SUPREME COURT NO. 15-0772
DELAWARE COUNTY CASE NO. PCCE07544

IN THE
SUPREME COURT OF IOWA

ROBERT KROGMANN

Applicant-Appellant,

v.

STATE OF IOWA

Respondent-Appellee.

ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR DELAWARE COUNTY
HONORABLE THOMAS BITTER, DISTRICT COURT JUDGE

BRIEF FOR APPELLANT

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CERTIFICATE OF FILING

I, Angela Campbell, certify that I did file the attached brief with the Clerk of the Iowa Supreme Court by electronically filing the brief through the EDMS system on January 17, 2016.

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ROUTING STATEMENT

Because this case requests the Court overrule prior precedent, and involves issues not yet settled by the Iowa Supreme Court, the Iowa Supreme Court should retain jurisdiction. Iowa R. App. P. 6.1101.

STATEMENT OF THE CASE

This appeal follows an application for postconviction relief alleging ineffective assistance of counsel, prosecutorial misconduct, and challenges to an illegal sentence. The postconviction application was denied by a written ruling filed April 14, 2015. Notice of appeal was filed May 8, 2015.

STATEMENT OF FACTS

On March 13, 2009, Robert Krogmann shot his former girlfriend Jean Smith. (App. 47). Krogmann then called 911. (Ex. 5, 6 DVDs). At the time, Krogmann was suffering from severe mental illness. (App. 167-171). Krogmann was arrested and charged with attempted murder and willful injury the same day. (App. 47). Bond was set at $750,000 cash only. (App. 47). David Nadler entered an appearance for Krogmann on March 23, 2009. (App. 47).

On March 24, 2009, the Delaware County Attorney Bernau filed an "Application for Order" (App. 47, 193-94). Bernau did not cite any authority, did not set forth the amount of the victim's expenses, did not request a cap for the injunction, and did not provide any evidence that Krogmann would have sold or

transferred his assets to avoid a restitution order. (App. 193-94). There was no warrant, no oath or affirmation, and no affidavit attached to the motion. Bernau testified that no defense lawyer alerted him to any authority to the contrary on the asset freeze. (App. 104, l. 4-21).

On March 30, 2009, the Court granted the State's motion and froze all of Krogmann's assets. (App. 48, 195). Defense lawyer Nadler got the order granting the asset freeze before he ever saw the application requesting it. (App. 153, l. 18-22). The address the application was mailed to was never his address. (App. 154, l. 22 – p. 11, l. 7). Krogmann wanted the asset freeze challenged and authorities cited to the Court to lift the asset freeze. (App. 85, l. 17 – App. 86, l. 19). Nadler thought the asset freeze was "outrageous," that there was not any authority for it, and he filed a resistance on April 2, 2009. Nadler thought filing the resistance meant he had resisted the asset freeze, even though it was filed after the Order was entered. (App. 152, l. 11-15). Nadler never thought of filing a motion to reconsider, felt like he had to go straight to the appellate court, and thought he had preserved the issue. (App. 156, l. 11 – App. 157, l. 24). He was not exercising any sort of strategy in not preserving the issue for appeal, or for not properly contesting it. *Id.* He filed an application for interlocutory appeal on April 28, 2009. (App. 48). The State resisted the application. (App. 48). The Application was denied on May 26, 2009. Later, on direct appeal, the Iowa Supreme Court ruled that Nadler

did not properly preserve Krogmann's complaints regarding the asset freeze. *State v. Krogmann*, 804 N.W.2d 518, 523-24 (Iowa 2011).

As a result of the asset freeze, Krogmann had to get a Conservator, and had to request permission from the trial court, with a copy to the prosecutor, every time he wanted to spend his own money on his criminal defense. (App. 48, 195). The Order required Krogmann to make application to the court to spend any of his assets, with explanation as to why he needed the money. Every application for access to his own money was reviewed by the county attorney, and the victim, and both were allowed to, and did, make objections to Krogmann's requests to spend his own money. Bernau objected to Krogmann's use of his own money for bond, for phone calls at the jail, for legal expenses, including hiring a jury consultant, and for personal expenses. These objections were filed by Bernau in the GCPR005152 conservatorship case. (App. 457-460, 465-66, 470-71, 480-81, 486-87, 489-91, 494-95, 497-500, 503-04). Krogmann's assets were $3.3 million at the time. (App. 48).

At the same time, the victim sued Krogmann in LACV006620. Krogmann's attempts to hire a civil attorney were also stymied by the asset freeze. The victim was also allowed to continue to object to Krogmann's use of his own money for both the civil and criminal cases. (App. 457-460, 465-66, 470-71, 480-81, 486-87, 489-91, 494-95, 497-500, 503-04).

Of note, Krogmann's requests for money to pay $20,000 to his civil attorney, Krogmann's requests to pay his bond, and Krogmann's requests to hire a jury consultant were all denied. (App. 48-50). Krogmann's requests to pay his criminal defense trial attorney were all eventually granted, but sometimes with significant delays. (App. 49, 482). For example, his August 3, 2009 request for $20,000 to pay his criminal defense attorney was not granted until September 17, 2009. (App. 49, 482).

As one result, Krogmann did not have access to his own money to post bond, and so Nadler filed a Motion for Bond Review. (App. 48). After the hearing, the bond was raised, rather than lowered, to $1,000,000 cash only. (App. 48). Mark Brown was then hired to take over the case. (App. 48-49). By the time Brown entered the case, he thought that the asset freeze issue could no longer be raised, and he never considered getting involved again on that issue. (App. 121, p. 21, l. 20-22). He did not file anything challenging the asset freeze.

Trial started on November 2, 2009, and Krogmann presented a diminished capacity defense. (App. 50). He was convicted of both attempted murder and willful injury on November 6, 2009. (App. 50). Krogmann was sentenced to 25 years for attempted murder and 10 years for willful injury, to run consecutive to each other. (App. 50). Notably, the actual restitution was approximately $36,000 to the victim, and $18,000 to the State, yet the asset freeze completely eliminated

access to over $3.3 million in assets. *Krogmann*, 804 N.W.2d 518, n. 1, 4. The asset freeze continued past the time of the conviction into the appeal. Krogmann's direct appeal was ultimately unsuccessful. *Id.*

This postconviction application ensued. (App. 1-12). The PCR court held that defense counsel's actions with the asset freeze fell below the standard demanded of a reasonably competent attorney. (App. 53). However, the PCR Court determined that Krogmann had not shown enough prejudice to warrant a reversal of the conviction. Similarly, Krogmann's other arguments were denied by the Court and the Application was denied on April 14, 2015. Krogmann filed a Motion to Enlarge and Amend on April 27, 2015 asking for further elaboration as to the Court's findings regarding prejudice. (App. 58-59). The Court did not rule on the Motion. Notice of Appeal was filed May 8, 2015. (App. 60). Additional facts are included below.

ARGUMENT

I. THE PRETRIAL ASSETT FREEZE IN KROGMANN'S CRIMINAL CASE VIOLATED KROGMANN'S CONSTITUTIONAL RIGHTS

Preservation of Error

Defendant preserved error by filing an application for postconviction relief, (App. 1-12), taking the case to an evidentiary trial, raising the issue at the trial and in briefing (App. 15-46), and obtaining a ruling on the issue. (App. 53). Specifically the Court acknowledged that Krogmann submitted the asset freeze

issue as an illegal action, ineffective assistance of counsel, and prosecutorial misconduct. (App. 52). The Court further acknowledged the prejudice Krogmann asserted were the inability to post bond, hiring more or different counsel, hiring a better expert, and hiring a jury consultant. (App. 53).

Krogmann filed a Motion to Enlarge and Amend, asking the Court to elaborate on its denial of Applicant's arguments that the asset freeze prevented him from hiring a jury consultant, and whether the asset freeze specifically also constituted prosecutorial misconduct. (App. 58). Both issues were acknowledged by the Court as having been raised by Krogmann (App. 53) and both were rejected by the Court's denial of the Application (App. 57), but the Court did not further elaborate on the evidence presented on these issues. To preserve error, a "party seeking to appeal an issue presented to, but not considered by, the district court" must "call to the attention of the district court its failure to decide the issue." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

Krogmann submits that all of these issues were presented to the district court, and were denied by the court in its ruling on April 13, 2015, because "If the court's ruling indicates that the court *considered* the issue and necessarily ruled on it, even if the court's reasoning is 'incomplete or sparse,' the issue has been preserved. *Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012). To the extent any portion of Krogmann's argument was not directly addressed by the district

court, and the State seeks to argue that it was not properly preserved, Krogmann satisfied the requirements of *Meier* by filing his Motion to Enlarge and Amend.

Standard of Review:

The appellate courts review postconviction relief proceedings which implicate constitutional issues de novo. *Key v. State*, 577 N.W.2d 637, 639 (Iowa 1998).

Merits:

Krogmann's entire trial was pervaded by the State's pre-trial asset freeze which resulted in him not having access to his own assets for preparation of his defense at trial. The asset freeze was submitted to the trial court as both an ineffective assistance of counsel issue, and a prosecutorial misconduct issue. Krogmann submits it was ineffective assistance of counsel to not properly object to the asset freeze, not sufficiently preserve the issue for interlocutory or direct appeal, to fail to file a motion to reconsider the freezing of the assets, to fail to object to the prosecutor and victim's participation in the asset freeze and applications for funds, to fail to file an application to terminate the freeze order, to fail to cite clear controlling authority, and to fail to raise the prejudice the asset freeze was causing Krogmann at the trial level with regards to the asset freeze. Krogmann submits it was prosecutorial misconduct to file an ex parte application to freeze the assets in contravention of clear authority, to ignore the case law and

statutory law disallowing such freezes yet failing to cite the adverse controlling legal authority to the court, to fail to appropriately and timely notify defense counsel and the defendant of the asset freeze, to participate and contest defense spending on his own defense, and to allow the victim to participate in objecting to the defense spending on his own defense.

A. THE ASSET FREEZE WAS ILLEGAL.

Asset freezes are not allowed to be used the way they were used in this particular case –indeed this exact type of asset freeze was disallowed in *State ex rel Pillers v. Maniccia*, 343 N.W.2d 834 (Iowa 1984). The PCR Court acknowledged that *Maniccia* "seems to support Krogmann's contention that his assets should not have been frozen." (App. 52). The PCR Court further held that the county attorney's actions in regards to the asset freeze were "troubling" and that "it seems clear that Krogmann's counsel failed to properly raise his objection to the asset freeze," thus the defense attorney's actions "fell below the standard demanded of a reasonably competent attorney." (App. 53).

Nothing in the Iowa Code allows for freezing a defendant's assets for any reason. More specifically, nothing in the Iowa Code allows for a criminal prosecutor to freeze the assets of a criminal defendant so as to prevent the defendant from obtaining bond, or to prevent the individual from using his money in his criminal case without governmental involvement or interference. The Iowa

Supreme Court has already commented on the legality of the asset freeze in Krogmann's case. While the Iowa Supreme Court declined to reverse his conviction on this ground on direct appeal because it had not been preserved adequately below, in so doing, the Court stated,

> Our determination that Krogmann has failed to preserve error does not mean we approve of the asset freeze. We are troubled by the State's effort to tie up a criminal defendant's personal assets without citing any rule or statute, without making a verified filing, and without citing the district court to relevant authority (*Maniccia*). We are also troubled by the State's attempts to use the asset freeze, once it was in place, to object to defense expenditures not on the ground they would jeopardize restitution or other victim compensation (the alleged reasons for the asset freeze), but simply because the State deemed them unnecessary.

Krogmann, 804 N.W.2d at 525. The opinion specifically preserved this issue for postconviction review. *Id.* at n. 8.

Even though Bernau cited no authority for his application to freeze the assets, and despite the Iowa Supreme Court's statements regarding the asset freeze, the State asserted at the PCR level that the asset freeze was not illegal. In so doing, the State claimed Iowa Rules of Civil Procedure 1.1501-1.1511 allow for the asset freeze, the State attempted to distinguish *Maniccia* from the instant case, and the State claimed that any asset can be frozen in a criminal case because criminal restitution is the same as a civil judgment. Each of these arguments misapplied and distorted Iowa law. Indeed, Bernau did not even cite any of these rules of civil procedure, or cases, in its application, demonstrating Bernau was never intending

on relying upon them. These arguments are raised years after the illegal asset freeze in a desperate attempt to justify a clearly illegal, and unconstitutional, violation of Krogmann's rights.

"The Rules of Civil Procedure have no applicability in criminal cases, unless made applicable by statute." *State v. Wise*, 697 N.W.2d 489, 492 (Iowa Ct. App. 2005). The State cites no such statute – indeed there is none. In addition, even if these civil procedure rules applied (which they clearly do not) Bernau did not follow the requirements of the very rules that the State now attempts to defend his actions with. Iowa Rule of Civil Procedure 1.1502(1) requires supporting documentation, and specifically requires an affidavit, to be filed in support of a request for an injunction. No affidavit was filed. Rule 1.502(2) requires a showing that a parson is "doing, procuring or suffering to be done, or threatens or is about to do" an act which will make "judgment ineffectual." No such showing was provided. Rule 1.1504 requires the petition to certify whether this relief has been previously presented to any other court or justice. No such certification was included. Rule 1.1507 requires notice to the party who is subject to the injunction, or certification of the efforts which have been made to give notice to the party. No such notice was given – the Order was in place before Krogmann or his attorney ever knew about the application, and was obtained ex parte, in violation of Iowa Rule of Professional Conduct 32:3.5. (A lawyer shall not communicate ex parte

with a judge "unless authorized to do so by law or court order."). Rule 1.1508 requires a bond in the amount of 125 percent of the probable liability. Krogmann was never given this opportunity to pay a bond, nor was a bond requested. If it had been, the bond could have been paid, and Krogmann could have bonded out and paid for his defense expenses as he wished. Instead, Bernau wanted Krogmann's entire assets to be completely frozen, regardless of the possible amount of restitution, because, in fact, Bernau did not want Krogmann to bond out and he wanted to control Krogmann's expenditures on the defense case to give himself an advantage in the case.

Even the victim herself could not have encumbered all of Krogmann's assets through attaching his land and preventing the sale of his assets for use as criminal attorney fees. *See Estate of Lyon ex rel Lyon v. Heemstra*, 779 N.W.2d 494 (Iowa Ct. App. 2010) (finding that the victim of a manslaughter could not file attachments as liens against the criminal defendant's real estate). Surely the prosecutor himself could not do what the victim could not do.

The State argued that *Maniccia* is distinguishable because there was "exceptional circumstances" here because there was no other way to freeze Krogmann's assets, and because *Maniccia* was decided under a different statutory scheme. Notably these arguments mirror the State's arguments on direct appeal on this issue, after which the Court of Appeals commented,

> Some time ago, in *Maniccia*, we held that a district court could not enter an injunction barring a person charged with a crime from disposing of property that might otherwise be used to reimburse the crime victim or the county. 343 N.W.2d at 834. As we put it, "[A] court of equity has no inherent power to issue the injunction requested by petitioner." *Id.* at 835. The only difference here is that the State sought the order within the criminal case, instead of filing a separate civil action for injunctive relief.
>
> Also, the State has the statutory right to seek a criminal restitution lien to protect both its interests and those of the victim. *See* Iowa Code § 910.10.[4] Indeed, it requested and received such a lien. Under these circumstances, one might well question the State's ability to obtain inherent injunctive relief beyond the statutory remedy already afforded by section 910.10.[5]

Krogmann, 804 N.W.2d at 523-24. The Court then footnoted,

> The State notes on appeal that section 910.10(5) provides, "This section does not limit the right of the state or any other person entitled to restitution to obtain any other remedy *authorized by law*." (Emphasis added.) Still, this begs the question of how the asset freeze was 'authorized by law.'"

Id. at 524, n. 5.

The State did not explain at the postconviction trial how it is that the statutory structure is now different than it was back when *Maniccia* was decided. Indeed, the State cited no authority whatsoever allowing this type of asset freeze. And indeed, restitution awards in criminal cases are NOT the same as civil awards. "[R]estitution is a penal sanction separate from civil remedies…" *State v. Bonstetter*, 637 N.W.2d 161, 165 (Iowa 2001) (Finding that the tort remedy of offsetting damages other than insurance not applicable in criminal restitution.) Indeed, restitution awards are set off by insurance, where civil judgments are not. Iowa Code 910.1(3). And even a civil plaintiff could not have done what was done

to Krogmann – frozen over $3 million in assets to secure $36,000 in potential future restitution. Surely then criminal prosecutor in a criminal case cannot do what a civil litigant could not in a civil case.

If somehow the language of these rules and cases does allow the freezing of a defendant's assets without a hearing, without following any of the rules for civil injunctions, without following the rules for 910.10 restitution liens, without a cap, without a bond, and by allowing the state prosecutor and victim object to what a defendant spends his money on for his defense, such a reading of those rules and cases would be a violation of the defendant's rights to due process and rights to counsel under the Fifth and Sixth Amendments of the US Constitution, as well as article 1 sections 9 and 10 of the Iowa Constitution. *See Ferri v. Ackerman*, 444 U.S. 193, 204 (1979) (Noting that it is defense counsel's responsibility to "act independently of the Government and to oppose it in adversary litigation"); *Morris v. Slappy*, 461 U.S. 1, 23 (1983)(Brennan, J., concurring in result) (Noting that the "quality of a criminal defendant's representation frequently may turn on his ability to retain the best counsel money can buy."); *United States v. Stringer*, 535 F.3d 929, 941 (9th Cir. 2008) ("Government interference with a defendant's relationship with his attorney may render counsel's assistance so ineffective as to violate his Fifth Amendment right to due process of law.") The asset freeze was illegal, as argued above. Neither defense counsel raised the issue appropriately with the

district court. *Krogmann*, 804 N.W.2d at 523-24. Neither counsel got it rescinded. Neither counsel raised the issue to Bernau.

B. THERE WAS INEFFECTIVE ASSISTANCE OF COUNSEL IN HANDLING THE ASSET FREEZE.

Krogmann submits it was ineffective assistance of counsel to not properly object to the asset freeze, not sufficiently preserve the issue for interlocutory or direct appeal, to fail to file a motion to reconsider the freezing of the assets, to fail to object to the prosecutor and victim's participation in the asset freeze and applications for funds, to fail to file an application to terminate the freeze order, to fail to cite clear controlling authority, and to fail to raise the prejudice the asset freeze was causing Krogmann at the trial level with regards to the asset freeze. The PCR Court agreed that defense counsel's performance in these regards fell below the standards demanded of a reasonably competent attorney. (App. 53).

Generally, to establish an ineffective assistance of counsel claim under the Sixth Amendment, the defendant must show that counsel failed to perform an essential duty, and prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Prejudice is established by showing "there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Under article I, section 10 of the Iowa Constitution, the defendant must also generally show the same deficient performance and prejudice.

Krogmann submits that in this case, both under the 6th Amendment, and then if not under the 6th Amendment, under article I, section 10 of the Iowa Constitution, he not only has shown deficient performance and prejudice, but that also he should not have to show traditional prejudice, as argued below.

Asset freezes are not allowed to be used the way they were used in this particular case – to allegedly indeed this exact type of asset freeze was disallowed in *State ex rel Pillers v. Maniccia*, 343 N.W.2d 834 (Iowa 1984). In addition, nothing in the Iowa Code allows for a criminal prosecutor to freeze the assets of an individual so as to prevent the individual from obtaining bond, or to prevent the individual from using his money in his criminal case as he saw fit. Indeed nothing allows freezing assets in a criminal case for any reason. In noting that the asset freeze was in contradiction to *Maniccia*, the Iowa Supreme Court declined to address this issue on direct appeal because it had not been preserved adequately below. In so doing, the Court stated,

> Our determination that Krogmann has failed to preserve error does not mean we approve of the asset freeze. We are troubled by the State's effort to tie up a criminal defendant's personal assets without citing any rule or statute, without making a verified filing, and without citing the district court to relevant authority (*Maniccia*). We are also troubled by the State's attempts to use the asset freeze, once it was in place, to object to defense expenditures not on the ground they would jeopardize restitution or other victim compensation (the alleged reasons for the asset freeze), but simply because the State deemed them unnecessary.

State v. Krogmann, 804 N.W.2d 518, 525 (Iowa 2011). The opinion specifically preserved this issue for postconviction review. *Id.* at n. 8.

Krogmann submits that his lawyers' failures on this point warrant a finding of ineffective assistance of counsel, with prejudice being presumed, and a new trial should be ordered.

C. THERE WAS PROSECUTORIAL MISCONDUCT IN OBTAINING AND MAINTAINING THE ASSET FREEZE.

Krogmann submits it was prosecutorial misconduct to file an application to freeze the assets in contravention of clear authority, to ignore the case law and statutory law disallowing such freezes yet failing to cite the adverse controlling legal authority to the court, to fail to appropriately and timely notify defense counsel and the defendant of the asset freeze, to participate and contest defense spending on his own defense, and to allow the victim to participate in objecting to the defense spending on his own defense. The PCR Court was wrong in determining that even though it was "troubling" what the State did in obtaining and maintaining the asset freeze, there was not prosecutorial misconduct and that this was solely an issue of ineffective assistance of counsel. (App. 53).

In general, to prevail on a claim of prosecutorial misconduct, usually the defendant must show both the misconduct, and prejudice. *State v. Ruble*, 372 N.W.2d 216, 218 (Iowa 1985). Krogmann submits that he should not have to show prejudice, as argued below, because the misconduct created structural error.

Bernau stated that the reason he filed the asset freeze was because (1) the victim had medical expenses of over a million dollars and (2) he did not want Krogmann to post bond. (Ex. 1, p. 7, l. 1 –p. 8, l. 23). Burnau did not state that these medical expenses were not covered by insurance, which is the only way they would become part of any future restitution order, because in fact they were covered by insurance. Iowa Code §910.1(3). Recovery of these amounts would therefore be through a civil case, not a criminal restitution order. *Id.* Indeed, Bernau's actions in aiding the victim's civil lawyers or the victim herself in preserving assets for the civil case is prohibited by statute. Iowa Code §331.755(2) and (3). Bernau's stated desire to preserve these assets for the victim in what would have to be a civil lawsuit is therefore a violation of law in and of itself. But, indeed, that was not the actual reason for the asset freeze.

The facts show that instead of "restitution to the victim" as his main concern, Bernau's real reasons for the asset freeze were to prevent Krogmann from getting bond, and to prevent Krogmann from accessing his assets to use on his defense at trial. This is shown through not only Bernau's own statements, but also his filings throughout the trial, and the timing of the release of the asset freeze.

Bernau admitted he did no research on the issue before filing the request. (App. 100, l. 7-9). He did not have anyone else to do any research on the motion. (App. 100, l. 10-19). He claimed he got the motion as a "form" from either the

Attorney General's office, or the Iowa County Attorney's Association, but he could not remember who or what exactly he received, (App. 98, l. 2 – App. 100, l. 19) and no further evidence was ever offered by the State that this motion was, indeed a form from either of those agencies. Research on the issue on Westlaw indicates that, in fact, these motions are NOT filed in criminal cases with any sort of regularity, if at all, and no such form has ever been presented into evidence. The Iowa Supreme Court, in fact, seemed shocked in its opinion that this had ever been filed in a criminal case. *Krogmann*, 804 N.W. at 525.

Bernau admitted that in filing the motion, he did not even look at the address for defense counsel, (App. 101, l. 22 – App. 102, l. 6) much less any other efforts so as to satisfy Iowa Code § 1.1507. Defense counsel did not get the motion until after the Order granting the motion was filed. Bernau did not talk to defense counsel before filing the motion. (App. 108, l. 11-15). Bernau did nothing to get a hearing set on the motion, once he learned the Order was granted without defense counsel having notice, even though such occurrences of orders being granted without the other party knowing of the motion were common in his county. (App. 103-104). Bernau "didn't even think" of asking for a cap on the asset freeze, even though he knew his restitution order would be limited to expenses not covered by insurance. (App. 105-106). He blamed defense counsel and stated that if defense counsel would have raised the issue, he would have then talked to the victim about

what the out of pocket expenses were going to be and told the court, implying that he did not do either of those things before instituting the complete multi-million asset freeze. (App. 106, l. 4-15). He admitted he had never done anything like this before. (App. 109, l. 2-11).

A guardianship was set up in GCPR00515 so Krogmann could apply to use his own funds as a result of the order issued in the criminal case. By June, the victim in the criminal case was making motions in the guardianship case to prevent Krogmann from using his money to pay for things like his son's college tuition (App. 459-60). On June 15, 2009, Krogmann applied to have access to his assets to post a bond. (App. 461-62) The victim objected. (App. 465-66) The Court ordered that Krogmann could have $20,000 to retain a defense lawyer but that it was "not to exceed" the $20,000. (App. 463) Krogmann also requested permission to use his own money to employ an attorney to represent him in the civil case that the victim had filed against him.

All of these objections and applications that had not been granted were set for hearing on July 20, 2009. (App. 467). The Court issued the order on July 20, 2009, which capped the costs for a civil attorney at $5000, denied applications to transfer life insurance policies, denied application to transfer a motorcycle, denied applications for college tuition payments, and denied application to borrow money against Krogmann's farm for his bond. (App. 468-69). Further applications and

objections followed, which should shock this court's conscience. For example, the victim, who was now also a plaintiff in a civil case, objected to Krogmann's applications to pay his civil attorneys on the basis that they had not received the billing statements from the civil lawyers, and the victim objected to Mark Brown, the criminal attorney, getting additional fees because there was similarly no bills provided to the victim and her lawyers. (App. 470-71). This resulted in future applications for his own money to include attorney statements of what they were doing in the cases. (App. 472). These statements included who the lawyers were talking to, and about what. The court denied additional funds for Krogmann to have a civil lawyer to defend himself, but did allow the money for the defense lawyer, as long as counsel continued to give everyone itemized billing statements. (App. 482).

Bernau claimed he did not "expect" to get notice of the requests for money (App. 109, l. 16 – App. 110, l. 3), yet the motion he filed was filed in the criminal case, and the order was entered in the criminal case. (App. 195). And by September 4, 2009, Bernau himself was filing resistances to Krogmann's requests for his own money. (App. 480-81). Specifically Bernau requested that the Court deny the Defendant's request for $500 per month of his own money to pay for jail amenities because they were "unreasonable and excessive" and told the court he believed $50 was "appropriate." *Id.* After that date, as to be expected, since the

State had filed responsive pleadings in the guardianship, the court added him to its service list. (App. 482). The court then denied Krogmann access to his own money to pay for his telephone contact with family members and others. (App. 483).

Brown asked for a jury consultant and or psychologist to evaluate the jury pool, estimating the cost as $4000-8000. The Court notified the county attorney and requested objections. (App. 485). The Court specifically said that it would grant the request if there were no objections. *Id.* Bernau filed a motion requesting to be able to see the details of the defense attorneys requests for money so he could "make an informed decision" about whether he would object. (App. 486-87). The State then objected to psychologist fees, and a jury consultant, even though the criminal judge had stated he would allow the jury consultant to aid defense counsel if the funds got released. *Id.* The funds for the psychologist and jury consultant were denied, and even worse, the Court ordered that if one appeared at trial, the defendant would have to "certify to the Court from where the funds originated." (App. 492-93).

As a result, Krogmann had one psychological expert, not two. He did not have a jury consultant, he was not able to post bond, he could not attorney-shop, he could not call his family as he wished, and all of his communications from the jail were monitored.

As a practical matter, Bernau was not, in fact trying to preserve assets for restitution. Iowa Code § 910.10 sets forth the procedure by which a restitution lien could have been filed, and it eventually was, yet the asset freeze was not lifted. Notably, the actual restitution was approximately $36,000 to the victim, and $18,000 to the State, yet the asset freeze completely eliminated access to over $3.3 million in assets. *Krogmann*, 804 N.W.2d, n. 1, 4.

Indeed, the facts demonstrate that Bernau was not actually trying to secure money for restitution for the victim through the civil rules because otherwise he would have (1) listed an amount of money that could be anticipated being due and requested a bond, (2) released the injunction after the restitution order was entered, rather than 6 months after Krogmann was in prison (App. 79, l. 14-22), (3) cited Iowa Rule of Civil Procedure 1.1501-1.1511, (4) followed the procedures set forth in the rules, (5) not requested to see defense counsel's billings, (6) not objected based on whether he had received notice of the witnesses yet that were involved in the work the defense lawyer was doing, (7) not objected to minimal monies to be spent on phone calls to family members. His actions demonstrate that, in fact, he was trying to control Krogmann's case and life, and he was trying to prevent him from bonding out of jail.

The PCR Court has now ruled that no prejudice resulted. (App. 53-57). But Bernau's conduct so pervaded the entire criminal process that its results go

beyond prejudice. *See United States v. Stein*, 435 F.Supp.2d 330 (SDNY 2009) (Structural defect in freezing assets preventing defendants in presenting defense of choice, rendering *Strickland* inapplicable, and eliminating the need to show prejudice). Krogmann submits that he does not need to show prejudice under these facts, as the pervasive nature of this asset freeze on the entire criminal process created structural error. And, its error was compounded by the real nature of Bernau's actions: an attempt to control the defense's case and the defendant's life well beyond what was allowable under any statute, case, rule, or law. He wanted to see what the defense counsel was doing with his time. He wanted to prevent Krogmann from talking to his family. He did not want Krogmann to have amenities in jail. He did not want Krogmann to select a sympathetic jury. He did not want Krogmann to be able to call his family. He wanted to listen in to Krogmann's conversations, and indeed he did. He wanted to read Krogmann's letters, and indeed he not only read them, but used them against Krogmann at trial and at sentencing. All of these uncontested facts demonstrate that there was overwhelming pervasive prosecutorial misconduct as it related to the asset freeze. Prejudice should be presumed and Krogmann should get a new trial.

D. PREJUDICE SHOULD BE PRESUMED AND EVEN IF NOT, KROGMANN DID SHOW TRADITIONAL PREJUDICE FOR INEFFECTIVE ASSISTANCE OF COUNSEL AND PROSECUTORIAL MISCONDUCT FROM THE ILLEGAL ASSET FREEZE.

The parties disputed at the PCR trial whether Krogmann has to show prejudice from this asset freeze under the traditional *Strickland v Washington*, 466 U.S. 668 (1984) analysis, or under the prosecutorial misconduct argument regarding the asset freeze.

Krogmann submits that prejudice may be presumed in his case, under both the Sixth Amendment to the United States Constitution, and article I, section 10 of the Iowa Constitution, because of the structural defect the asset freeze created in the case. *See United States v. Stein*, 435 F.Supp.2d 330 (SDNY 2009) (Structural defect in freezing assets preventing defendants in presenting defense of choice, rendering *Strickland* inapplicable, and eliminating the need to show prejudice). From the United States Supreme Court's decisions, we can see that structural errors occur when there is something that is not simply a trial or evidentiary error, but something that affects the "framework within which the trial proceeds." *Arizona v. Fulminante*, 499 U.S. 279, 310-11 (1991); *see also United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006); *Chapman v. California*, 87 S.Ct. 824 (1967) (no prejudice necessary when judge and prosecutor commented throughout trial that defendant's refusal to testify should be held against defendant); *Tumey v.*

Ohio, 273 U.S. 510 (1927) (structural error where judge was not impartial); *Vasquez v. Hillery*, 474 U.S. 254 (1986)(structural error in excluding members of the defendant's race from the grand jury); *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (structural error in denying self-representation at trial); *Waller v. Georgia*, 467 U.S. 39 (1984) (structural error in denying public trial).

The Iowa Constitution provides the same, if not more, protections as the federal constitution on this question, and courts should interpret article I, section 10 to mean that illegal asset freezes in a criminal trial result in automatic reversal of any conviction. *See Lado v. State*, 804 N.W.2d 248, 252 (Iowa 2011) (Listing types of cases in which structural errors in the process eliminate the need for a showing of prejudice and finding a structural error where a postconviction lawyer provided ineffective counsel.) The *Lado* court does note that "The Iowa case law on 'structural error' is minimal…" *Id.* at n. 1. Thus, looking to the rationale in the federal cases, like *Stein*, an illegal asset freeze, chilling the defendant's ability to post bond, make phone calls, hire witnesses, research new attorneys, or hire a jury consultant should be considered structural error and prejudice should be presumed.

Despite his position that he does not need to show prejudice to secure a reversal of his conviction, Krogmann did submit evidence that demonstrated traditional prejudice from the asset freeze. Krogmann was prejudiced in that he

could not have a jury consultant, he was prejudiced in his lawyer's poor performance in voir dire and jury selection, he was prejudiced in not getting bond, he was prejudiced in having his letters copied and used against him, he was prejudiced in not being able to choose additional or substitute lawyers, he was prejudiced in not having multiple experts, he was prejudiced in having the prosecutor have access to his defense attorney's billing statements and strategies, and he was prejudiced in not being able to make phone calls to family and additional lawyers. His entire defense was hampered by this asset freeze.

Krogmann did not have a jury consultant at his criminal trial, and so he hired a jury consultant to testify at his postconviction trial. Marygrace Schaeffer testified to the postconviction court what services they provide, and why people use them. She identified numerous problems with the way jury selection was done in Mr. Krogmann's case. (App. 172-187). First, she would have advised the attorney to object to the abnormal process of jury selection without knowing the alternates as was done. (App. 63, l. 4 – App. 66, l. 25). She also would have helped inform defense counsel why he should ask open-ended questions, rather than closed-ended questions during voir dire. (App. 66, l. 19-25). Her opinion was that defense counsel's voir dire prevented effective jury selection. (App. 67, l. 1-12). Instead of the jurors talking, the lawyer did all of the talking. (App. 69, l. 5-13). She found that it was "very unusual" to have an attempted murder case with a

mental health defense where there were no for cause strikes. (App. 70, l. 20-23). This disadvantaged Krogmann. (App. 71, l. 7-10). She could say with "reasonable certainty" and that it was "highly likely" that there would have been a different jury if she had been allowed to participate in the jury selection process as a jury consultant. (App. 72, l. 3-10). Krogmann testified that he would have hired a jury consultant if he had been allowed to. (App. 83, l. 13 – App. 84, l. 22). Indeed, he asked to hire one and was not allowed.

Second, Krogmann showed prejudice by demonstrating that he would have posted bail if he had been allowed access to his money. The PCR Court found this to be only a "personal interest" in posting bail, not a valid prejudice argument because the Court feared a slippery slope argument from other defendants. (App. 53). But bail is not simply a "personal interest" – it is a constitutional right. Iowa Const. art. I, § 12; U.S. Const., am. VIII. Being able to post his constitutionally-required bail would have allowed Krogmann unfettered access to his lawyers, unfettered access to mental health professionals, and unfettered access to his family. It also would have prevented the State from copying all of his correspondence and listening to his phone calls at the jail. These letters were used against Krogmann at his sentencing (App. 444-48). None of these letters would have existed if Krogmann had been let out on bail. In addition, the entire 473 pages of State's Exhibit A in the postconviction trial would not have existed for the

State to continue to use against Krogmann if he would have been allowed bail and not had to write letters to his lawyers. (State's Exhibit A was a collection of all of the letters sent to and from Krogmann's various counsel from the jail). Thus, the asset freeze denied Krogmann his rights to a reasonable bail, and his rights to access his own assets to pay for the bail that was set in his case. Prejudice was properly shown in this case.

Third, Krogmann testified he would have put together the "best defense team" if he could have had access to his $3.3 million in assets. (App. 77, l. 1-12). He testified extensively how the asset freeze hampered his existing lawyers, as well as himself in selecting lawyers. He would have hired a new lawyer, if not multiple lawyers. He would have hired a civil lawyer who knew how to challenge the asset freeze. (App. 87, l . 18-25). He would have hired multiple experts to aid him with his diminished capacity defense. (App. 88, l. 11-19). An additional expert, like Dr. Greenfield, would have testified that people with bipolar disorder can experience psychotic states, that Krogmann has experienced these psychotic states, and that "his severe and chronic mental illness did impact his actions at the time of the crime. There is a possibility that at the time of the crime he may have had a brief psychotic episode as well as being severely depressed." (App. 171).

Fourth, Krogmann was prejudiced by the prosecutor having access to his defense lawyer's billing statements, his defense strategies, and his requests for

investigation and trial preparation expenses. Krogmann was also prejudiced by forcing his defense lawyer to spend more time fighting to get paid than he was on the actual case. This is played out in the filings that had to be made, the hearings that had to be held, and the exhibits that had to be provided in the guardianship case, all in the name of simply allowing Krogmann to defend himself in the criminal case.

Finally, if Krogmann at least had access to his own money for calls, he would have called more lawyers, more family members, more everything. He wanted to defend himself. Bernau would not let him. Krogmann's lawyers did not help him. This case is appalling from every viewpoint. Krogmann should get the benefit of presumed prejudice, but even without presumed prejudice, the PCR court was simply wrong in finding that his evidence did not show traditional prejudice. He was suffering from a massive and "troubling" violation of his rights which pervaded every aspect of his criminal trial. He deserves a new trial free from these restrictions.

II. KROGMANN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL THROUGHOUT HIS CRIMINAL CASE.

Preservation of Error

Defendant preserved error by filing an application for postconviction relief, (App. 1-12), taking the case to an evidentiary trial, raising the issues at the trial and in briefing (App. 15-46), and obtaining a ruling on the issue. (App. 53-56).

Standard of Review:

The appellate courts review postconviction relief proceedings which implicate constitutional issues de novo. *Key* 577 N.W.2d at 639.

Merits:

The Applicant submits that trial counsel was ineffective in a number of ways in addition to the ineffectiveness regarding the asset freeze. These grounds for ineffective assistance of counsel should be analyzed under *Strickland v. Washington*, 466 U.S. 668 (1984): namely, that counsel's performance fell below the standards of a reasonable criminal defense attorney, and prejudice resulted.

A. COUNSEL WAS INEFFECTIVE IN RAISING AND PRESENTING THE MENTAL HEALTH DEFENSE.

Counsel failed to hire sufficient experts to maintain a viable mental health defense, yet the PCR Court found that counsel was not ineffective in this regard. (App. 54-55). The Applicant's trial defense was solely a diminished capacity defense. Iowa Jury Instruction 200.13 sets forth what the defense counsel should have been trying to show at trial in order to proceed with a diminished responsibility defense:

> One of the elements the State must prove is that the defendant acted with specific intent. The lack of mental capacity to form a specific intent is known as "diminished responsibility". Evidence of "diminished responsibility" is permitted only as it bears on [his] [her] capacity to form specific intent. "Diminished responsibility" does not mean the defendant was insane. A person may be sane and still not have the mental capacity to form an intent because of a mental disease

> or disorder. The defendant does not have to prove "diminished responsibility"; rather, the burden is on the State to prove the defendant was able to, and did, form the specific intent required.

Iowa Criminal Jury Inst. 200.13.

Krogmann did not contest that he was the person who shot the victim and his entire defense at trial was the diminished capacity defense. The defense lawyer did not present an expert that supported this theory of defense at trial. (App. 404, l. 21 – 440, l. 11). The defense's expert, Dr. Gallagher, testified, it was "possible" Krogmann's mental health influenced his actions and intent when he shot the victim. (App. 439, l. 22 – App. 440, l. 7).

At the postconviction trial, Krogmann offered the opinion of such an additional expert, Dr. Jerome Greenfield. Dr. Greenfield's report demonstrates the prejudice in not having additional, or different, expert witnesses. Dr. Greenfield opined that Krogmann's "severe and chronic mental illness did impact his actions at the time of the crime," and in addition that he "may have had a brief psychotic episode as well as being severely depressed." (App. 171). This is a stronger statement on behalf of Krogmann than Dr. Gallagher's testimony. And as such, it demonstrates both the error of counsel in how the case was presented, as well as the need to have multiple, and stronger, experts for Krogmann. To have any chance of success on the merits of a mental health defense, Krogmann needed to

present better expert testimony – testimony that Krogmann's psychotic episode legally excused his actions when he shot the victim.

This issue is intertwined with the pretrial asset freeze as any expert funds had to be approved by the trial court, subject to the prosecutor's objections, before any expert could be consulted or hired. But, to the extent that counsel could have pursued additional experts, could have objected to the denial of funds for the experts, and could have presented a stronger mental health defense, such failures are ineffective assistance of counsel.

B. COUNSEL WAS ADDITIONALLY INEFFECTIVE IN HIS PRETRIAL AND TRIAL PERFORMANCE.

The Applicant also raises other ineffective assistance of counsel issues in addition to those above, including: failing to file a mistrial after the prosecutor's statement "have you shot anybody today," failing to obtain the phone records necessary to demonstrate the defendant had called 911 so as to prevent the false assertion at trial by the prosecution that he had not called 911, and failing to obtain Krogmann's mental health records in support of his mental health defense. These errors, individually and collectively, when compounded with the other errors prevalent throughout the trial, render Krogmann's conviction in violation of the Sixth Amendment and article I, section 10 of the Iowa Constitution.

Specifically as it pertains to the 911 tapes, Exhibits 5 and 6, these exhibits support Krogmann's defense. He did call for help. He sounds confused. He gives

the address. He waits for the paramedics to arrive. He only leaves the scene when confronted with the possibility of violence by the victim's son. There was no strategy in not offering these tapes into evidence. And, even worse, the prosecutor tried to imply that Krogmann hadn't called for help. (App. 398, l .2 – App. 400, l. 9).

The prejudice is also clear. A call to 911 after shooting someone tends to negate specific intent to kill. The sound of Krogmann's voice, the obvious confusion in his words, and what he and his son said on Exhibits 5 and 6 all support the mental health defense – that Krogmann was acting as a result of a mental illness, not out of any specific intent to kill the victim. Additionally, the jury would have been left thinking Krogmann hadn't called 911, when in fact he did. These errors, individually and collectively, when compounded with the other errors prevalent throughout the trial, render Krogmann's conviction in violation of the Sixth Amendment and article I, section 10 of the Iowa Constitution.

III. THE PROSECUTOR COMMITTED NUMEROUS INSTANCES OF PROSECUTORIAL MISCONDUCT WARRANTING A REVERSAL OF KROGMANN'S CONVICTION.

Preservation of Error

Defendant preserved error by filing an application for postconviction relief, (App. 1-12), taking the case to an evidentiary trial, raising the issue at the trial and in briefing, and obtaining a ruling on the issue. (App. 53).

Standard of Review:

The appellate courts review postconviction relief proceedings which implicate constitutional issues de novo. *Key*, 577 N.W.2d at 639.

Merits:

In addition to the prosecutorial misconduct prevalent throughout the asset freeze issue, Krogmann also submits that it was prosecutorial misconduct for the prosecutor to improperly ask, and imply, and extensively cross examine at trial, around the question of whether and when the defendant had called for help, knowing, and having in his possession, the 911 tapes showing that Krogmann had, in fact, called for help (App. 398, l .2 – App. 400, l. 9); and contesting Krogmann's diminished capacity defense at trial while simultaneously setting forth to the court that Krogmann needed a conservatorship to control his assets.

As stated above, to prevail on a claim of prosecutorial misconduct, usually the defendant must show both the misconduct, and prejudice. *Ruble*, 372 N.W.2d at 218. In finding prosecutorial misconduct, the courts are to look to,

> (1) the severity and pervasiveness of misconduct; the significance of the misconduct to the central issues in the case; (3) the strength of the State's evidence; (4) the use of cautionary instructions or other curative measures; (5) the extent to which the defense invited the misconduct.

Krogmann, 804 N.W.2d at 526, citing *State v. Boggs*, 741 N.W.2d 492, 508-09 (Iowa 2007) and *State v. Graves*, 668 N.W.2d 860, 860 (Iowa 2003).

"Ordinarily a finding of prejudice results from [p]ersistent efforts to inject prejudicial matter before the jury." *Id.* quoting *State v. Webb*, 244 N.W.2d 332, 333 (Iowa 1976). "Unfairly questioning the defendant simply to make the defendant look bad in front of the jury regardless of the answer given is not consistent with the prosecutor's primary obligation to seek justice…" *Graves*, 668 N.W.2d at 873.

On direct appeal the Iowa Court of Appeals found that the prosecutors had committed misconduct during the trial against Krogmann. *Krogmann*, 804 N.W.2d at 526-27. However, the Court found, as presented at the time of that appeal, that the misconduct was "isolated." As shown by this record, the misconduct was not so isolated.

Adding these issues to the prior finding of misconduct by the Court of Appeals, and the asset freeze misconduct as argued above, the prosecutors committed multiple instances of severe, pervasive, and significant misconduct. The defendant did not invite the misconduct, and with regards to the asset freeze, the 911 tapes issue, and the diminished capacity inconsistences, there were no curative measures or cautionary instructions given. Thus, now, upon this record, this court should reverse Krogmann's conviction because he was the victim of these pervasive and significant incidents of misconduct.

Exhibit 5 offered to the PCR court demonstrates that Krogmann called 911 after shooting the victim. (Ex. 5 - DVD). Yet, knowing that Krogmann had called 911, and Jeff Krogmann had also called 911 (Ex. 6 - DVD), the prosecutor still said he did not.

IV. KROGMANN'S SENTENCE VIOLATED THE MERGER RULE AND VIOLATES HIS CONSTITUTIONAL RIGHTS TO BE FREE FROM DOUBLE JEOPARDY.

Preservation of Error

Defendant preserved error by filing an application for postconviction relief, (App. 1-12), taking the case to an evidentiary trial, raising the issue at the trial and in briefing, and obtaining a ruling on the issue. (App. 53).

Standard of Review:

Appellate review of a dismissal of an application for postconviction relief is for correction of errors at law. *Harrington v. State*, 659 N.W.2d 509, 519-20 (Iowa 2003). Appellate review of challenges to illegality of a sentence is for errors at law, *Tindell v. State*, 629 N.W.2d 357, 359 (Iowa 2001) and constitutional challenges to an allegedly illegal sentence are reviewed de novo. *State v. Ragland*, 812 N.W.2d 654, 657 (Iowa 2012).

Merits:

The Applicant submitted a legal issue to the trial court regarding the appropriateness of receiving consecutive sentences for the attempted murder and

willful injury. The two offenses should have merged, and the double jeopardy clause of the federal constitution should prevent the consecutive sentences that he received for the two counts. U.S. Const., am. V; Iowa Code §701.9. This is raised as an ineffective assistance of counsel issue on the part of both trial counsel, and appellate counsel for failing to raise it, as well as a challenge to the legality of his sentence, which may be raised at any time. *State v. Halliburton*, 539 N.W.2d 334, 343 (Iowa 1996).

A double jeopardy problem stems from multiplicitous convictions – essentially when a defendant gets convicted of the same crime within two counts. *United States v. Chipps*, 410 F.3d 438, 447 (8th Cir. 2005). "The main difficulty with such an indictment is that the jury can convict the defendant on both counts, subjecting the defendant to two punishments for the same crime in violation of the double-jeopardy clause of the fifth amendment." *Id.* In order to determine if the punishments are truly multiplicitous, the court is to look to the legislature's intent. *Id* at 448. If the "unit of prosecution" (the aspect of criminal activity the legislature intended to punish) is not established clearly and without ambiguity, the courts must resolve any doubt in favor of lenity for the defendant. *Id.*

Several recent cases on double jeopardy have been issued in the past couple of years by the Iowa Supreme Court and Iowa Court of Appeals, and some of these cases demonstrate that Krogmann's consecutive sentences are a violation of double

jeopardy. *See State v. Velez*, 829 N.W.2d 572, 582-83 (Iowa 2013) (setting forth the double jeopardy analysis); *State v. Goins*, 720 N.W.2d 192, 2006 WL 1229990, at *2 (Iowa Ct. App. 2006) (reversing multiple convictions for multiple stab wounds as a violation of double jeopardy).

In addition, the merger rule is found in Iowa Code § 701.9.

> No person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted. If the jury returns a verdict of guilty of more than one offense and such verdict conflicts with this section, the court shall enter judgment of guilty of the greater of the offenses only.

Iowa Code § 701.9. Recently the Iowa Supreme Court set forth detailed analysis of the merger doctrine. *State v. Stewart*, 858 N.W.2d 17 (Iowa 2015). Closely after the filing of *Stewart*, the Iowa Supreme Court issued *State v. Love*, 858 N.W.2d 721 (Iowa 2015).

The main question arising from these cases is whether it was legally possible to have committed the greater crime (attempted murder) without also committing the lesser crime of willful injury. *Stewart*, 858 N.W.2d at 21. And then, if there is a question as to possibility, and if there was not a jury instruction where a jury decided whether the counts should merge, the Court must merge the convictions. *Love*, 858 N.W.2d at 725 . The Applicant submits that in this case it was not possible to have committed attempted murder without also committing willful injury. The same acts which constituted the act of attempted murder (shooting the

victim as an assault) constituted the act of willful injury (shooting the victim as an assault.) Similarly, the same intent needed in attempted murder (intent to kill the victim) was sufficient for the intent for willful injury (intent to seriously injure the victim).

In effect, each count is a type of lesser-included offense of each other. A chart is illustrative of the idea that these are truly lesser-included offenses of each other.

	Intent	**Action**	**Injury**
Attempted murder	Specific intent to kill	Attempt to kill with an assault[1]	Injury may or may not result
Willful injury Causing Serious Injury	Specific intent to cause serious injury	Attempt to seriously injure with an assault	Serious injury results
Lesser included?	Willful injury is lesser included of attempted murder	Willful injury is lesser included of attempted murder	Attempted murder is lesser included of willful injury

Krogmann's jury was not asked, and did not find, that there was a sufficient break in the action, or completed acts, necessary to find Krogmann guilty of both counts, rendering his consecutive sentences, and the lack of merger, a violation of the merger doctrine, and double jeopardy. *See Love*, 858 N.W.2d at 724-25. In addition, the court sentenced Krogmann to consecutive sentences, not because

[1] Assault is a lesser included offense of attempted murder. *State v. Braggs*, 784 N.W.2d 31 (Iowa 2010), *State v. Luckett*, 387 N.W.2d 298 (Iowa 1986), *State v. Powers*, 278 N.W.2d 26 (Iowa 1979).

there were two offenses, or a break in the action, but solely to punish Krogmann. (App. 325-28, 450).

Krogmann's argument on this matter is in direct contravention of *State v. Clarke*, 475 N.W.2d 193 (1991) which held that convictions for attempted murder and willful injury causing serious injury are not a violation of the merger doctrine or double jeopardy. Krogmann submits that *Clarke* case is distinguishable, erroneous, and should be overruled, if it has not already been by *Stewart* and *Love*. Also, *Clarke* predates *State v. Heemstra* by fifteen years. In *Heemstra*, the Iowa Supreme Court reversed prior precedent involving the merger of willful injury with felony murder and held that in some circumstances willful injury would merge with murder. *State v. Heemstra*, 721 N.W.2d 549, 557 (Iowa 2006). Since assault is a lesser included offense of attempted murder, and assault is a lesser included offense of willful injury, and willful injury merges with murder, it is only logical that willful injury merges with attempted murder.

Krogmann's convictions should have merged. When they did not merge, the consecutive sentences violated the merger doctrine, and violated Krogmann's double jeopardy rights. The sentence should be reversed.

CONCLUSION

For the reasons articulated herein, Robert Krogmann asks this court to reverse the Order denying his postconviction application, enter a finding that he has received ineffective assistance of counsel under the federal and state constitutions, that he was subject to prosecutorial misconduct, and that his sentence is illegal. The case should be remanded for a new trial.

REQUEST FOR ORAL ARGUMENT

Counsel for Appellant requests to be heard in oral argument.

COST CERTIFICATE

I hereby certify that the costs of printing this brief was $0.00 because it was filed electronically.

CERTIFICATE OF COMPLIANCE

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

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