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

RESISTANCE TO APPLICATION FOR FURTHER REVIEW

(COURT OF APPEALS DECISION FILED NOVEMBER 21, 2023)

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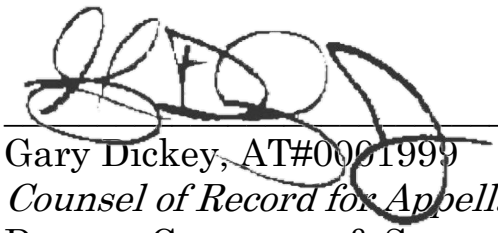
PROOF OF SERVICE & CERTIFICATE OF FILING

On December 18, 2023, I served this resistance 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 resistance with the Clerk of the Iowa Supreme Court by EDMS on December 18, 2023.



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Cases:

Bell v. Lockhart, 795 F.2d 655 (8th Cir. 1986)
Burdge v. Belleque, 290 Fed. Appx. 73 (9th Cir. Aug. 15, 2008)
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Strickland v. Washington, 466 U.S. 668 (1984)

STATEMENT OPPOSING FURTHER REVIEW

Further review should be denied because this appeal does not present an issue worthy of this Court's attention. The court of appeals correctly determined that Timothy Smith's original trial judge erred by failing to strike multiple jurors for cause. Smith's trial counsel compounded the error by failing to request additional peremptory challenges to preserve the issue for appellate review as required by *State v. Jonas*, 904 N.W.2d 566 (Iowa 2017). Had his trial counsel acted competently, Smith would have been entitled to automatic reversal on appeal.

The State argues that Smith cannot satisfy *Strickland* prejudice without showing that his trial counsel's error affected the jury's determination of his guilt. The State's analysis misses the mark. State and federal case law is replete with instances in which a defendant is entitled to relief under *Stickland* without proof of innocence. The court of appeals correctly held Smith was prejudiced by being deprived of a fair trial and an appeal that would have resulted in an automatic reversal for a new trial. Accordingly, the Court should deny the State's application.

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

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

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

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

(App. at 386).

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

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

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

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

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

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

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

- Failing to properly investigate and litigate the case; and

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

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

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

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

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

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

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

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

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

ARGUMENT

THE COURT OF APPEALS CORRECTLY HELD TRIAL COUNSEL FAILURE TO REQUEST ADDITIONAL PEREMPTORY CHALLENGES DEPRIVED SMITH OF AN AUTOMATIC REVERSAL ON APPEAL, WHICH IS SUFFICENT TO ESTABLISH *STRICKLAND* PREJUDICE

The State takes the remarkable position that the only means by which a PCR applicant may establish *Strickland* prejudice is to prove that "the factfinder would have had a reasonable doubt

respecting guilt" but for trial counsel's errors. (State's App. at 13) (quoting *Strickland v. Washington*, 466 U.S. 668, 695 (1984)). The State is wrong. *Strickland* requires a defendant to show "a reasonable probability that, but for counsel's unprofessional errors, *the result of the proceeding would have been different*." *Strickland*, 466 U.S. at 695. As relevant to Smith's appeal, the operative word in the *Strickland* prejudice standard is "proceeding." Sometimes the "proceeding" will be the jury's determination of the defendant's guilt following a trial. Other times the "proceeding" may be a pretrial matter, sentencing hearing, or an appeal. *See Burdge v. Belleque*, 290 Fed. Appx. 73, 79 (9th Cir. Aug. 15, 2008) ("if counsel had objected to the applicability of section 137.635, either the sentencing judge would have agreed with the objection, or the issue would have been preserved for appeal").

This Court's decision in *Ennenga v. State*, 812 N.W.2d 696 (Iowa 2012), illustrates this point. In *Ennenga*, the defendant pled guilty to the charge of eluding. *Id.* at 699. In his PCR action, Ennenga claimed ineffective assistance due to trial counsel's

failure to file a motion to dismiss following the violation of his right to a speedy indictment. *Id.* On the issue of prejudice, this Court held that it is established by showing "a reasonable probability that, but for counsel's unprofessional errs, *the result of the proceeding would have been different*." *Id.* at 708 (emphasis added). In that context, it meant that Ennenga had to show he "would not have plead guilty . . . had he known that the court would have been required to dismiss the charges under rule 2.33(2)(a)." *Id.* at 708. Under this standard, the Court held that Ennenga was prejudiced by his trial counsel's failure to file "a successful motion to dismiss." *Id.* Notably, the Court did not require Ennenga to prove he would have been found not guilty after trial. And for good reason – Ennenga already pled guilty. Nonetheless, he was prejudiced – even though admittedly guilty – because trial counsel could have obtained an outright dismissal before trial.

The Eighth Circuit's decision in *Burns v. Gammon*, 260 F.3d 892 (8th Cir. 2001), adds further support. In *Burns*, the habeas petitioner's trial counsel was ineffective for failing to object to the

prosecutor's improper comment in closing argument about the exercise of his constitutional rights. *Id.* at 896. In assessing prejudice, the court looked to whether the error "worked to Burns' actual and substantial disadvantage and infected his entire trial with constitutional error." *Id.* at 895. In finding the error prejudicial, the court explained:

> Further, trial counsel's failure to make a constitutional argument concerning the prosecutor's remarks started *a chain reaction of burdensome review by the Missouri appellate courts and this court*. Because trial counsel did not make the constitutional objection, the Missouri Court of Appeals and this court reviewed the prosecutorial misconduct claim only for plain error to determine whether the comments had 'a decisive effect' on the outcome of the trial. Plain error review is much more onerous for both the direct appeal defendant and the habeas corpus petitioner than is review for a defendant or petitioner pursuing a properly preserved prosecutorial misconduct claim. Counsel's performance thus prejudiced Burns at trial, on direct appeal, and on collateral review. But for counsel's unprofessional errors, the result of either the trial *or the later appeals would likely have been different*, and Burns can therefore establish that counsel's deficient performance prejudiced his defense.

Id. at 897-98 (emphasis added)(citations omitted). *Burns* stands for the principle that *Strickland* prejudice exists when counsel's error effectively deprives the defendant of a fair appellate review

of his conviction. *Id.* at 898; *see also Bell v. Lockhart*, 795 F.2d 655, 658 (8th Cir. 1986) ("Bell lost his direct appeal due to his attorney's unprofessional error and because his post-conviction proceeding was not a substitute for a direct appeal, we hold that Bell has made a sufficient showing of prejudice under *Strickland*").

The State's prejudice argument also runs headlong into the line of ineffective assistance cases from the United States Supreme Court, which hold that prejudice is presumed "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken." *Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000). For example, *Flores-Ortega* involved a lawyer who forfeited an appellate proceeding by failing to file a notice of appeal. *Id.* at 473-75. As the Court explained, it makes sense to presume prejudice when counsel's deficiency forfeits an "appellate proceeding altogether." *Id.* at 483. *Flores-Ortega* makes clear that even when it is *trial* counsel who breaches an essential duty in the *trial court*, the relevant focus in assessing prejudice may be the client's appeal. *See also Garza v.*

Idaho, 586 U.S. ___, 139 S. Ct. 738, 744, 747 (2019) ("prejudice is presumed when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken . . . with no further showing from the defendant of the merits of his underlying claims").

The decision in *Davis v. Sec'y for Dep't of Corr.*, 341 F.3d 1310 (11th Cir. 2003), most closely resembles the question presented in this case. In *Davis*, the habeas petitioner's trial counsel raised a "meritorious" *Batson* challenge when the prosecution struck all the black jurors. *Id.* at 1315-16. Under Florida law, however, Davis's trial counsel failed to preserve the *Batson* challenge for appellate review when he did not renew his objection before the jury was sworn. *Id.* at 1315. The Eleventh Circuit Court of Appeals had no difficulty finding *Strickland* prejudice:

> Davis faults his trial counsel not for failing to raise a *Batson* challenge - which counsel did - but for failing to preserve it. As his federal habeas counsel puts it, the issue is not trial counsel's failure 'to bring the *Batson* issue to the attention of the trial court,' but 'failure in his separate and distinct role of preserving error for appeal.' As in *Flores-Ortega*, the attorney error Davis identifies was, by its nature, unrelated to

> the outcome of his trial. To now require Davis to show an effect upon his trial is to require the impossible. Under no readily conceivable circumstance will a simple failure to preserve a claim - as opposed to a failure to raise that claim in the first instance - have any bearing on a trial's outcome. Rather, as when defense counsel defaults an appeal entirely by failing to file timely notice, the only possible impact is on the appeal.
>
> Accordingly, when a defendant raises the unusual claim that trial counsel, while efficacious in raising an issue, nonetheless failed to preserve it for appeal, *the appropriate prejudice inquiry asks whether there is a reasonable likelihood of a more favorable outcome on appeal had the claim been preserved*.
>
> * * *
>
> Consequently, there is a reasonable probability that the Florida Third District Court of Appeal would have reversed Davis's conviction had trial counsel preserved a *Batson* challenge. Because we believe that the likelihood of a different outcome on appeal is the appropriate focus of our inquiry under *Strickland* and *Flores Ortega*, we hold that the district court should grant Davis a writ of habeas corpus conditioned on the state's provision of either a new trial or an opportunity to take an out-of-time appeal wherein his freestanding *Batson* challenge could be decided by the state courts on the merits.

Id. at 1316-17 (emphasis added); *accord Commonwealth v. Little*, 246 A.2d 312, 330 (Pa. Super. 2021) ("There is a reasonable probability, then, that Little could have prevailed on this issue in

his direct appeal but for his defense counsel's ineffectiveness in waiving it").

From *Ennenga*, *Burns*, and *Flores-Ortega*, it necessarily follows that a PCR applicant need not show proof that he would have been acquitted in order to show *Strickland* prejudice. And, *Davis* demonstrates that the failure to preserve appellate review of a meritorious voir dire challenge is sufficient to establish *Stickland* prejudice. Consequently, there is no need for further review in this case.

CONCLUSION

Because the court of appeals decision is manifestly correct, the Court should deny further review.

REQUEST FOR ORAL ARGUMENT

If further review is granted, Smith requests to be heard in oral argument.

COST CERTIFICATE

I hereby certify that the costs of printing this resistance were $8.25, and that that amount has been paid in full by me.

CERTIFICATE OF COMPLIANCE

This application complies with the typeface requirements and the type-volume limitation of Iowa R. App. P. 6.1103(4) because:

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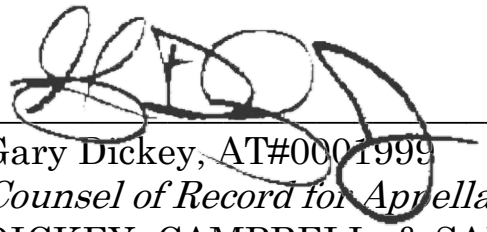

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