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No. 22-0813
Cass County No. PCCV025884

IN THE
SUPREME COURT OF IOWA

TIMOTHY SMITH,
Applicant-Appellant,

v.

STATE OF IOWA,
Respondent-Appellee.

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

REPLY BRIEF FOR APPELLANT

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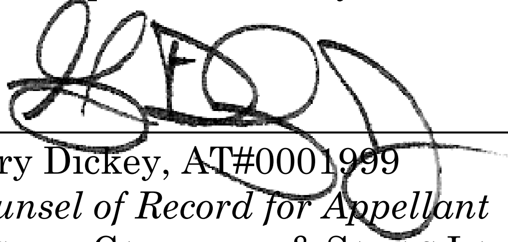
PROOF OF SERVICE & CERTIFICATE OF FILING

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

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



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STATEMENT OF ISSUES

I. WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST ADDITIONAL PEREMPTORY STRIKES

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State v. Ary, 877 N.W.2d 686 (Iowa 2016)
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State v. White, 693 N.E.2d 772 (Ohio 1998)
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II. WHETHER TRIAL COUNSEL'S ERRORS UNDERMINED CONFIDENCE IN THE OUTCOME

Bowman v. State, 710 N.W.2d 200 (Iowa 2006)
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REPLY ARGUMENT

I. SMITH'S TRIAL COUNSEL BREACH AN ESSENTIAL DUTY IN FAILING TO REQUEST ADDITIONAL PEREMPTORY CHALLENGES OF PARTICULAR JURORS

Reading the State's brief, the Court may be left with the impression that a juror may not be stricken for cause unless he or she affirmatively declares an "actual, unequivocal bias." (State's Proof Br. at 17). But, the standard is not nearly so myopic. "Impartiality is not a technical conception." *United States v. Wood*, 299 U.S. 123, 145-46 (1936). "It is a state of mind." *Id.* "For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." *Id.*; *see also State v. Ary*, 877 N.W.2d 686, 700 (Iowa 2016). It is sufficient to disqualify a jury who "holds such a fixed opinion on the merits of the case that he or she cannot judge impartially the guilt or innocence of the defendant." *State v. Gavin*, 360 N.W.2d 817, 819 (Iowa 1985). Stated differently, the court must determine whether the prospective juror's views would "prevent or substantially impair the performance of his [or her] duties as a

juror in accordance with his [or her] instructions and his [or her] oath." *State v. White*, 693 N.E.2d 772, 777 (Ohio 1998) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)); *see also Garza v. State*, 18 S.W.3d 813, 819 n.3 (Tex. Ct. App. 2000) ("Bias exists when a venireperson's beliefs or opinions would prevent or substantially impair the performance of his duties as a juror)."

Juror Knudsen repeatedly identified opinions that would substantially impair her ability to perform her duties. Even in the face of the prosecutor's attempts to rehabilitate her, Juror Knudsen maintained that she would be inclined to find Smith guilty if he did not testify:

> MS. KRISKO: I want to ask a few questions about that. Obviously, we see everything that goes on on TV. We all have this idea, "If I didn't do it, I'd get up there and say I didn't do it." Do you believe that our system of justice works?
> MS. KNUDSEN: Most of the time.
>
> MS. KRISKO: And one of the basic tendencies is someone does not have to testify or give evidence against themselves. Would you agree with that?
> MS. KNUDSEN: I would agree that's how it's supposed to work.
>
> MS. KRISKO: So a lot of times when we're trying to determine if we believe something or we don't, we're weighing sides; right? We hear from X person

and then we hear from Y person. When you're in a courtroom you will be told that we have to prove our case, whether they ever do anything or not. Can you set aside kind of that thought process of, "gosh, if I had done something I would want to yell from the rooftops I didn't" and understand there could be a million reasons why the defendant wouldn't take the stand?

MS. KNUDSEN: Be hard -- It's hard for me to understand that, understand that reason.

MS. KRISKO: Absolutely. When you say, "hard for you," and that's where we talked about too -- I'm not picking on you -- but, you know, would you be able to sit on a criminal jury because that's going to be the same in every single one. Anytime someone is charged with a crime, they do not ever have to say anything. And for our system to work we have to have people on the jury that understand that and can follow that. Is that something that you're saying you could not follow?

MS. KNUDSEN: No. Yeah. No. I don't know. Maybe what I would need to have is some sort of defense against whatever. I mean, whether it's not the defendant himself, there would need to be somebody that takes defense on whatever is proven or what you're trying to prove, otherwise I will be like you're guilty.

MS. KRISKO: You understand --

MS. KNUDSEN: You got nothing to give me.

MS. KRISKO: By sitting here in court he has said, "not guilty," so he has said, "I did not do that" just by simply saying, "not guilty." Is that enough?

MS. KNUDSEN: No.

MS. KRISKO: I submit it to the Court.

(App. at 190-192).[1]

The Court should be highly skeptical of the district court's rehabilitative efforts. The desire to show deference to the tribunal when questioned undermines the juror's self-evaluation of their own impartiality. *See* Mary R. Rose & Shari Seidman Diamond, *Judging Bias: Juror Confidence and Judicial Rulings on Challenges for Cause*, 42 Law & Soc'y Rev. 513, 516 (Sept. 2008) ("The context of voir dire provides several reasons to be concerned about the quality of jurors' claims of fairness. For one thing, by design, voir dire questions often convey social desirability; that is, the questions suggest that it is 'better' to answer one way than another .... [I]ndividuals recognize that fairness is a desirable characteristic, and most people want to believe that they possess it."); Shari Seidman Diamond et al., *Realistic Responses to the Limitations of Batson v. Kentucky*, 7 Cornell J.L. & Pub. Pol'y 77, 92 (1997) ("People are often unable to recognize the extent to

[1] The error was not limited only to Juror Knudson. The declaration from Juror Anderson that testimony from the defendant at trial would be a "necessity" also demonstrates a strongly-held belief that would substantially impair her ability to serve as a juror. (App. at 195).

which their experiences or attitudes affect their judgments."); Dov Fox, *Neuro-Voir Dire and the Architecture of Bias*, 65 Hastings L.J. 999, 1011 (2014) ("[S]imply asking jurors whether they can be impartial is not likely to reveal with any reliability the presence or strength of many of the outside influences that they would in fact bring to bear on the questions at trial."); Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol'y Rev. 149, 160 (2010) ("As a [federal] district court judge for over fifteen years, I cannot help but notice that jurors are all too likely to give me the answer that they think I want, and they almost uniformly answer that they can 'be fair.'"); Kurt F. Ellison, *Comment, Getting Out of the Funk: How Wisconsin Courts Can Protect Against the Threat to Impartial Jury Trials,* 96 Marq. L. Rev. 953, 979 (2013) ("[J)urors' statements of impartiality are often motivated by pressure from the judge . . . .").

The State does not dispute that ABA standards impose on trial counsel a broad duty to be aware of the legal standards

governing jury voir dire. *See* ABA Standards for Criminal Justice, Defense Function 4-7.3(a). Nor does it dispute that the same ABA standards require that defense counsel take steps necessary to preserve an issue for appellate review. *Id.* at 4-1.5. Trial counsel clearly breached these essential duties when he did not correctly preserve the denial of his challenges for cause. As a result, Smith was deprived of effective representation.

Counsel's actions cannot be explained as reasonable strategy. Instead, he believed he needed only to request additional peremptory strikes under *State v. Jonas*, 904 N.W.2d 566 (Iowa 2017):

> Q. Now, when we took your deposition, we discussed a case entitled State versus Jonas.
> A. Yes, sir.
>
> Q. And that has to do with a requirement of defense counsel requesting additional strikes?
> A. My understanding of that case is the finding allows for defense counsel to request additional strikes, yes.

(PCR Trial Tr. 11:5-12)(App. at 500). Indeed, trial counsel testified at the PCR trial that he thought he had preserved the issue for appeal properly. (PCR Trial Tr. at 11:18 to 13:10)(App.

at 500-502); *See State v. Lindaman*, 2020 Iowa App. LEXIS 173 at *4-5 (Iowa Ct. App. Feb. 19, 2020)(explaining that a general request for additional strikes is insufficient to establish prejudice under the *Jonas* decision).

The PCR court concluded that Smith had not been prejudiced because "all four of the challenged jurors were struck." (App. at 33). On appeal, the State offers a slightly different riff. It argues that Smith has not been prejudiced because he cannot show the jurors who were empaneled were impartial. (State's Proof Br. at 19-20). Neither view articulates the correct prejudice standard. 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*." *Jonas*, 904 N.W.2d at 583 (emphasis added). No additional showing about the impartiality of the empaneled jurors is necessary. Trial counsel's failure to request additional strikes for specific jurors waived Smith's ability to challenge the trial court's error. It bears repeating, when asked at the PCR trial if he had use for two

additionally peremptory strikes had the court granted his for-cause challenges, trial counsel responded, "Absolutely." (PCR Trial Tr. 12:3-17)(App. at 501).

In the end, the State is left only to criticize trial counsel's inability – *four years later* – to identify the two jurors who ended up serving on the jury for which he would have used his additional peremptory challenges. (State's Br. at 18). Of course, this criticism only shines the spotlight on trial counsel's error. He had a duty to contemporaneously identify the jurors to avoid this precise situation. *Jonas*, 904 N.W.2d at 583. His failure to do so then, and inability to recreate his state of mind, is the breach and the prejudice. That is why the *Jonas* court adopted a presumed-prejudice standard in instances in which trial counsel adequately preserves error. Counsel's failure to do so at trial cannot be explained as reasonable trial strategy. It is an error of constitutional dimension that warrants postconviction relief.

II. THE CUMULATIVE PREJUDICE OF TRIAL COUNSEL'S ERRORS IS SUFFICIENT TO UNDERMINE THE CONFIDENCE IN THE OUTCOME

The State contends that Smith waived any argument on *Strickland* prejudice arising from trial counsel's failure to call certain witnesses because section III of the initial merits brief does not contain the word "prejudice." (State's Proof Br. at 26). This contention misreads Smith's brief and misunderstands *Strickland* prejudice. For starters, Smith's initial brief identifies multiple weaknesses in the strength of the State's case. (Smith's Br. at 38); *see State v. Redmond*, 803 N.W.2d 112, 125-27 (Iowa 2011) (recognizing the heightened prejudice arising in "he-said-she-said" cases in which there is "little corroborating evidence"). In addition, Smith reiterated the prejudice of the error in the conclusion section of his brief. (Smith Br. at 41-42).

It has long been recognized in Iowa that *Strickland* prejudice must take into account all of trial counsel's errors. *State v. Clay*, 824 N.W.2d 488, 500 (Iowa 2012). Accordingly, the Court must "look at the cumulative effect of the prejudice arising from all the claims." *Id.* at 501 (setting forth "the proper practice when

dealing with multiple ineffective assistance claims"). Thus, the proper practice when dealing with multiple ineffective assistance claims is as follows:

> * * *
>
> 4. If the defendant raises one or more claims of ineffective assistance of counsel, and the court finds trial counsel failed to perform an essential duty in any of the claims and that single failure to perform an essential duty meets the *Strickland*, prejudice prong, the court should find for the defendant on that claim and deem counsel ineffective.
>
> 5. If the defendant raises one or more claims of ineffective assistance of counsel, and the court analyzes the prejudice prong of *Strickland* without considering trial counsel's failure to perform an essential duty, the court can only dismiss the postconviction claim if the alleged errors, cumulatively, do not amount to *Strickland* prejudice.

Id. at 501-02.

The Iowa Supreme Court also has repeatedly stressed that the "prejudice prong of the *Strickland* test does not mean a defendant must establish that counsel's deficient conduct more likely than not altered the outcome in the case." *State v. Maxwell*, 743 N.W.2d 185, 196 (Iowa 2008) (citing *Bowman v. State*, 710 N.W.2d 200, 203 (Iowa 2006)); *see also State v. Graves*, 668

N.W.2d 860, 882 (Iowa 2003). Instead, a “defendant need only show that the probability of a different result is sufficient to undermine confidence in the outcome.” *Maxwell*, 743 N.W.2d at 196. As explained in Smith’s opening brief, had counsel provided constitutionally adequate representation, the defense at trial would have seriously unsettled an already weak case. That is all that is required to undermine the confidence in the outcome.

CONCLUSION

Timothy Smith asks this Court to reverse the district court’s denial of his application for postconviction relief.

COST CERTIFICATE

I hereby certify that the costs of printing the Appellant's brief was $7.50, and that that amount has been paid in full by me.

CERTIFICATE OF COMPLIANCE

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

[x] this brief has been prepared in a proportionally spaced typeface using Century in 14 point and contains 2,108 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(*g*)(1).

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