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

REPLY BRIEF FOR APPELLANT

Angela Campbell
Counsel of Record for Applicant-Appellant
DICKEY & CAMPBELL LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008
FAX: (515) 288-5010
EMAIL: angela@dickeycampbell.com

PROOF OF SERVICE

On January 17, 2016, I filed this brief electronically through the EDMS system, which will serve the parties:

Martha Trout
Appeal's Division
Attorney General's Office
Hoover Building
Des Moines, Iowa 50319

__/s/ Angela L. Campbell__
Angela Campbell, AT#0009086
Counsel of Record for Applicant-Appellant
DICKEY & CAMPBELL LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008
FAX: (515) 288-5010
EMAIL: gary@dickeycampbell.com

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.

__/s/ Angela L. Campbell__
Angela Campbell, AT#0009086
Counsel of Record for Applicant-Appellant
DICKEY & CAMPBELL LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008
FAX: (515) 288-5010
EMAIL: angela@dickeycampbell.com

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REPLY STATEMENT OF FACTS

The State misstated the facts of the case in several material ways throughout its brief.

The State claimed eight times in its brief that Krogmann did not call 911 or call for help. (State's Br. p. 11, 12, 13, 58). This is patently untrue, and it was untrue at the time the prosecutor said it at trial. The State currently knows it is untrue, just as the prosecutor knew it was untrue at the time of trial. At the postconviction trial Krogmann offered the recording of his 911 call to show that he tried to get help for Jean Smith and that it was prosecutorial misconduct and ineffective assistance of counsel not to offer this recording into evidence at the criminal trial. (Exhibit 5 – DVD of 911 call). Bernau, the county attorney who prosecuted Krogmann, testified that at the time of the criminal trial he knew Krogmann had called 911 and that he had the recording of the call at the time the State suggested at the criminal trial that Krogmann had not called 911. (App. 112, l. 4 – App. 115, l. 12). The State continues to try to rely on a "fact" that it knows is false to try to support its arguments.

The State claims that "the asset freeze had little effect on the defense." (State's Br. p. 26). This misstates the overwhelming evidence presented at the postconviction trial. Krogmann testified that at the time he was arrested he had a

net worth of "roughly 4 million." (App. 74, l. 5). He testified that had he had access to his assets, he would have:

(1) posted bail (App. 74, l. 6-8);

(2) interviewed several lawyers across the nation to determine which ones he wanted to hire, and hired additional counsel (App. 74, l. 14 – 23; App. 77, l. 1-4; App. 79, l. 8-12);

(3) hired a civil lawyer to represent him in the lawsuit the victim had filed against him, and to protect his interests in the civil case, including challenging the asset freeze (App. 76, l. 12-13; App. 87, l. 18-23);

(4) done "whatever it takes" to get the best defense team, "no matter what it would have cost" (App. 77, l. 9-12);

(5) put more money on his own books at the jail for phone calls because he spent periods of time without an ability to make phone calls App. 77, l. 23 – App. 78, l. 14);

(6) called his lawyer more often (PCR Tr. p. 54, l. 2-4);

(7) visited his lawyer in person more often (App. 79, l. 5-7);

(8) been able to meet with people in person and not have his phone calls and letters recorded and copied, and then used against him at trial and sentencing (App. 83, l. 4-9);

(9) hired a jury consultant and followed their advice during jury selection (App. 83, l. 10 – App. 84, l. 22; App. 88, l. 20 – App. 90, l. 10);

(10) utilized multiple experts to support his mental health defense (App. 88, l. 11-19);

(11) sought out mental health treatment immediately, and gotten a mental health evaluation immediately, rather than six months after he was arrested (App. 92, l. 3 – App. 94, l. 6).

In addition, Marygrace Shaeffer, the jury consultant, testified that the entire voir dire and jury selection process would have been different had Krogmann been allowed to hire a jury consultant with his unfrozen assets. Specifically, she testified that she would have aided defense counsel in understanding that they should object to the process of seating 15 jurors like they did in Krogmann's trial, rather than seating 12 plus 3 alternates because "There is a great disadvantage strategically in not knowing who your 12 seated jurors are." App. 63, l. 25 – App. 64, l. 2). Not doing so, in her expert opinion, "hurt Mr. Krogmann." (App. 65, l. 5). Ms. Shaeffer also testified that trial counsel's voir dire was ineffective because it did not give the jurors the ability to talk which, according to scientific research, is not an effective way to choose jurors. (App. 66, l. 19 – App. 69, l. 24.) She noticed that Krogmann's jury selection process was "very unusual" because defense counsel did not use any for cause strikes, and that it disadvantaged Krogmann to

not use those strikes. (App. 70, l. 20 – App. 71, l. 10). Overall, not having a jury consultant, in Shaeffer's opinion, resulted in Krogmann not receiving adequate jury selection assistance. (App. 71, l. 14-15). She testified that "with reasonable certainty" there would have been a different makeup of the jury with different jurors on the jury if Krogmann had been allowed to use a jury consultant. (App. 72, l. 3-10).

Thus, the State is completely inaccurate when it claims the asset freeze had "little effect" on Krogmann's defense. It impacted every aspect of the defense, from which lawyer was hired, how many lawyers were hired, which experts were hired, how many experts were hired, and which jury was selected.

The State also stated that "the asset freeze did not stop either attorney from actively working on the case." (State's Br. p. 30). However, the evidence shows that these attorney would not have worked on the case at all had there not been an asset freeze because Krogmann would have hired someone else. (App. 74, l. 14 – 23; App. 77, l. 1-4; App. 79, l. 8-12). Krogmann "desperately wanted to hire a different lawyer" but felt that he couldn't get a new lawyer paid and he "didn't even know if they would let" him have a different attorney. (PCR Tr. p. 60, l. 21 – p. 61, l. 4). Instead, Krogmann had to pay for attorneys he did not even want to do things like file a motion for bond review for a bond he could have afforded without the asset freeze, prepare affidavits to get his own money to turn around and pay the

lawyer with that money to prepare more affidavits to get more money, and he paid lawyers to communicate with the conservatorship attorneys, rather than prepare for his criminal trial. (App. 48).

In addition, Krogmann's requests to pay his criminal defense trial attorney sometimes were not granted until after significant delays. (App. 49; Ap. 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; App. 482). In Krogmann's opinion, this impacted his lawyers because they would not work as effectively as they could because they did not know if they were ever going to get paid for their work. (PCR Tr. p. 70, l. 12-17). Thus it is simply not true that the defense lawyers were not impacted by the asset freeze.

The State mentioned that there was a "restitution lien" filed "pursuant to Iowa Code section 910.10" on Krogmann's property, as if this lien somehow rectified the separate asset freeze that the State also filed. (State's Br. p. 8). The State failed to mention, however, that the Iowa Supreme Court specifically noted in its opinion that, "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." *State v. Krogmann*, 804 N.W.2d 518, 524 (Iowa 2011). Thus, the State's actions were not "pursuant to" section 910.10, the restitution lien did nothing to salvage the legality of the asset freeze, and the

State's actions went well beyond the statutory authority of section 910.10. The restitution lien did nothing to make the asset freeze legal, and indeed section 910.10's provisions appear to be the exclusive remedy the State could have pursued as the Supreme Court noted because there is nothing in the law that permits the asset freeze. *Krogmann*, 804 N.W.2d at 524, n. 5.

Also, if the real motivating factor in obtaining the asset freeze was to secure assets for restitution under section 910.10, as the State now claims, then the $ 4 million asset freeze would have been released after the $50,000 in restitution was ordered and paid. It was not released. (App. 80, l. 15 – p. 56, l. 3). Indeed, the asset freeze actually delayed the payment of additional money to the victim because the civil settlement could not be paid until after the asset freeze was lifted. (App. 81, l. 7-23). And, 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). All of these facts combined show that the State is mistaken in asserting that its conduct in freezing Krogmann's assets was somehow rendered legal by the fact that it also filed for a restitution lien.

The State mentioned in its brief that the Iowa Supreme Court found that the prosecutor's question, "shot anyone today" was "not misconduct." (State's Br. p. 9). This misstates the Iowa Supreme Court's opinion. In fact, the Court held that

the question was indeed misconduct, specifically calling it an "isolated incident of misconduct." *Krogmann*, 804 N.W.2d at 526-27. The Court held that this misconduct was not enough alone to warrant reversal of Krogmann's conviction at that point in time. *Id.* Indeed this postconvition action demonstrates that this misconduct by the prosecutor was not, in fact, isolated, and combined with other instances of misconduct, warrants reversal of Krogmann's conviction.

The State's facts should not be relied upon as the State does not accurately set forth the facts of this case.

REPLY ARGUMENT

I. THE STATE MISTAKELY RELIES ON TEXAS PRECEDENT AND CONFUSES AN INDIGENT DEFENDANT'S RIGHTS TO STATE MONEY FOR DEFENSE IN TEXAS WITH A NONINDIGENT DEFENDANT'S RIGHTS TO HIS OWN MONEY TO PAY FOR HIS DEFENSE IN IOWA.

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 postconviction court, as well as the Iowa Supreme Court, have both recognized that the asset freeze was illegal. Yet the State, citing *Busby v. State*, 990 S.W.2d 263, 271 (Tex. Crim. App. 1999) argued that Krogmann's inability to access his own money to prepare for his own defense essentially "wasn't that bad" because doing things like hiring a jury consultant are not "basic tools" for a defendant. But, *Busby* did not hold that a criminal defendant could not

hire a jury consultant – *Busby* held in 1999, in Texas, that an indigent criminal defendant did not have the right to a court-appointed jury consultant.

The State's reliance on *Busby* is misplaced three-fold. First, Iowa is not Texas and the Iowa Constitution is not the Texas Constitution. Iowa prides itself on being at the forefront of civil liberties, while Texas prides itself on being at the forefront in executions. *Compare State v. Short*, 851 N.W.2d 474, 506, Cady, J. concurring (Iowa 2014) ("As Iowans, we are deservingly proud of a long history of rejecting incursions upon the liberty of Iowans, particularly because we have so often arrived to the just result well ahead of the national curve") *with* "Texas Death Penalty Facts," available at *http://tcadp.org/get-informed/texas-death-penalty-facts/* (last accessed 1/5/16) ("Harris County [Texas] alone accounts for 124 executions, more than any state except Texas"). This Court should never parrot a Texas court on a question of the rights of a criminal defendant as civil liberties in Texas are simply not the same as civil liberties in Iowa.[1]

[1] *Compare Mezratian v. State*, 961 S.W.2d 353 (Ct. App. Texas 1997) (Not ineffective assistance when attorney (1) had a suspended license during the trial, (2) who admitted to consuming multiple beers during lunch breaks in the jury trial, and (3) when defendant was not present during counsel's discussions with the judge about his drinking) *with State v. Morris*, 801 N.W.2d 33 (Iowa Ct. App. 2011) (Affirming trial court's order of new trial after it was discovered that defense counsel had been drinking the night before trial and defendant was excluded from discussions about the alcohol consumption). *Compare also,* Texas Constitution, Art. 1, § 32 "Marriage in this state shall consist only of the union of one man and one woman" *with Varnum v. Brien*, 763 N.W.2d 862, 906-07 (Iowa 2009) (Iowa Constitution prohibits defining marriage as between one man and one woman).

Second, the Texas opinion in *Busby* was decided in 1999, before much of the current body of scientific research on juror bias was complete. (App. 172-187). This research was all noted by Schaeffer as being directly relevant to Krogmann's trial. (App. 172-187). And even back in 1999 in Texas, the Texas courts recognized that "a jury-selection expert's assistance would no doubt be helpful in nearly every case…" *Busby*, 990 S.W.2d at 271.

Finally, the indigent defendant in *Busby* was appealing the denial of his request for the court to appoint him a jury consultant, not a request to use his own money to hire a jury consultant for work done on his criminal case both in and out of court. *Busby*, 990 S.W.2d at 271. This question of court-paid third party experts was the backdrop of *Busby's* quote that a jury consultant is not a "basic tool of the defense" and that it is a "luxury, not a necessity." *Id*.

The State's reliance on *MacEwan v. State*, 701 So.2d 66 (Ala. 1997) was similarly misplaced. In *MacEwan*, the Alabama court was also reviewing a denial of a court-appointed jury consultant for an indigent defendant. *Id.* at 70. Notably *MacEwan* did not hold that a defendant never could get a court-appointed jury consultant, only that this particular defendant had not made a sufficient showing to support reversing the ruling denying him one. *Id.*

Compare also Belle Mansfield, first woman admitted to a bar in the United States, admitted in Iowa in 1869, with Edith Locke, first woman admitted to the Texas bar 32 years later in 1902. Karen B. Morello, *The Invisible Bar: The Woman Lawyer in America 1638 to the Present* (New York: Random House, 1986).

Krogmann, unlike *Busby* and *MacEwan*, did not ask for the court to appoint him a jury consultant, he simply asked for permission to use his own money that had been illegally frozen by the state to hire one himself. Krogmann was in an even tougher position than *Busby* and *MacEwan*. He was not indigent, so he had to find his own lawyer, pay for his own experts, and pay for his own bills, but he could not use his own money to do so. Krogmann also did not have the resources or skill of the State Public Defender's Office at his disposal. Thus, Krogmann's case is more like *United States v. Stein*, 435 F.Supp.2d 330 (SDNY 2006) than it is *Busby* or *MacEwan*.

In *Stein* the defendants challenged the actions of the New York U.S. Attorney's office actions in pressuring the defendants' employers to cut off funding for the defendants' criminal defense costs, despite contractual requirements for the employer to pay for the defense. *Stein*, 435 F.Supp.2d at 336. The *Stein* court found that the United States Attorney was violating the defendants' constitutional right to a fair trial because,

> A defendant with the financial means has the right to hire the best lawyers money can buy. A poor defendant is guaranteed competent counsel at government expense. This is at the heart of the Sixth Amendment.

Stein, 435 F. Supp. 2d at 335. The *Stein* court, citing the United States Supreme Court, most aptly explained,

> A defendant's right to control the manner and substance of the defense has several aspects. The defendant has the right to represent him—or herself, even if such a decision objectively may appear to be unwise. A defendant is guaranteed also "the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire"—in other words, to use his or her own assets to defend the case, free of government regulation. Nor may the government interfere at will with a defendant's choice of counsel, as the Constitution "protect[s] ... the defendant's free choice independent of concern for the objective fairness of the proceedings." Similarly, a defendant is generally free, within the procedural constraints that govern trials generally, to adduce evidence without unjustified restrictions and may choose which witnesses to present or cross-examine. In short, fairness in criminal proceedings requires that the defendant be firmly in the driver's seat, and that the prosecution not be a backseat driver.
>
> The constitutional requirement of fairness in criminal proceedings not only prevents the prosecution from interfering actively with the defense, but also from passively hampering the defendant's efforts. As the Court put it in *California v. Trombetta*,
>
> > "Under the Due Process Clause ..., criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that right, the Court has developed what might loosely be called the area of constitutionally guaranteed access to evidence. Taken together, this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system."

Stein, 435 F. Supp. 2d at 357-58; *citing Faretta v. California*, 422 U.S. 806, 820-21 (1975); *California v. Trombetta*, 467 U.S. 479 (1984); and *Caplin & Drysdale,*

Chartered v. United States, 491 U.S. 617, 624 (1989) (remaining citations omitted.)

Krogmann was denied this most fundamental right to due process, and denied his right to counsel, both under the Fifth and Sixth Amendment to the United States Constitution and article I, sections 9 and 10 of the Iowa Constitution. Every move he made was scrutinized and controlled by the prosecution. The prosecution was not just a "back-seat driver" as *Stein* condemned, but was in fact the one in control of whether or not there was gas in the tank. Without governmental approval, Krogmann could not do anything to defend himself – he could not hire the lawyers of his choice, he could not make phone calls as he pleased, he could not get the mental health assessment in a timely fashion, he could not hire the experts he needed, he could not hire a jury consultant to help him select a jury that would be sympathetic to a mental health defense, he could not hire a lawyer to represent himself in a related civil case, and he couldn't bond himself out of jail. The State tried to, and succeeded in, controlling everything Krogmann did, said, and spent money on.

This is not Texas. This is Iowa. And in Iowa our criminal defendants should have the right to use their own money to hire their own lawyers when they are on trial for their lives. Both the United States Constitution and the Iowa

Constitution demand it. Krogmann deserves a new trial free from the perverseness that infected his first one.

II. THE STATE IS CONFUSED WHEN IT CLAIMS THAT KROGMANN DID NOT PROPERLY RAISE THE QUESTION THAT THE ASSET FREEZE WAS ILLEGAL.

Asset freezes are not allowed to be used to freeze a defendant's assets so that he cannot choose the course of his defense–indeed this exact type of asset freeze was disallowed in *State ex rel Pillers v. Maniccia*, 343 N.W.2d 834 (Iowa 1984). The postconviction 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).

The Iowa Supreme Court also 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.

The State itself asserted at the postconviction level that the asset freeze was not illegal, stating specifically, "The asset freeze in this case, while unusual, was not illegal." (Attachment to Joint Request to Modify the Record, p. 1). In so doing, the State claimed Iowa Rules of Civil Procedure 1.1501-1.1511 allowed 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. (Attachment to Joint Request to Modify the Record, p. 1-2). After the trial, again the State argued, "The asset freeze was proper within the state's injunctive powers." (Attachment to Joint Request to Modify the Record, p. 45). Not once did the State argue to the trial court that the asset freeze's legality should not be decided by the trial judge – indeed the State's counsel at the trial level seemed to understand that to evaluate the ineffective assistance of counsel and prosecutorial misconduct claims, the trial court must evaluate the asset freeze's illegality. Thus, the State never raised a claim that Krogmann improperly raised the illegality of the asset freeze in the postconviction trial and so such an argument has been waived. *DeVoss v. State*, 648 N.W.2d 56, 63 (Iowa 2002) (binding State to error preservation rule).

Yet, now, despite all of the foregoing, the State argues that Krogmann's "challenges to the legality of the asset freeze … cannot be properly brought in this appeal because they were not properly raised either on direct appeal or as a claim of ineffective assistance of counsel." (State's Br. p. 17-18). The State either completely misunderstands the nature of Krogmann's claims, or misunderstands the process by which an applicant must prove ineffective assistance of counsel and prosecutorial misconduct. The State also ignores Krogmann's proof brief which accurately stated, "The asset freeze was submitted to the trial court as both an ineffective assistance of counsel issue, and a prosecutorial misconduct issue," (Def's Proof Br., p. 15), and it ignores the postconviction court that evaluated it in that way. (App. 47 - 53).

In order to prove ineffective assistance of counsel for failing to properly resist the asset freeze, to prove ineffective assistance of counsel for failing to raise the various forms of prosecutorial misconduct within the asset freeze, and to prove actual prosecutorial misconduct, Krogmann must first demonstrate that the asset freeze was actually illegal. If the asset freeze was not illegal, there could be no ineffective assistance by defense counsel in not challenging it, and there could be no prosecutorial misconduct for getting the asset freeze in the first place. Krogmann specifically set out in his briefing to the trial court, "The asset freeze is submitted as both an ineffective assistance of counsel issue, and a prosecutorial

misconduct issue." (App. 16, 24), just as he did to the appellate courts in the proof brief. Counsel then went on to explain how the asset freeze was illegal, why it was prosecutorial misconduct, and why it was ineffective assistance of counsel not to properly object to the asset freeze itself, as well as the prosecutor's action in securing the asset freeze. (App. 16-18, 34-40).

The State is simply wrong in now trying to somehow claim this Court cannot not review whether the asset freeze was illegal. The Court must evaluate the illegality of the asset freeze in order to determine if there was ineffective assistance of counsel and prosecutorial misconduct in the handling of the asset freeze.

And, the asset freeze was, in fact, illegal. Entering it into Krogmann's case was 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. This question on the federal level will likely be answered even more definitively by the United States Supreme Court in *Luis v. United States*, No. 14-419, argued November 10, 2015, pending opinion. *See* SCOTUS blog, available at http://www.scotusblog.com/2015/11/argument-analysis-looking-for-limits-on-frozen-assets/, last accessed 1/5/16. Despite this outcome, this Court should hold that Iowa prosecutors cannot freeze defendants' assets so as to control the outcome of a trial, only to release the assets only after

the appeal is over. Such behavior is appalling and violates the very essence of the Iowa Constitution which "embraces the notion of 'inalienable rights', not rights that shrink and disappear based upon currently fashionable transient pragmatic assessments." *State v. Young*, 863 N.W.2d 249, 278 (Iowa 2015). Krogmann deserves a fair trial where he is free to spend his money to defend himself as he pleases.

III. THE STATE'S CONCESSION THAT KROGMANN'S NEW EXPERT PROVIDED A STRONGER OPINION ON HIS MENTAL ILLNESS DEMONSTRATES PREJUDICE IN THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS.

The State conceded in its brief that "Krogmann found one expert who had a slightly stronger opinion on how mental illness affected him…" (State's Br. p. 40). This essentially confesses prejudice. Krogmann's only defense at trial was a mental health defense. A stronger witness on the only issue at trial could have affected the outcome of the jury verdict.

The defense's expert, Dr. Gallagher, testified only that 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). Dr. Jerome Greenfield, however, 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, p. 5).

Clearly, if a defense lawyer had the choice between an expert who would say it was "possible" that Krogmann's mental illness affected his ability to form intent and one who would say it "did," the better choice is the stronger witness. As such, it was ineffective assistance of counsel for trial counsel not to obtain additional expert witnesses for Krogmann's case.

As with every issue in this case, the pretrial asset freeze impacted Krogmann's ability to seek additional experts himself, or to seek counsel that would pursue the best possible defense for him. But, it is clear that Krogmann wanted, and needed, more and better experts. As such, the blame must rest on trial counsel for not pursuing additional experts, not properly objecting to denial of funds for experts, and not properly preserving objections to the asset freeze. Thus, not only is the mental health expert issue an independent ground of ineffective counsel, it also shows additional prejudice from the asset freeze.

These errors, individually and collectively, when compounded with the other errors prevalent throughout the trial, render Krogmann's conviction in violation of the Fifth and Sixth Amendment and article I, sections 9 and 10 of the Iowa Constitution.

IV. THE STATE IS INCORRECT IN ASSERTING THAT PROSECUTORIAL MISCONDUCT WAS NOT PROPERLY RAISED IN THE POSTCONVICTION APPLICATION AND THE STATE HAS WAIVED ANY OBJECTION TO PRESERVATION OF THE ISSUE.

The State argued that Krogmann has not properly preserved error during the postconviction proceedings to challenge prosecutorial misconduct. (State's Br. p. 46-48). But, indeed, Krogmann did do exactly what the State now claims he did not do – he claimed that counsel was ineffective for failing to object to the prosecutorial misconduct. (App. 2-4, ¶ 4, 5, 6, 12, 13; App. 37). So to the extent Krogmann must detail in his application that his trial counsel was at fault for failing to object to the prosecutor's actions at the time of the criminal trial, he did, in fact do so, satisfying Iowa Code § 822.8.

The analysis of a due process violation for prosecutorial misconduct starts with an analysis of whether there was, in fact, a due process violation for the prosecutorial misconduct. *State v. Graves*, 668 N.W.2d 860, 869-70 (Iowa 2003). If so, then the court is to determine if there was ineffective assistance of counsel for failing to object to the due process violation. *Id.* But, indeed, the exercise is somewhat superfluous. If the prosecutorial misconduct resulted in a due process violation with prejudice, then it must be that trial counsel was ineffective, with prejudice, for failing to object to it. If there was not prosecutorial misconduct with prejudice, then it would similarly be that trial counsel would not be ineffective for failing to object to a meritless issue. As such, the vast majority of the inquiry

about misconduct rests upon whether or not the prosecutor committed the alleged misconduct which resulted in prejudice to the defendant.

Krogmann also did specifically raise one of his claims of prosecutorial misconduct on direct appeal, and 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." *Id.* As now shown by this record, the misconduct was not so isolated, but instead was pervasive.

Perhaps most fatal to the State's argument that prosecutorial misconduct was not properly preserved is the fact that the State also did not raise this argument at the trial level. Specifically, the State did not raise any sort of claim that Krogmann defaulted his claims in the postconviction court. (Attachment to Joint Application to Modify the Record, p. 9-13; 33-35). As such, the State's objection is untimely, and has been waived. *DeVoss*, 648 N.W.2d at 63. As the Court stated in *DeVoss*,

> Unquestionably, the State could have urged in the district court Devoss's failure to raise [her claims]. The State's failure to do so waives Devoss's failure to comply with section 822.8, allowing us to proceed to the merits of DeVoss's postconviction relief claims.

Id. The *DeVoss* court went on to review the prosecutorial misconduct claims raised by the applicant. *Id.* at 63-65.

For all of these reasons, all of Krogmann's arguments should be considered on their merits by this Court, and Krogmann should get a new trial.

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.

COST CERTIFICATE

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

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/s/ Angela L. Campbell __
Angela Campbell, AT#0009086
Counsel of Record for Applicant-Appellant
DICKEY & CAMPBELL LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008
FAX: (515) 288-5010
EMAIL: angela@dickeycampbell.com