0565 at Tr.155:1-156:11 (Harvey did not undertake any sampling plan; nothing in SOPs or AFTE theory, and no proficiency testing on calculating population frequency). Harvey was able to go rogue in this way because of the lack of laboratory standards at the time of his

examination; today, such testimony would not be acceptable. No expert, even a qualified statistician, would give this testimony because it is now understood that there is no statistical foundation for Harvey's baseless testimony.

E. FATM Is No Longer "Generally Accepted" by the Community of Independent Scientists and Scholars.

The Ruling's conclusions regarding the "continued general acceptance of the methodology from courts as well as the scientific community" ignores the new evidence demonstrating the ever-increasing chorus of scientific voices critiquing FATM evidence. D0548 at 21. Beginning with the reports of the National Research Council (2008), D0451, Ex.31 at 272-80; the National Academies of Science (2009), D0425, Ex.5 at 150-55; and the President's Council of Advisors on Science and Technology (2016 & 2017), D0426, Ex.6 at 11-12 & D0431, Ex.11 at 6-8, and continuing today with numerous articles by statisticians, a chorus of neutral and esteemed scientists have roundly critiqued the notion that FATM examination in casework can boast the vanishingly low error rates reported in existing studies. Proponents of FATM create and rely on studies with low error rates to bolster their use of FATM, but the low error rates

are misleading. *See* D0464, Ex.44, Dorfman Study at p.5 (2022). The critique has such momentum within the broader community of scientists, statisticians and academics, that additional research has been published on the subject even since Wyldes's PCR trial ended. Courts around the country have responded to this criticism by precluding or severely limiting FATM testimony. *See e.g., United States v. Adams,* 444 F. Supp. 3d 1248 (D. Or. 2020); *United States v. Shipp,* 422 F. Supp. 3d 762 (E.D.N.Y. 2019); *United States v. Tibbs,* 2019 WL 4359486 (D.C. Super. Sep. 5, 2019); *People v. Tidd,* 2024 WL 3982134 (Cal. App. Aug. 29, 2024); *People v. Ross*, 129 N.Y.S. 3d 629 (N.Y. Sup. Ct. 2020).

F. Research Demonstrates Significant Error Rates in Actual FATM Casework.

The Ruling's reliance on "low error rates" in the FATM field overlooks the unrebutted testimony and evidence from the PCR trial regarding the inability to generalize error rates from studies to actual casework. D0548 at 21, 27. There are many scientific studies regarding the validity and reliability of FATM examinations.

Table 1: Design Flaws[2]

Study	Closed- or Partially Closed-Set	Unexplained Drop-Outs	Volunteer Participants	Not Blind	Counts Inconclusives as Correct
Smith 2004 (D0515, Ex.FF)					
Hamby 2009 (D0401, Ex.Y)					
"Miami-Dade" 2013 (D0406, Ex.U)					
Smith 2016 (D0516, Ex.GG)*					
"Ames I" 2016 (D0483, Ex.34)					
Duez 2017 (D0517, Ex.HH)**					
Keisler 2018 (D0407, Ex.V)					
Hamby 2019 (D0421, Ex.Z)					
Neuman 2022 (D0471, Ex.R)†					
"FBI-Ames II" 2023 (D0452, Ex.32)					

[2] *In addition to suffering from the flaws in this chart, the Smith study included out of class comparisons, as noted by PCAST. D0426 at 111 n.335.

**The level of difficulty of the Duez study was extremely low. D0565 at Tr.144:20-145:8.

†The Neuman study involved 11 examiners from a single lab; moreover, it was not designed as a *validation* study, but rather to report "preliminary results from a blind quality control program," as specified in its title. D0404 at 964-67.

Table 2: False Positive Range in "Open Set" Studies[3]

Study	% of Different Source Comparisons Deemed "Inconclusive"	Bottom of FP Range (reported FP rate in study)	Top of FP Range (counting inconclusive as incorrect)
"Ames I" 2016 (D0483, Ex.34)	33.7%	1.01%	**34.8%**
Keisler 2018 (D0407, Ex.V)	20.1%	0.00%	**20.1%**
Neuman 2022 (D0471, Ex.R)†	74.1%	0.00%	**74.1%**
"FBI Ames II" 2023 (D0452, Ex.32)	65.43%	0.92%††	**50.58%**††

The Ruling wholly fails to analyze the impact of the unrebutted PCR trial evidence regarding study design issues and the treatment of inconclusive answers, especially when the jury was not provided with

[3] ††Cartridge cases only.

any information on the possibility of error of the forensic examinations. Consideration of this evidence demonstrates high potential error rates that undermine the FATM evidence used at Wyldes's original trial and requires the court to grant relief. *See e.g.*, *Abruquah v. State*, 296 A.3d 961, 980-81 (Md. 2023); *see also People v. Genrich*, 471 P.3d 1102, 1112 n.5 (Colo. Ct. App. 2019) (showing that trial courts can consider, among other factors, "the scientific technique's known or potential rate of error …").

First, there was unrebutted evidence at the PCR trial that, for studies to be supportive of FATM examination, the participants must constitute a representative sample of the population at issue—in the case of FATM examination, all qualified examiners in the U.S. *See* D0464.5; D0565 at Tr.98:19-22 (stating it is important "that the people being studied are representative of the larger population"). The population participating in existing FATM studies, however, are not randomly selected participants from the population, but are self-selected volunteers, who may be more experienced than the general population of FATM examiners. *See* D0464 at 5; D0565 at Tr.98:10-99:14. Without a representative sample of participants, a study can speak to the error rate of only those participants, not the discipline

as a whole and does not support the use of FATM examination as presented to Wyldes's jury in 1986.

Similarly, existing FATM studies do not generally report the drop-out rate for participants or the number of participants who fail to complete the full study. *See* D0464 at 5. Missing data from either participant drop-out or failure to complete a study can create several potential biases—particularly if the participants that are the source of missing data are "systematically different" from those who complete the study. *See* D0464 at 5. However, to understand whether a study's results can be applied to the discipline at large, it is important to understand this missing data and its causes. D0464 at 5; D0565 at Tr.100:17-101:13. FATM studies have not reported their rates of missing data, and it is impossible to assess the magnitude of its effect on the error rates reported by those studies and thus, the studies are not reliable support of FATM examinations.

Other issues with generalizability include the level of difficulty, *see, e.g.*, D0565 at Tr.96:2-15, and the size of the sample population of both examiners and types of firearms and ammunition studied, *see* D0565 at Tr.132:5-21. Of the eleven studies on which the State's expert relied, all involve volunteer study participants, and none fully

reports missing data or its causes. *See generally* D0401, D0405-07, D0421, D0471, D0487, D0515-17.

Moreover, all FATM studies report very high rates of "inconclusives," which creates a significant generalizability problem: it is impossible to know if the large number of "inconclusive" responses would shift to erroneous "identifications" in casework, where examiners face different pressures and incentives. *See* D0464 at 5 (when "calculating error rates, one is left in the dark as to whether the comparisons termed inconclusive are equivalent to what would be judged inconclusive in field work …").

As Murillo, one of the State's FATM expert, conceded, examiners participating in studies are incentivized to answer "inconclusive" when in doubt about a potential identification. D0565 at Tr.101:16-102:7. Examiners in all but one of the State's studies knew they were participating in a study. *Cf.* D0404 at 965. In studies—as opposed to casework—ground truth is known, as the researchers scoring the test know whether the compared samples were fired by the same or different firearms. If an examiner makes an erroneous identification in a study, it is guaranteed the mistake will be discerned. Examiners, who earn their living performing FATM comparisons, have a vested

interest in maintaining the validity of the field. D0565 at Tr.102:5-7. Therefore, if an examiner has any doubt, "inconclusive" is always a safe answer in a study.

In casework, the pressures are entirely different, as examiners are often key to closing a case. D0565 at Tr.93:22-94:1 ("Q. In case work … [y]ou're trying to close the case; right? A. Yes."). Examiners receive contextual information—such as the crime at issue, the status of the victim, and the identification of a suspect—which could influence an examiner's determination. D0565 at Tr.103:3-18. The influence of contextual information, in the words of the State's own expert, "could mean that you had fewer false positives in a study than in case work." D0565 at Tr.103:3-18. A mistaken "identification" will never be revealed, as it is impossible to know ground truth in casework. D0565 at Tr.94:22-95:5 ("Q. So in case work, unlike on a test, no one actually knows the right answer; right? A. Correct."). Thus, the pressures in casework favor making an identification, even when there is some doubt. Here, Harvey was a part of the investigation team and privy to biasing information about the crime and Wyldes, D0409 at T.627:2-11, likely causing him to face external pressures to link Wyldes to the crime.

The false positive rate reported in these studies can best be understood to be the *bottom of the range* of false positive error rates in actual casework, with the top of that range being the percentage of different source comparisons that are deemed by examiners to be "identifications" or "inconclusives," and the false positive rate in actual casework would be expected to fall somewhere in between. D0464 at 3 ("All we can then properly speak of is the potential error rates, which can be assumed to lie somewhere between the minimum and the maximum."). Murillo himself espoused this approach. D0565 at Tr.107:17-108:8. Recalculating the error rates in this manner—which one of the State's experts did during cross-examination—yields a *staggering change in results, with rates ranging from around 1 percent to 20, 30, or even 50 percent. See, e.g.*, D0565 at Tr.136:18-138:3 (D0406 at 29-30: 1.2 to 43%); 138:19-139:8 (D0483 at 17: 1.01 to 34.8%); 142:1-143:8 (D0407 at 2-3: 20.1%), 147:17-148:1 (D0487 at 89-97: 51.5%); 148:11-149:18 (D0452 at 47).

Even just a slightly lower threshold for identification in casework than in studies would cause the false-positive error rate to spike dramatically. Using the FBI Ames II data, if the threshold for identification was lowered for "inconclusive' answers on the cusp of

being "identifications"—the "Inconclusive A" category[4]—to became "identifications" in casework, the false-positive rate would significantly rise. D0452 at 32-70. For cartridge casings, the rate would go up *nearly 10 times*, *from 0.92% to 7.2%*. *See* D0452 at Figure 1*; see also Abruquah* 296 A.3d at 980-81 (undertaking the same calculation for bullet comparisons and finding the false-positive rate would jump from 0.7% to 10.13%).

No evidence from the PCR trial contradicts that examiners' determinations can shift from one category to another. D0452 at 74-75. In the FBI Ames II study, even under precisely the same conditions, examiners were unable to repeat *their own conclusions* (repeatability) 21 percent of the time for known matches and 35.3 percent of the time for known non-matches and were unable to repeat the conclusions of other examiners (reproducibility) 32.2 percent of the time for known matches and almost 70 percent of the time for known non-matches. D0452 at 39, 47. Results were similarly abysmal for cartridge casings, with disagreement for the same

[4] There are three "Inconclusive" categories: A, closest to being an identification; B, truly inconclusive; and C, closest to being an exclusion. D0452 at 13.

examiner at 24.4 percent for matches and 37.8 percent for non-matches, and for different examiners at 36.4 percent for matches and 59.7 percent for non-matches. D0452 at 39, 47. If examiners shift decision thresholds between conclusions at these rates in the same conditions, then under significantly different conditions—that is in studies versus casework—the potential shifts of identifications and inconclusives would be even more significant. Here, this is imperative since Wyldes's jury never learned of the significant error rates in FATM analyses, and this would have greatly impacted his jury's interpretation of the FATM evidence against him.

The court erred in determining that FATM can boast "low error rates." D0548 at 27. When considered collectively, the new evidence shows that Wyldes did not receive a fair trial and this evidence would change the result. *State v. Weaver*, 554 N.W.2d 240, 250 (Iowa 1996).

G. The Time Delay Between Crime and Analysis Should Have Precluded Examination of Footwear Impressions.

The Ruling does not adequately address the new footwear impression research introduced during the PCR trial, which undermined Tarasi's trial testimony, including studies on significant changes to outsoles caused by normal wear. The Ruling dismisses

this newly discovered evidence, erroneously stating that the defense expert at the PCR trial was aware of the near four-month lag between the time the crime scene impression was allegedly made and seizure of Wyldes's shoes and that this information did not affect her conclusions. D0548 at 24. This is not supported by the record. The State's witness, Kenneth Martin, testified that according to today's standards, information about such a time lag must be included in a report and would be considered in arriving at a conclusion. D0556, PCR Tr.231:5-14, 234:17-235:15 (6/29/2023); *see* D0476, Ex.57, ANSI/ASB Standard 095 (2020).

As Martin conceded, this four-month lag is now understood to be necessary information because the outsole of a shoe may be "substantially different" between the time a footwear impression is allegedly made and seizure of suspect shoe. D0556 at Tr.230:19-231:22. "[I]n most cases shoes not recovered until weeks or months after a crime contain general wear advanced beyond the condition they possessed on the day of the crime." D0556 at Tr.230:19-22. Unlike Wyldes's jury, the court had the opportunity to observe the research showing the increasingly dramatic changes to the outsoles of sneakers after 30, 90, and 120 days. D0556 at Tr.233:12-233:3.

Here, the shoes were seized nearly four months after the crime—shoes that Wyldes wore frequently—important information for a jury to consider. D0411, Ex.K, Crim. Trial Tr.326:1-4; D0408 at 822:2-5. Moreover, far from appearing unique, the wear patterns exhibited in the relevant research and those exhibited in Wyldes's shoes are extremely common. D0563, PCR Tr.43:2-44:21 (6/30/2023).

The Ruling erroneously overlooks that today, a jury would understand what Wyldes's jury never heard: the gross characteristics of the outsoles of the shoes may have changed dramatically in the intervening four months and the size and tread—which was the basis of Tarasi's weak association—was extremely common and does not identify or connect Wyldes to the prints on the Starnes's door.

H. The District Court Overlooked Critical Evidence from Wyldes's 1987 Trial.

The Ruling inaccurately characterizes evidence from Wyldes's original trial and omits significant factual findings regarding the credibility of certain lay witness testimony. D0548 at 1-28. Although the State recognized at the time of Wyldes's original trial the evidence against him was "thin," D0409 at T.764:2, the Ruling characterizes Wyldes's trial in a different light without reference to the record.

Indeed, a full consideration of all the evidence—new and old—is required to evaluate Wyldes's claims.

1. Only Weak Evidence Tied Wyldes to the Casings in the Road.

The Ruling—like the State's experts at Wyldes's original trial—rests on the assumption that casings found on the gravel drive came from Wyldes's gun; something Wyldes has always vehemently denied. D0409 at T.830:8-9. The only person who claimed that Wyldes shot his gun near the gravel drive was Jay Kanney. D0410, Ex.L Crim. Trial T.519:4-6-520:2-14. As the Ruling notes, Kanney picked Wyldes up during a heavy rainstorm four days prior to the crime, after Wyldes's car slid into a ditch not far from the Starnes's residence. D0548 at 2; D0408 at T.796:8-798:15. This incident is the only time that Wyldes met the Starneses, when he used their telephone to call Kanney for a ride. D0408 at T.797:16. The Ruling relies on Kanney's testimony that, after Wyldes's car slid into the ditch, Wyldes shot his .22 caliber firearm to scare any potential mean dogs in the area before proceeding to the Starnes's home. D0410 at T.519:4-6-520:2-14. The casings from this area were later "matched" to casings found at the Starnes's.

However, Kanney was not a reliable witness. During the investigation of this case, Kanney was interviewed multiple times by law enforcement, including on October 29, 1986 (two weeks after the crime occurred) and on January 29, 1987 (several months after the crime occurred). *See* D0457, Ex.64, Kanney Interviews pp.1-10 (1986-87). It was not until after Kanney's January 29, 1987 interview that the Sheriff's office wrote a memo indicating Kanney purportedly called to say that, upon further reflection, he remembered Wyldes telling him that he had fired his rifle several times. *See* D0457 at 4-8. The Ruling overlooks the convenient timing of this sudden recollection, which took place *more than three months* after the crime occurred and after at least two interviews with law enforcement. *See* D0457 at 4-8.

Kanney's theory that Wyldes's shot his .22 is contradicted by Wyldes and makes no practical sense. The physical evidence demonstrates it is improbable: it was raining hard enough for a car to slide off the road into a ditch and the ground was so wet that a pickup truck could not pull the car out of the ditch. D0408 at T.805:21-806:23. The casings, however, were neither dusty nor muddy—the Ruling notes this detail but overlooks its importance.

D0548 at 3. Given the condition of the casings, it is improbable that they were in the mud during the October 11th storm and therefore more likely to have been left sometime after the storm. Moreover, their location belies Kanney's story: the shell casings were found .14 miles away from Wyldes's car in the opposite direction from the Starnes residence. D0412 at 175:19-178:18. There would have been no reason and there is no evidence that Wyldes, during a massive rainstorm, walked .14 miles away from the Starnes's residence to shoot his .22 firearm for fear of mean dogs.

Similarly, Kanney testified Wyldes was in possession of his .22 at the time of the crime, but this is contradicted by Wyldes's since Kanney told him that someone had stolen it from the car, D0408 at T.847:23-849:13, as well as the testimony of another witness, Bobby Easley. Easley testified he was with Kanney and Wyldes on October 11th and did not see Wyldes retrieve the gun from Kanney's car. D0412 at T.246:20-247:13, D010 at 527:23-528:9.

Notably, defense investigators attempted to interview Kanney before trial, but he was intoxicated and lied to them. Kanney admitted under oath that when he was approached by an investigator and trial counsel for Wyldes, he told them a "couple old wives tales

that wasn't the truth," in part because "he had too many beers that day" and "wanted to get rid of them." D010 at T.578:3-14. The Ruling does not acknowledge the weaknesses in Kanney's testimony or note his lack of credibility, despite the significant role that Kanney played for the State by connecting Wyldes to the casings on the gravel road.

2. The Testimony of Ruby Starnes Undermined Evidence Tying Wyldes to the Casings in the Road and to the Crime Itself.

The Ruling does not give appropriate weight to surviving victim Ruby Starnes, who provided a detailed description of the perpetrator to law enforcement at the time of the crime and again at trial but never identified Wyldes as the perpetrator. D0412 at T.151:7-54:22.

Ruby testified about the October 11th incident stating that while "sitting on the davenport reading … I saw the lights [of a car] go in the ditch." D0412 at T.165:2-3. Shortly after, a man came to the door to use the telephone. D0412 at T.165:12-66:3. Ruby did not describe Wyldes as threatening, in fact she knew his grandparents from the community. D0408 at T.799:1-3 Neither Ruby nor any of her neighbors heard a gunshot. The only detail Ruby remembered was that Wyldes was wearing a raincoat, something unremarkable, given the stormy weather. D0412 at T.167:1-10. Most importantly,

Ruby testified that she did not see Wyldes with a gun on October 11th. D0412 at T.169:17-25.

Ruby's testimony about Wyldes's behavior and her observations on the night of October 11th are significant because she is the only witness present on both October 11th and on the night of the shooting. The fact that Ruby noticed the lights of a car go into a ditch, but did not hear any gunshots or observe Wyldes with a gun on October 11th—let alone positively identify Wyldes's as the perpetrator from October 15th—should be given appropriate weight by the Court.

3. Wyldes's Alibi Was Not "Inconsistent."

The Ruling mischaracterizes Wyldes's alibi as "inconsistent," but ignores the fact that Wyldes's whereabouts were accounted for by Kanney and Easley, who were with him for at least three hours on the night of the crime. D0548 at 3. Though there were some minor inconsistencies in trial testimony regarding the precise timing, all witnesses put the three men together, drinking beer, and working on leveling Wyldes's trailer. D0408 at T.812:3-815:25. The slight inconsistencies regarding the timing are not surprising—all the witnesses were interviewed about this random Wednesday night, a night when many beers were consumed—multiple times over the

course of a four-month long investigation. The Ruling fails to appreciate that the basic facts of Wyldes's alibi are supported: on October 15, 1986, Wyldes was at home with friends for several hours and then spent the night at the home of his grandparents.

4. Any Misstatements by Wyldes Did Not Concern Key Evidence in the Case and He Voluntarily Went to Law Enforcement to Clarify Them.

The Ruling further mischaracterizes Wyldes as a liar and interprets these "lies" as admissible evidence of guilt. D0548 at 3, 5. This is not supported by the record. None of the statements concern any key issue central to guilt. *See, e.g.*, *State v. Graves*, 668 N.W.2d 860, 877, 880 (Iowa 2003). Wyldes explained why he was not forthcoming to law enforcement, D0408 at T.817:14-825:6, including that he misunderstood some of the questions he was asked, D0408 at T.817:23-24 ("I believe that he asked me if I had many guns and I had told him no, I didn't."), was not clear about what Christmas he was referencing when he told law enforcement that he receives tennis shoes from his family "last Christmas" D0408 at T.820:2-24, was "nervous," D0408 at T.823:5, especially because he purchased a gun from his cousin without transferring ownership and because one of his guns was missing and possibly stolen or sold by Kanney, D0408

at T.818:1-819:4, 822:6-22, and was "afraid of being implicated in something I had nothing to do with." D0408 at T.824:13-14. Wyldes voluntarily went to law enforcement to clarify any misinformation he provided and provide locations where he had fired his .22 firearm. D0408 at T.825:4-11.

5. Similar Crimes Were Committed in Rural Iowa around the Time of the Starnes Murder.

Finally, the Ruling overlooks evidence provided by Wyldes showing other crimes of a similar nature took place across rural Iowa over the decade in which this crime had occurred. *See* D0490, Ex.67, Similar-Crimes Media Coverage. Within a month of Starnes's death, three men were charged in the murder of Harold Horner, an elderly man who was shot to death in his own home with a .22 firearm. D0490 at 3.

I. The Court Misapplied the Newly Discovered Evidence Standard as Well as the Standards for Admissibility of Expert Testimony and 403 Admissibility.

The appropriate standard for deciding the PCR claim under § 822.2(1)(d) based on newly discovered scientific evidence is whether Wyldes established by a preponderance of the evidence that the newly discovered evidence "probably would have changed the result at

trial." *More*, 880 N.W.2d at 499; *Weaver*, 554 N.W.2d at 249. The Ruling, however, applies a different standard, finding that "*it is not clear* that the newly discovered evidence would have changed the outcome." D0548 at 22. (emphasis added). This is a meaningful shift in terms of both the standard of proof—from "preponderance" to "clear"—and the effect of that evidence—from "probably would" to "would."

Moreover, the Ruling inappropriately hangs Wyldes's claims entirely on admissibility:

> [A]ll of Wyldes' challenges [are] dependent on the same link: that there is some newly discovered problem with the validity of the theory or field of firearm toolmark examination that would render all related testimony inadmissible if known during the original trial. They argue that the evidence in the PCR record shows that is not true. The validation studies establish that the examiner testimony has clear probative value, and that it can be relied upon as relevant to help prove that the two sets of bullets/casings were fired by the same gun. Further, AMES-II and other validation studies establish that same-source identifications are generally reliable. Thus, *because this testimony does not survive under the high bar* for PCR claims, Wyldes' argument must fail.

D0548 at 15-16 (emphasis added). However, admissibility is not the lynchpin of the *More* analysis. *More* requires the Court to consider

the full weight of *all the evidence*, both old and new, in determining whether the new scientific evidence probably would have changed the result of Wyldes's trial. *See Weaver*, 554 N.W.2d at 249 (citations omitted) ("In determining whether newly-discovered evidence probably would have changed the result at trial, we examine the district court's ruling regarding the proffered new evidence in view of the strength or weakness of the State's proof of guilt."); *see also State v. Whitsel*, 339 N.W.2d 149, 156-57 (Iowa 1983); *State v. Gilroy*, 313 N.W.2d 513, 522 (Iowa 1981).

The Ruling avoids the precise analysis it was required to undertake, finding "[t]he evidence may have provided Wyldes with more fodder for cross-examining the State's experts and criticizing their methodology, but that is not the standard for this Court to follow." D0548 at 22. *In fact, the Court was required to analyze how this "fodder" would have impacted the totality of the evidence at trial.* Preclusion could be one reason the newly discovered evidence would probably change the outcome of the trial, but it is not the only reason. The newly discovered evidence should render the original evidence inadmissible—because current science demonstrates that it is not appropriate expert testimony, is more prejudicial than probative

under Iowa Rule Evidence 5.403, and would violate Wyldes's due process rights. However, even if the State was permitted on direct examination to introduce the original evidence in the exact way it did in 1987, consideration of the full weight of the evidence, both old and new—that is, the newly discovered scientific evidence alongside the evidence that came in at Wyldes's 1987 trial—would probably change the result. This is particularly true given that *even the State's witnesses agree* the casing "matching" testimony was misleading and the "progressive deterioration" testimony lacked an adequate scientific basis. As discussed in Section II, below, starting on page 59, engaging in the correct analysis and applying the correct standard yields only one result, regardless of the original evidence would have been precluded: Wyldes is entitled to a new trial. It was error for the Court to find otherwise.

1. The Court's Expert Admissibility Analysis Ignores Crucial Areas of Newly Discovered Evidence in Section I(A)-(D) as well as the Significant Legal Authority Cited by Wyldes.

Though, as discussed immediately above, preclusion is not necessary for Wyldes to prevail under *More*, he nevertheless maintains that many aspects of the FATM testimony would be

precluded or significantly limited under Iowa's expert admissibility analysis. Specifically, as outlined above in detail in Section I(A)-(D), on pages 20-29, the Ruling omits all discussion of the newly discovered evidence concerning Harvey's opinion that the casings from the crime scene, gravel road, and certain shooting ranges could be traced to a firearm possessed at one time by Wyldes, the post-trial emergence of laboratory standards that Harvey's analysis did not meet, Harvey's made-up theory of progressive deterioration, and Harvey's scientifically indefensible statement of statistical rarity. Further, the Ruling does not undertake any analysis of the admissibility of his trial testimony related to these issues. Given the record of unrebutted testimony and evidence from both Wyldes's and the State's experts repudiating Harvey's trial testimony on these points (as described above on pages 20-29 in Section I(A)-(D)), Iowa's standard for expert admissibility should preclude testimony (1) that the gouge marks are "unique" or casings fired by the "same gun"; (2) that "progressive deterioration" allows Harvey to opine that the other casings from ranges Wyldes was known to have visited "could have been" fired by the same gun; or (3) providing a rarity statistic of "five tenths of one percent" for the kinds of gouge marks found on the

casings. *See Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 533 (Iowa 1999).

Similarly, as discussed in Section I(F) on pages 30-39, the Ruling improperly ignores clearly established evidence from the PCR trial—evidence conceded by the State's witness and unrebutted by any other evidence—of the very high potential casework error rates for FATM analysis (potential error rates of up to 50%)—that undermine the reliability of Harvey's testimony matching the casings from the road and the scene.

Moreover, with respect to these comparisons, the Court rests its analysis entirely on only two non-controlling decisions and one dissent (in a case where a majority of the Maryland Supreme Court overturned a murder conviction because it found the newly discovered scientific evidence regarding FATM analysis would probably change the outcome of the trial, *Abruquah* 296 A.3d at 997, and omits any independent analysis of the unique record before it or discussion of the myriad cases limiting the admission of FATM testimony supplied by Wyldes.

Similarly, as discussed in Section I(G) on pages 39-41, the Court misunderstands the factual record regarding the footwear

impression analysis, which should not have taken place due to the significant four-month time lag between the crime and the collection of Wyldes's shoes.

2. The Court's 403 Admissibility Discussion Applies the Wrong Legal Standard and Ignores Crucial Areas of Newly Discovered Evidence.

The Ruling fails to undertake the requisite balancing analysis of probative value versus the prejudicial effect of the evidence discussed above. D0548 at 21-22; *see United States v. Johnson*, 27 F.3d 1186, 1193 (6th Cir. 1994); *United States v. Aims Back*, 588 F.2d 1283, 1286 (9th Cir. 1979). Iowa requires the probative value "substantially" outweighs prejudice. *Stender v. Blessum*, 897 N.W.2d 491, 511 (Iowa 2017) (noting two-step inquiry asking whether evidence is relevant and, if so, whether its probative value substantially outweighs risk of prejudice).

The newly discovered evidence omitted from the Ruling should lead to prelusion under Rule 5.403 of testimony (1) that marks are "unique" or casings fired by the "same gun"; (2) that "progressive deterioration" allows Harvey to opine that the other casings from ranges Wyldes was known to have visited "could have been" fired by

the same gun; or (3) providing a rarity statistic of "five tenths of one percent" for the kinds of gouge marks found on the casings. The evidence at Wyldes's PCR trial conclusively established—with no dispute from the State's expert—that these areas of testimony are unscientific and misleading and, even if admissible, not highly probative. However, as expert testimony purporting to associate Wyldes with evidence from the crime scene, they are also highly prejudicial, and should be excluded under a 403 analysis.

Similarly, the unrebutted testimony—from both Wyldes's and the State's expert—concerning the very high potential error rates in casework indicate that the prejudicial impact of expert testimony matching the markings on the casings—let alone describing them as "unique" and fired by the "same gun" (words that mean that no other gun in the world could have fired them)—is obvious. Harvey's testimony should not be admissible under 403, or, at minimum, be limited to conclusions that are scientifically supported.

Finally, the State's witness established, given the new research on outsole wear, no weight should have been given to the shoeprint examination due to the time lag between the crime and the collection of Wyldes's shoes. The new research presented at the PCR trial

demonstrates that the time lag can lead to dramatic changes in the outsoles, especially due to Wyldes's constant wear of these specific shoes. D0411 at Tr.326:1-4; D0408 at 822:2-5. The association—by the admission of the State's expert—is not reliable and, even if admissible, is not probative, since the outsole design at issue was from the most popular sneakers of the 1980s. D0563 at Tr.42:7-12. It is prejudicial for the jury to hear from an expert about science linking Wyldes's shoe to prints from the scene. This testimony would today be excluded under 403.

3. The Newly Discovered Evidence Would Probably Change the Outcome of the Trial.

The Court erred when it found that the newly discovered evidence would not change the outcome of the trial. Where, as conceded by the State, the circumstantial evidence introduced at trial was "thin," D0408 at T.764:2, presentation of the newly discovered scientific evidence of the evolving standards and significant criticism within the relevant scientific community—standards and criticism that did not yet exist at the time of Wyldes's trial in 1987—would significantly alter the evidence before the jury and probably change the outcome of the trial. *See Weaver*, 554 N.W.2d at 246-49. The jury

in 1987 was told—not only by the State's expert but by Wyldes's expert—that, to a certainty, cartridge casings associated with Wyldes were fired by the very same gun as casings found at the scene; conclusions that were improperly bolstered by Harvey's made-up theory of "progressive deterioration," misleading rarity statistics, and Tarasi's shoeprint association testimony. D0409 at T.606:5-608:4, 647:2-649:25, 663:7-19. One need only consider the reports of the NRC (D0451), NAS (D0425), and PCAST (D0426, D0431), the avalanche of post-PCAST critiques, as well as the testimony of both party's witnesses—and overlay it on the trial record in 1987—to see how different Wyldes's trial would have been if all this new evidence had been available. When "considered with all the other evidence"—including the appropriate treatment of the trial evidence that the court overlooked in its decision—Wyldes's new evidence demonstrates by a preponderance that a reasonable jury would probably conclude that there existed reasonable doubt as to guilt and change the outcome of his trial.

While the materiality standard is "case specific and fact intensive," *More*, 880 N.W.2d at 510, other Iowa cases provide helpful comparisons confirming that a new trial is warranted where, as here,

newly discovered evidence renders key prosecution evidence unreliable. *See, e.g., Weaver*, 554 N.W.2d at 248 (granting a new trial because new evidence in the form of three witness statements undermined the State's theory of cause of death) (overruled on other grounds by *State v. Hallum*, 585 N.W.2d 249, 254 (Iowa 1998)).

Likewise, analogous new-science cases from other jurisdictions ordering a new trial are instructive. *See, e.g.*, D0544 at Attch. P.4-34, *People v. Genrich*, No. 1992CR95 (Mesa Cty. Ct. July 7, 2023) (granting a new trial because the newly discovered evidence established that toolmark expert's unqualified individualization testimony would not be admissible); *see also Genrich*, 471 P.3d at 1113 ("[i]t is probable that … testimony tying Genrich's tools to the marks on the pipe bombs served as the prosecution's pillar of proof, and the other evidence presented at trial cannot, alone, sustain a conviction.").

Similarly, in *State v. Behn*, the defendant presented a new expert affidavit detailing scientific advances that discredited FBI experts' trial testimony on bullet lead analysis. 868 A.2d 329, 342-43 (N.J. Super. 2005). The appellate court examined whether the new evidence "probably would have affected the jury's verdict,"

determined it would have, and remanded for a new trial. *Id.* at 345. *Behn* emphasized that because prosecutors stressed the importance of their expert's testimony at trial, including in closing (as the prosecution did in Wyldes's case), "*the State should not be permitted to now 'walk away' from its evidence and demean its importance*." *Id.* at 346 (emphasis added); *see also Bunch v. State*, 964 N.E.2d 274, 297 (Ind. Ct. App. 2012) (concluding that new evidence showing that fire victim toxicology evidence was no longer reliable would probably produce a different result on retrial).

For the foregoing reasons, the court erred in denying Wyldes's a new trial based on the newly discovered evidence.

II. THE DISTRICT COURT ERRED BY IGNORING CRUCIAL AREAS OF NEWLY DISCOVERED EVIDENCE DESCRIBED IN SECTION I.

Error Preservation

Wyldes argued there was newly discovered evidence requiring a new trial. D0544 at 44-67. The Ruling ignored the critical changes in the newly discovered science. D0548 at 28. Wyldes filed a timely Motion to Reconsider asking the lower court to reconsider the newly

discovered evidence, which was denied. D0549 at 7-19; D0551 at 1-2. Error was preserved. *Lamasters*, 821 N.W.2d at 858-59.

Standard of Review

This Court has the authority to review the denial of a PCR Application for correction of errors at law. *Goosman*, 764 N.W.2d at 541; *Osborn*, 573 N.W.2d at 920; Iowa R. App. P. 6.907. Further, Constitutional claims must be reviewed de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001).

Merits

The Ruling fails to address numerous areas of newly discovered evidence. A *de novo* review of this evidence—all of which came in without contradiction by any State evidence—reveals that it is not reliable and that its admission at trial violated Wyldes's due process rights.

The due process clauses of both the United States and Iowa Constitutions "'require[] fundamental fairness in a judicial proceeding,' so a trial that is fundamentally unfair violates the guarantees of due process in the United States and Iowa Constitutions." *More*, 880 N.W.2d at 499 (citing *State v. Becker*, 818 N.W.2d 135, 148 (Iowa 2012) (quoting *In re Det. of Morrow*, 616

N.W.2d 544, 549 (Iowa 2000)); *see also Crane v. Kentucky*, 476 U.S. 683, 690 (1986) ("The Constitution guarantees a fair trial through the Due Process Clauses." (citation omitted)). "[S]ome evidence may be so unreliable that its admission violates due process." *More*, 880 N.W.2d at 499 (citing *Foster v. California*, 394 U.S. 440, 449 (1969); *Manson v. Brathwaite*, 432 U.S. 98, 117 (1977)). Indeed, "'when evidence is so extremely unfair that its admission violates fundamental conceptions of justice' Due Process, like the sleeping giant, awakens ... and courts must step in to prevent injustice." *United States v. Sanders*, 708 F.3d 976, 983 (7th Cir. 2013); *see also, e.g.*, *Genrich*, 471 P.3d at 1124 (Berger, J., concurring) ("[M]ultiple courts have concluded that the admission of such unreliable [individualization] testimony can constitute a due process violation.").

The newly discovered evidence establishes that Wyldes's due process rights were violated through the use of faulty forensic evidence that was presented to the jury as conclusive, "scientific" proof of guilt. *See Han Tak Lee v. Glunt*, 667 F.3d 397, 403 (3d Cir. 2012) (holding that admission of unreliable expert testimony can violate due process) (citing *Keller v. Larkins*, 251 F.3d 408, 413 (3d Cir. 2001)); *see also Gimenez v. Ochoa*, 821 F.3d 1136, 1145 (9th Cir.

2016) ("[H]abeas petitioners can allege a constitutional violation from the introduction of flawed expert testimony at trial if they show that the introduction of this evidence 'undermined the fundamental fairness of the entire trial.'") (quoting *Lee v. Houtzdale SCI*, 798 F.3d 159, 162 (3d Cir. 2015)); *Ege v. Yukins*, 485 F.3d 364, 375 (6th Cir. 2007) (holding that the "improper admission of certain evidence injurious to the defendant" violates due process when it "deprive[s] a defendant of her right to a fair trial" (emphasis omitted)).

Courts across the country have found that the use of such grossly unreliable scientific evidence amounts to a due process violation by depriving "a defendant of a fair trial as required by the Fifth and Sixth Amendment." *United States v. Ausby*, 916 F.3d 1089, 1092 (D.C. Cir. 2019) (introducing false scientific evidence violates due process); *State v. Bridges*, No. 90 CRS 23102-04, 2015 WL 12670468, at *2 (N.C. Super. Ct. Oct. 1, 2015) (admitting debunked forensic evidence violated Due Process because "it exceeded the limits of the science and overstated the significance of the hair analysis to the jury"); *see also Ex parte Henderson*, 384 S.W.3d 833, 834 (Tex. Crim. App. 2012) (per curiam) (remanding for a new trial where conviction was obtained through subsequently discredited scientific

evidence); *Genrich*, 471 P.3d at 1123 (Berger, J. concurring) ("Given the significant potential for [the expert's toolmark] individualization testimony to have swayed the jury to convict Genrich, I … conclude that Genrich's due process claims warrant an evidentiary hearing.").

A due process claim based on the "faulty evidence" of repudiated science exists even if, as here, Wyldes's conviction was based on then-current knowledge, and the State acted in good faith. *See Jones v. United States*, 202 A.3d 1154, 1166 n.31 (D.C. Ct. App. 2019) (explaining that "'the touchstone of due process' in cases such as this 'is the fairness of the trial, not the culpability of the prosecutor'") (quoting *Woodall v. United States*, 842 A.2d 690, 697 (D.C. Ct. App. 2004)); *see also Henderson*, 384 S.W.3d at 834 (granting a new trial where conviction was predicated on discredited evidence). Indeed, "recognizing such a claim is essential in an age where forensics that were once considered unassailable are subject to serious doubt," because "flawed analytical methods may not be debunked until well after" a petition would ordinarily be timely. *Gimenez*, 821 F.3d at 1144.

Finally, relief is warranted because Wyldes's right to due process under the State and Federal Constitutions was violated by

the presentation of unreliable evidence that Wyldes 'matched' evidence from the crime scene when the jury heard testimony of "expert" individualization, progressive deterioration, rarity statistics and association opinions at trial. *See Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *see also More*, 880 N.W.2d at 499. Given the new advancements that have emerged, Wyldes's convictions were based on unreliable and fundamentally flawed evidence. Thus, relief here is merited.

III. THE DISCTRICT COURT ERRED IN FAILING TO FIND THAT THE NEWLY DISCOVERED EVIDENCE DEMONSTRATES THAT WYLDES IS ACTUALLY INNOCENT.

Error Preservation

Wyldes argued the newly discovered evidence presented at trial proved he was actually innocent. D0544 at 67-68. The Ruling did not address this issue. D0548 at 1-28. Wyldes filed a timely Motion to Reconsider asking the lower court to reconsider his actual innocence, which was denied. D0549 at 7-19, 33-34; D0551 at 1-2. Error was preserved. *Lamasters*, 821 N.W.2d at 858-59.

Standard of Review

Constitutional claims must be reviewed *de novo*. *Ledezma*, 626 N.W.2d at 141; *Oetken*, 613 N.W.2d at 683; *Carrillo*, 597 N.W.2d at

499; *Mapp*, 585 N.W.2d at 747; *Osborn*, 573 N.W.2d at 920. A *de novo* review should be made "'in light of the totality of the circumstances and the record upon which the post[-]conviction court's rulings [were] made.'" *Goosman*, 764 N.W.2d at 541 (quoting *Giles v. State*, 511 N.W.2d 622, 627 (Iowa 1994)).

Merits

A *de novo* review of the newly discovered evidence—undermining the only direct evidence of Wyldes's guilt—further demonstrates that Wyldes is actually innocent. *Schmidt v. State*, 909 N.W.2d 778, 795 (2018) (recognizing a free-standing claim of actual innocence under the due process clause of the Iowa Constitution); *Dewberry v. Iowa*, 941 N.W.2d 1, 5 (2019). To prevail on this claim, "the applicant must show by clear and convincing evidence that, despite the evidence of guilt supporting the conviction, no reasonable fact finder could convict the applicant of the crimes for which the sentencing court found the applicant guilty in light of all the evidence, including the newly discovered evidence." *Schmidt*, 909 N.W.2d at 797. Here, a reasonable factfinder would have reasonable doubt as to Wyldes's guilt when faced with the newly discovered scientific evidence repudiating the forensic basis for his conviction—

the only direct evidence presented against him—taken together with the remaining "thin" evidence against him. Indeed, jurisdictions across the country have granted relief in cases like Wyldes's, where the newly discovered evidence undermines the basis for the original conviction. *See e.g., State ex rel. Amrine v. Roper,* 102 S.W.3d 541, 548 (2003); *Ex parte Tuley,* 109 S.W.3d 388, 397 (2002); *In re Figueroa,* 412 P.3d 356 (2018).

IV. THE DISTRICT COURT ERRED IN GRANTING SUMMARY DISPOSITION ON NUMEROUS CONSTITUTIONAL CLAIMS RAISED BY WYLDES.

Error Preservation

Wyldes engaged in discovery via subpoenas, and the State filed a motion to quash. D0184, Notice Subpoenas to DPS, Clarke Cty., Lucas Cty., & Marion Cty. at 2-16 (10/7/2022); D0186, Mtn. Quash at 1-2 (10/26/2022). The lower court limited Wyldes's access to critical discovery. D0205 at 6. Wyldes raised constitutional claims in his PCR Application, which were denied on summary judgment. D0003-7 at 14-17; D0010 at 45-50; D0107 at 10-20; D0129 at 15-29. Error was preserved. *Lamasters*, 821 N.W.2d at 858-59.

Standard of Review

Generally, summary dismissals of post-conviction relief applications are reviewed for errors at law. *Dewberry v. State,* 941 N.W.2d 1, 4 (2019) (citing *Schmidt*, 909 N.W.2d at 784). To the extent that claims raise constitutional challenges, this Court must review *de novo*, which should be made "'in light of the totality of the circumstances and the record upon which the post[-]conviction court's rulings [were] made.'" *Goosman*, 764 N.W.2d at 541 (quoting *Giles*, 511 N.W.2d at 627 (Iowa 1994)); *see also Powers v. State*, 911 N.W.2d 774, 780 (2018) (citing *State v. Kurth*, 813 N.W.2d 270, 272 (Iowa 2012)) (finding that constitutional challenges to discovery rulings are subject to *de novo* standard of review where courts "make an independent evaluation [based on] the totality of the circumstances as shown by the entire record").

Merits

The lower court erred in dismissing numerous claims raised by Wyldes by erroneously finding that they were procedurally time barred. *See* D0129 at 2. These claims, all raised in Wyldes's 2010 PCR and subsequent amendments that were filed in 2020 and 2022, are premised on constitutional violations that Wyldes experienced

during his 1987 trial and discovered years after his wrongful conviction, including *Brady*, *Napue*, and *Strickland*—landmark cases rooted in the rights guaranteed by the U.S. Constitution. *Brady v. Maryland*, 373 U.S. 83 (1963); *Napue v. Illinois*, 360 U.S. 264 (1959); *Strickland v. Washington*, 466 U.S. 668 (1984); *Harrington v. State*, 659 N.W.2d 509 (Iowa 2003); *Ledezma v. State*, 626 N.W.2d 134 (Iowa 2001).

A. The Court Erred in Denying Wyldes the Opportunity to Create a Record on Wyldes's Constitutional *Brady* Claim Regarding the State's Failure to Disclose Critical Impeachment Evidence Regarding the State's Star Witness.

The State's failure to disclose evidence about the State's star witness—DCI criminalist Harvey—allowed him to falsely testify at trial. Unbeknownst to Wyldes, his defense counsel, as well as the judge and jury at Wyldes's 1987 trial, Harvey had just misrepresented his FATM findings and his qualifications and experience as an expert in a different case. *See* D0096-97, 2nd Amend. PCR Attach.12, 19-26, *State v. Yahnke*, Linn County Case No. CRF 9153 (1986). In *Yahnke*, Harvey testified that he had eighteen or nineteen years of experience in ballistics examination, when in fact he had only eight. D0109, 2nd Amend. PCR Attach.32,

Harvey SOQ (6/14/2005). At Wyldes's trial one year later, Harvey lied again, testifying that he had worked in FATM examination for nearly *twenty* years. D0410 at T.625:19-25-626:1-2. Knowledge of this exculpatory evidence—a matter of public record—is already imputed to the State, but the Attorney General's office prosecuted both cases, and in fact, the Attorney General's office handled Harvey's examination in Wyldes's case. *Cf. Hamann v. State*, 324 N.W.2d 906, 909-10 (Iowa 1982) ("[K]nowledge on the part of the police within the prosecutor's jurisdiction is attributed to the prosecutor's office, based on the investigatory, law-enforcement 'team' relationship presumed to exist.").

The State was obligated to disclose impeachment evidence like this, regardless of whether it was specifically requested by the defense. *United States v. Barraza Cazares*, 465 F.3d 327, 334 (8th Cir. 2006) (citing *United States v. Bagley*, 473 U.S. 667, 676 (1985)); *see also Giglio v. United States*, 405 U.S. 150, 154-55 (1972) (holding that evidence relevant to the credibility of a witness called by the State should be disclosed to the jury); *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999) ("[T]he duty to disclose such evidence is applicable even though there has been no request by the accused.")

(citing *United States v. Agurs*, 427 U.S. 97, 107 (1976)). "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within the general [Brady] rule." *Giglio*, 405 U.S. at 154 (quoting *Napue*, 360 U.S. at 269). And "if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Agurs*, 427 U.S. at 113.

The State's failure was not discovered by current counsel until 2022, at which time Wyldes supplemented his application for post-conviction relief. Nevertheless, the court summarily dismissed the claim, ruling that, though "it is … not clear why Wyldes could not have raised this issue," Wyldes was precluded from raising this critical impeachment evidence because a "claim particularly attacking Harvey's alleged 'questionable' methods, qualifications, and history of misrepresentations could have been brought earlier." D0129 at 21. This was error. First, the State was required to disclose this information regardless of whether Wyldes requested this information at the time of trial. *Harrington v. State,* 659 N.W.2d 509, 522 (2003) (citing *Stickler v. Greene,* 527 U.S. 263, 280 (1999)). The court's own words show that the question of the timeliness of

Wyldes's claims on this issue is "not clear." D0129 at 21. Wyldes should have been allowed to create a record of this newly discovered impeachment evidence and its discovery. *See Moon v. State*, 911 N.W.2d 137, 144 (2018) (citing *Schmidt*, 909 N.W.2d at 799).

For the same reason as it dismissed his *Brady* claim, the court erroneously dismissed as time-barred Wyldes constitutional violations regarding the State's use of false evidence at his original trial pursuant to *Napue v. Illinois*, 360 U.S. at 269, given Harvey's misrepresentations regarding his qualifications as a purported expert. D0129 at 21. This was also in error.

Wyldes asks that this Court reverse the summary disposition and allow a trial to proceed on Wyldes's *Brady/Napue* claims.

B. The Court Erred in Denying Wyldes the Opportunity to Create a Record on His Ineffective Assistance of Counsel Claims.

On the other hand, if this Court believes that defense counsel reasonably should have discovered the impeachment evidence regarding Harvey earlier—whether prior to trial or earlier in the PCR process, then the failure to do so was ineffective. In his underlying PCR, Wyldes alleges that prior counsel, including PCR counsel Booth,

was ineffective for numerous reasons, including the failure to properly investigate certain avenues for relief as well as properly file Wyldes's successive federal habeas petition.

A claim of ineffective assistance of counsel ("IAC") is a violation of the constitutional right to counsel under the Sixth Amendment. *Strickland v. Washington*. 466 U.S. 668 (1984). Counsel has a duty to make reasonable investigations. *Id*. at 691. Iowa has extended the right to effective counsel to PCR proceedings. *See* Iowa Code § 822.5 (2024); *Patchette v. State*, 374 N.W.2d 397, 398-99 (Iowa 1985) ("the statutory grant of a postconviction applicant's right to court-appointed counsel necessarily implies that counsel be effective."); *see also Connor v. State*, 630 N.W.2d 846, 848 (Iowa Ct. App. 2001); *Dunbar v. State*, 515 N.W.2d 12, 14 (Iowa 1994). In addition to failing to uncover critical impeachment evidence about Harvey, PCR counsel Booth also failed to properly file Wyldes's successive federal habeas petition by failing to request a certificate of appealability. *See Crutcher v. United States*, 2 F. App'x 658, 660 (8th Cir. 2001) (holding counsel's failure to file a notice of appeal when instructed by the client constitutes IAC).

The lower court found Wyldes was time barred from raising any IAC claims, D0129 at 26, which is premised on the mistaken belief that Wyldes does not qualify for an exception to § 822.3's statute of limitations. *See* Iowa Code § 822.3 (2024) (requiring applications for PCR to be filed within three years from the date the conviction or decision is final, or, in the event of an appeal, from the date the write of procedendo is issued, *unless a ground of fact or law could not have been raised within the applicable time*).

Wyldes's IAC claims are not time barred. Wyldes timely filed his PCR Application and this is his first opportunity to raise ineffective claims against prior PCR counsel Booth.[5] *See Hasselmann v. State*, No. 21-0483, 2022 WL 951084, at *10 (Iowa Ct. App. Mar. 30, 2022) (remanding a case back for a PCR trial to build an evidentiary record as to the ineffectiveness claims raised against prior PCR counsel) (citing *Stigler v. State*, No. 05-0998, 2006 WL 1278754, at *4 (Iowa Ct. App. May 10, 2006)). Wyldes's ineffectiveness claims should also relate back to the timing of his original PCR. *Allison v. State*, 914

[5] Procedendo for Wyldes's previously filed PCR was issued on December 29, 2009 and this instant PCR was filed on November 24, 2010, which falls under the requirement of the three-year statute of limitations.

N.W.2d 866, 891 (Iowa 2018) (finding that the timing of a second PCR alleging ineffective assistance of postconviction counsel relates back to the timing of the filing of an original PCR alleging ineffective assistance of trial counsel for statute of limitation purposes). Here, the lower court held *Allison* does not apply because the present petition for PCR was filed fourteen years after the conclusion of his last PCR. D0129 at 26. This is incorrect. Wyldes's pending application was filed on November 24, 2010, less than a year after procedendo was issued for Wyldes's previous PCR, which was handled by Booth, the subject of some of Wyldes's IAC claim. Moreover, the lower court cannot interpret a statute in such a way as to violate an applicant's constitutional rights, which is precisely the sort of claim that Wyldes raises here. *Godfrey v. State, et al.*, 898 N.W.2d 844, 875 (Iowa 2017) (overruled on other grounds *Burnett v. Smith*, 990 N.W.2d 289 (Iowa 2023)). Wyldes requests that he be allowed to present his claims of IAC.

C. The Court Violated Wyldes's Constitutional Rights by Denying Discovery Requests Related to Similar Crimes

A *de novo* review of Wyldes's request for post-conviction discovery demonstrates that the Court inappropriately denied him

the right to PCR discovery in violation of his constitutional rights. While litigating his current application, Wyldes sought relevant discovery via subpoenas through local law enforcement agencies regarding similar crimes that occurred in neighboring counties in rural Iowa during the same timeframe as the crime for which Wyldes was wrongly convicted. D0184 at 2-16. Following a hearing on the matter, the lower court violated Wyldes's constitutional rights by denying Wyldes's discovery requests to these similar crimes, and quashing numerous subpoenas. D0205 at 6.

Rule 1.503 of the Iowa Rules of Civil Procedure allows parties to obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action. Iowa R. Civ. P. 1.503(1). The party seeking the information "need only advance some good-faith factual basis demonstrating how the [information is] reasonably calculated to lead to admissible evidence germane to an element or factor of the claim or defense." *Fagen v. Grand View Univ.*, 861 N.W.2d 825, 835 (Iowa 2015). Here, Wyldes demonstrated the investigative reports from similar crimes were not only relevant to understanding the validity of the FATM and shoeprint comparisons in these cases, but also could point to the identification of the true

perpetrator. *See* D0490 at 1-14. This is particularly salient here, where Wyldes has constitutional liberty interests at stake. *See, e.g., Powers,* 911 N.W.2d at 781 (finding that defendant met sufficient standard for showing that police investigative reports were relevant and could lead to admissible evidence germane to an element or factor of the claim or defense, a low threshold). Wyldes requests his case be remanded to seek access to this relevant discovery and be provided with an opportunity to create an evidentiary record.

CONCLUSION

WHEREFORE, the Appellant respectfully requests that the Court reverse the dismissal of Wyldes's PCR application, remand the summarily dismissed claims to create a record, and grant any other relief that may be appropriate in the circumstances.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

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

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/s/ Elaina Steenson Dated: October 8, 2024

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