IN THE SUPREME COURT OF IOWA

No. 16-1650

DAVID M. POWERS

Applicant-Appellant,

vs.

STATE OF IOWA

Resister-Appellee

APPEAL FROM THE BLACK HAWK COUNTY DISTRICT COURT

THE HONORABLE GEORGE L. STIGLER

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

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/s/ Kent A. Simmons

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutions, Statute, Rules

STATEMENT OF ISSUES FOR REVIEW

I.

Whether the district court abused discretion in quashing a subpoena to produce police reports from an investigation that would provide evidence as to whether Applicant's granddaughter made false allegations of sexual abuse against other persons.

Wells Dairy Inc. v. American Refrigeration, 690 N.W. 2d 38, 4 (Iowa 2004)

Exotica Botanicals v. Terra Inc., 612 N.W. 2d 801, 804 (Iowa 2000)

State v. Tyler, 867 N.W. 2d 136, 152 (Iowa 2015)

State v. Neiderbach, 837 N.W. 2d 180 (Iowa 2013)

Rule 1.1701 (1)(c), Ia. R. Civ P.

Rule 1.1701(4), Ia. R. Civ P

Rule 1.1701 (5), Ia. R. Civ P

Section 22.7(5), the Code

II.

Whether the judge abused discretion in overruling Applicant's Motion for Ruling on Admissibility of Evidence because he denied Applicant discovery to develop the evidence, and he reached his conclusions on unreasonable and untenable grounds

State v. Tyler, 867 N.W. 2d 136, 152 (Iowa 2015)

State v. Neiderbach, 837 N.W. 2d 180 (Iowa 2013)

Iowa Constitution at Article I, Section 9

United States Constitution, Amendment Fourteen

War Eagle Village Apartments v. Plummer, 775 N.W. 2d 714 (Iowa 2009)

Owens v. Brownlie, 610 NW 2d 860 (Iowa 2000)

Holm v. District Court for Jones Co., 767 N.W. 2d 409 (Iowa 2009)

Tun v. Gonzales, 485 F.3d 1014 (8th Cir. 2007)

C Line, Inc. v. Malin and City of Davenport,
2011 WL 6058580 (S.Ct. No. 10-1600)

ROUTING STATEMENT

The Supreme Court should retain this appeal because it involves issues germane to a postconviction applicant's ability to obtain evidence to show a wrongful conviction, and the uniform and proper administration of postconviction proceedings will be greatly impacted by a definitive ruling.

STATEMENT OF THE CASE

NATURE OF THE CASE: This is an interlocutory appeal that was granted after the Honorable George L. Stigler quashed Applicant's subpoena *duces tecum* seeking police reports, refused to release the reports to Applicant,

and then used the content of those reports to rule against Applicant's motion regarding admissibility of evidence to prove a postconviction claim.

PROCEEDINGS: The current issues in this appeal arose out of a subpoena Applicant David Powers served on the original complaining witness. His defense in the underlying criminal prosecution for Sexual Abuse had always maintained that his granddaughter, K.P., had made false accusations against him.

To prove the foregoing claim, Applicant subpoenaed K.P. to appear to testify at the hearing on the merits scheduled for June 22, 2016. Applicant had also subpoenaed a police witness to bring reports to the PCR trial to prove K.P.'s false accusation against criminal street gang members. (Return of Service, Tyler, 6/10/16) On June 13, 2016, the Public Defender filed a Motion to Quash on behalf of K.P. The only reason for avoidance of appearance stated in the motion was that K.P. was scheduled to be on a family vacation on the date of the court appearance. On that basis, counsel for Mr. Powers agreed to reschedule the PCR trial.

(Motion to Quash, 6/13/16; Motion for Ruling on Admissibility of Evidence and in Response to Motion to Quash, 7/12/16; App. 39-44) At the time she was served with the PCR subpoena, K.P. was 20 years old, and it is not clear why the Public Defender's juvenile division was representing her without being appointed.

After Applicant agreed to the continuance of the PCR trial, the Court cancelled the trial and ordered a trial setting conference. In the same order, however, the Court set K.P.'s Motion to Quash for a one-hour hearing on July 25, 2016. (Order, 6/14/16; App 40). In his Motion for Ruling on Admissibility of Evidence and in Response to Motion to Quash, Mr. Powers pointed out that K.P.'s motion had only asked for leave to be excused from the June 22 trial, and because that date was continued, her Motion to Quash was moot. The Motion for Admissibility then set out the facts averring that K.P. had made a false complaint of sexual abuse against members of a criminal street gang in March of 2011. These facts had all been set out in Applicant's First Amendment to Application for PCR that had been allowed by the trial court's order of October 31, 2014. (App.

18-20) Officers of the Waterloo Police Department (WPD) had determined K.P.'s allegations against the gang members were false. The false complaint and police investigation occurred between the time of the verdict and sentencing in the criminal prosecution against Mr. Powers. Counsel for Mr. Powers was ineffective in failing to pursue that evidence of K.P.'s false complaint of sexual abuse in litigation on a Motion for New Trial. (Motion for Admissibility; App. 39-41)

The attorney for K.P. then filed an amended motion to quash, claiming "the testimony is irrelevant and should be excluded as a subsequent act unrelated to the events of the David Powers criminal trial." (Amended Motion, 7/14/16, p.1; App. 42-44) With his Resistance to Amended Motion to Quash, Mr. Powers again pointed out there was no subpoena pending for K.P. because a new trial date had not yet been scheduled. (Resistance, p.1; App. 47) On the same date that resistance was filed, a deputy sheriff served Applicant's Subpoena Duces Tecum upon the WPD Chief of Police, Dan Trelka. The subpoena directed the Chief or his designee to bring all reports "connected to a complaint of

sexual abuse [K.P.] first made in , or about, March, 2011, that was determined by an officer or officers of the Waterloo Police Department to be false." (Subpoena and Return, attached to Motion for Filing of Documents, 7/25/16; App. 58-60) The Waterloo City Attorney then moved to quash the Subpoena Duces Tecum, claiming "the items requested are wholly unrelated to the underlying sexual abuse case." The City Attorney also joined "in the Motion to Quash Subpoena (Amended)" filed by the Public Defender for K.P. (Motion, 7/20/16; App. 52).

In resistance to the City's Motion to Quash and the Public Defender's amended Motion to Quash, Mr. Powers pointed out that neither K.P., nor the City were a party to Applicant's postconviction action and neither party had standing to object to the relevance of the discovery request or Applicant's Motion for Ruling on Admissibility of Evidence. (Resistance, 7/23/16; App 53-54). The State never filed a resistance to the Motion for Admissibility. At the hearing on the motions, the City Attorney and the attorney for K.P. advanced the arguments as to why the subpoenaed police reports should not be turned over to Applicant and why K.P. should not be

called as a witness at the PCR trial in regard to the police investigation of her false complaint. Additionally, the City Attorney requested Judge Stigler examine the reports "in-camera" before deciding whether to release them to Applicant. The assistant county attorney who attended the motion hearing simply agreed with the arguments the City Attorney and Public Defender made. (Hrg. Tr., 7/25/16, pp. 4-8; L. 13-12)

At the same hearing, Applicant presented the testimony of Philip Powers. He is the father of K.P. and the son of Applicant. Philip testified that after his father was found guilty in the jury trial, K.P. ran away from home. Philip identified Motion Exhibit "1", a copy of a Facebook post from March 10, 2011. The post stated K.P. had been found. She was safe, and Philip had been required to take her to a youth shelter. He testified that within a few days of her placement at the shelter, Philip was summoned to the WPD. The police were beginning an investigation. "[K.P.] had made accusations that she had been abused sexually or raped or something along these lines by some gang members that she was staying around when she was on the run." (Hrg. Tr., 7/25/16, pp. 10-13, L. 19-17).

The police told Philip they were going to interview some people that K.P. was on the run with, and then get back to him. After police conducted the interviews, a detective again met with Philip and told him "the stories weren't matching up." The detective believed K.P. had made a false complaint, and the WPD was not going forward with it. (Hrg. Tr., 7/25/16, pp. 13-15, L. 24-8) After the attorneys each briefly cross-examined Philip, Judge Stigler then conducted a lengthy cross-examination of his own with the Applicant's witness. (Hrg. Tr., 7/25/16, pp. 20-23, L. 11-15)

At the conclusion of the hearing, Judge Stigler told the City Attorney he needed two things. First, he wanted the reports, "any and all that exist." Then, the judge told the City Attorney this:

> Second, I'd like you to get a photo, if you can, and specific information about [Detective] Chopard, because my recollection of his appearance, from having testified any number of occasions, is different than Mr. Powers' recollection of the person that he talked to. And if Chopard was the person that he talked to and he's been misidentified, I would think that would have some

relevance to this.

So, if I could get just a generic description of Chopard, how tall he is, the color of his hair, weight, so on and so forth, generic appearance. Okay. Can you do that, say in two or three days?

[City Attorney]: Yes.

The Court: Okay. Great.

[City Attorney]: Your honor, there are videos that were taken of some of these interviews with [K.P.] and the police.

The Court: Okay. I would like to have one of Chopard, not so much for the contents of the interview so much as his appearance and what have you.

[City Attorney]: Sure.

The Court: Okay. Great. Thank you, all.

(Hrg. Tr. 7/25/16, p. 26, L. 4-25)

This second request pertained to the judge's previous cross-examination of Philip. In that cross-examination, the judge was pressing Philip for details as to a physical description of the police officer

who told him that he believed K.P. had made a false complaint. At the conclusion of that inquiry, the attorney for K.P. had volunteered information to the judge stating the name of the police officer in question as “Chopard”. The attorney knew that because she had a copy of the police reports in that investigation. The attorney for K.P. had her own copy of the police reports Applicant had subpoenaed. (Hrg. Tr., 7/25/16, pp. 22-23, L. 7-5)

The City Attorney did provide the police reports to Judge Stigler. In the order that followed the motion hearing, the judge described ten police reports he had received, identifying them by author, date and number of pages. That itemization noted Chopard authored seven reports and a second police officer named Naumann had authored two reports. Judge Stigler identified an undated document as “Statement of K.P.” In addition, the judge noted: “DVDs were made of the various interviews, however, due to the passage of time, those DVDs are no longer available.” (Order, 8/3/16, p.2; App. 65) The judge went on in the order to make specific factual findings from the police reports that he would not allow the Applicant to have. (Order 8/3/16, pp. 2-3; App. 65-67) On the same day as the

motion hearing, Mr. Powers had filed his Motion for Filing of Documents. Applicant had requested Judge Stigler provide to Applicant the reports that the City Attorney was providing to him. In the motion, Mr. Powers stated:

> The Motion to Quash the City filed is based upon relevance. The Applicant will have to examine the documents regardless of how the Court rules, in order to preserve any error in the ruling, and to determine whether it appears the City has produced all documents requested in subpoena item No. 2. No ground of confidentiality has been advanced on the basis of any rule or statute. If the Court determines the documents should remain confidential, they can be ordered sealed, but nonetheless provided to Applicant's counsel. (Motion, pp. 1-2; App. 59-60)

In the Order that followed nine days later, the judge made no reference to Applicant's Motion for Filing Documents. After making his

findings from the withheld reports, the judge then initiated his own further investigation. He set a second hearing "to allow reception of evidence from" two police officers. (Order, 8/3/16, p. 4; App. 67) None of the parties who had been litigating the motions requested testimony from the two police officers, and none of the parties had requested any further hearing of any kind. After hearing testimony from Officer Chopard in the second hearing, Judge Stigler ruled from the bench:

> And lastly the exclusion of evidence I find that none of this relating to the events that related to the gang situation has anything at all to do with the situation involving the criminal case against Mr. Powers, and thus the evidence relating to the gang situation will be excluded from hearing in the post-conviction relief application. So all of the other bases for the PCR advance, but this one area will be foreclosed from consideration further. (Hrg. Tr., 8/31/16, p. 34, L. 4-12)

Counsel for Applicant then asked for clarification on two points. The judge verified that he would not be providing copies of the police reports to the Applicant, and he would issue a written ruling on the motions and withholding of reports. (Hrg. Tr. 34-35, L. 18-2). Judge Stigler never did file a written ruling. On September 22, 2016, Applicant requested the written order on the August 31 rulings. Applicant filed the Application for Interlocutory Appeal in this Court on September 30, 2016, and the Court granted that Application on October 26, 2016.

Statement of the Facts

In the course of Judge Stigler's cross-examination of Philip Powers in the first motion hearing, the judge changed the question of whether there was evidence K.P. had made a false complaint of sexual abuse against gang members. The question was no longer whether there was evidence of a false complaint, but whether a police officer "told" Philip the officer thought it was false. In the cross-examination, the judge decided to question Philip's credibility on conversations Philip had over five years

before the hearing. He pressed Philip on details of Detective Chopard's physical appearance. At the end of his cross-examination, the judge told Philip:

> Well Chopard has testified in court a number of times and we'll certainly get a better description of him for the record, but your statement of him may be at odds with what his appearance really is.
>
> (Hrg. Tr. 7/25/16, p. 23, L. 9-12)

After conducting his cross-examination, the judge then asked the City Attorney to get him a photograph and a general description of Chopard. He also asked for any available video of interviews conducted by Chopard, "not so much for content of the interview so much as his appearance and what have you." The judge was more interested in what Chopard looked like, as opposed to the verbal and substantive content of the investigation.

(Hrg. Tr. 7/25/16, p. 26, L. 4-25) Sometime after the first hearing, the judge decided it would be best to bring Chopard into court.

> The court hereby sets continuation of hearing for August 31, 2016, at 2:30 p.m. to allow reception of evidence from Waterloo police officers Chopard and Naumann as to whether either made a statement to K.P.'s father that they believe K.P.'s claim of sexual assault to be false.
>
> (Order, 8/3/16, p. 4; App. 67)

At the beginning of the second motion hearing, the prosecutor informed the judge that Officer Naumann had retired from the WPD and left the State. Judge Stigler then made his investigative intent clear:

> The Court: Okay. Why don't we hear from investigator Chopard. I am not interested in the investigation that he carried out. The only thing I'm really interested in is whether he made a statement along the lines as to what the father said last time being attributed to the police. Come on up. (Hrg. Tr., 8/31/16, pp. 3-4, L. 24-11)

Applicant counsel's cross-examination did not focus on what Detective Chopard had specifically said to Philip over five years before he testified. Instead, the Applicant's cross was directed toward what the detective had concluded as a result of his investigation. Chopard was candid in his answers.

As the Applicant set out to cross-examine Detective Chopard, counsel asked if he might be allowed to review the police reports before cross-examination. Judge Stigler denied the request. He told counsel, "I know your motion is on file and I have not ruled on it, but I will rule on it now. You will not be given access to those." (Hrg. Tr., 8/31/16, p. 9, L. 18-24). At the same time, the prosecutor, of course, did have those reports, and she used them in her examination of Detective Chopard. From one of those questions, Applicant was able to demonstrate that Chopard made clear to K.P. that he did not believe her complaint of being sexually assaulted by gang members:

> Q. Now, in the portion of a report that Ms. Griffith just read to you, and I will quote as part of your report, "KP told me since nobody believed her, she did not want to press charges." Do you recall reading that in your report of May 2, 2011?
>
> A. I do.
>
> Q. Would it indicate to you when she says "nobody" that means she believed you did not believe her?
>
> A. Yes.
>
> Q. Did you tell her that you did not believe her?
>
> A. No, I would not tell her that.
>
> (Hrg. Tr., 8/31/16, pp. 14-15, L. 20-6)

Detective Chopard's position on cross-examination was that he did not believe K.P's allegations. The detective maintained he would not have directly told K.P. or Philip that he did not believe the accusation. He did admit that he would have told Philip "the reasons why" he did not believe

K.P. The detective also conceded that Philip could have interpreted the detective's explanation as a statement that he did not believe K.P. (Hrg. Tr., 8/31/16, pp. 12-13, L. 13-18).

When he had called Detective Chopard to the stand, the judge announced he was "not interested in the investigation that [the detective] carried out." Judge Stigler announced his only reason for scheduling the second hearing before Chopard started his testimony. The judge said: "The only thing I'm really interested in is whether [the detective] made a statement *along the lines* as to what the father said last time being attributed to the police." (Hrg. Tr., 8/31/16, pp. 3-4, L. 24-11) The reference to Philip's testimony in the prior hearing was his recollection the WPD did not go forward with K.P.'s accusation because "stories weren't matching up … there were too many loopholes, I believe, in the investigation to do anything." Philip testified police believed it was a false complaint. (Hrg. Tr., 7/25/16, pp. 14-15, L. 21-8) Philip's testimony recalling what he had been told five years previously was certainly "along the lines" of Detective Chopard's testimony in the second hearing.

Chopard may not have precisely said he thought K.P. made a false accusation. He did testify he told Philip the reasons he did not believe K.P.'s accusation, however.

The judge did not mention how Philip and Detective Chopard matched up in their testimony. He did not make any type of findings as to whether their recollections actually were "along the same lines." Even though Chopard had corroborated Philip's testimony on the conversation he had with Philip five years previously, the judge decided to focus on Philip's physical description of Chopard. In ruling on Applicant's Motion for Admissibility and the Motion to Quash, the judge reverted to placing importance on his cross-examination of Philip as to the physical appearance of the detective he talked to.

> The third possibility is that Phil Powers is simply not telling the truth. He's not a credible witness. When he testified, Mr. Powers indicated that the officer who made the statement to him, the officer was six feet tall and

200 pounds. Apparently Officer Naumann is the only other officer that was involved in this case and Officer Naumann was not present on March 14, 2011, when that statement, whatever it was, was made. And so the only officer who conceivably could have made that statement was investigator Chopard. Chopard is six feet tall, 280 pounds and there is no way any rational adult would confuse him as being 200 pounds. He is way outside of 200 pounds and Mr. Powers would have to know that. He might not know that Chopard weighed 270 to 280 pounds, but certainly would know that Chopard was not a 200 pounder. And that leads me to the point of view that Mr. Powers intentionally testified falsely in that he has identified with his father and has chosen to do whatever and say whatever is necessary to get his father out of the predicament that his father is in. So I place absolutely no credibility in Phil Powers' testimony for any number of reasons.
(Hrg. Tr., 8/31/16, pp. 29-30, L. 14-12)

Whether a witness's ability to estimate or remember a person's weight five years after the fact is rationally or reasonably related to credibility will be discussed below.

ARGUMENT

I.

THE TRIAL COURT ABUSED DISCRETION IN QUASHING A SUBPOENA FOR POLICE REPORTS FROM A CLOSED INVESTIGATION THAT WOULD PROVIDE EVIDENCE AS TO WHETHER APPLICANT'S GRANDDAUGHTER MADE FALSE ACCUSATIONS OF SEXUAL ABUSE AGAINST OTHER PERSONS.

PRESERVATION OF ERROR: Applicant preserved error on this issue at several points in the litigation. The subpoena *duces tecum* was served on the Chief of Police on July 18, 2016. (Return, 7/19/16; App 63). In his

Resistance to Motions to Quash filed July 23, 2016, Mr. Powers pointed out that neither K.P. nor the City were parties to the PCR. Neither party had standing to object to the relevance of the subpoenaed police reports. In his Motion for Filing of Documents filed July 25, 2016, Mr. Powers stated that the parties had not advanced any ground stating the reports are confidential records on the basis of any rule or statute. Applicant pointed out three things in that motion: (1) The Applicant would need the records in order to evaluate any ruling the Court would enter on relevance and would have to preserve error on any adverse ruling on relevance; (2) Applicant would have to review the reports to determine whether it appeared the Chief had produced all of them; and (3) If the Court determined the documents were confidential, they could be filed under seal and provided to counsel for Applicant nonetheless. (Resistance to Motions to Quash; Motion for Filing Documents with Subpoena Duces Tecum attached; App. 53-63)

In the Supplemental Motion for Filing of Documents filed August 14, 2016, Mr. Powers added that he would need the police reports “in order to

effectively cross-examine" the police officers that Judge Stigler had scheduled for testimony in the August 31 hearing. The supplemental motion stated that because the trial court, the City and the State were going to be proceeding in the hearing with the benefit of having the reports, "the proceedings are thereby ex parte." Applicant asserted a violation of due process under state and federal constitutions and the right to effective PCR counsel guaranteed by state statute. (Supp. Mot., 8/14/16; App. 69-70)

When Applicant's counsel was given the opportunity to cross-examine Detective Chopard at the subsequent hearing, counsel requested copies of the reports to review for cross-examination. The judge then acknowledged that he was aware of Applicant's motion requesting the reports and he was taking the opportunity to overrule that motion. He said, "You will not be given access to those." (Hrg. Tr., 8/31/16, p. 9, L. 18-24).

In pronouncing his rulings, Judge Stigler made no reference to the arguments Applicant's counsel had made in reference to discovery. Counsel had pointed out that the only question that was ripe for ruling was one concerning discovery in the requests for the reports. There was no

subpoena pending for K.P. The Motion for Admissibility of the false accusation evidence did not require ruling at that time, and Applicant should be allowed to get the reports and conduct any further discovery in any direction the reports might lead. Counsel pointed out that admissibility of the evidence at trial was not the question under the discovery rules. Relevance was not the question. The question was whether the reports were "reasonably calculated to lead to admissible evidence." Counsel directed the judge to Rules 1.501 and 1.503(1), Ia.R. Civ.P. (Hrg. Tr., 8/31/16, pp. 26-29, L. 25-2). Judge Stigler found that in spite of the fact Detective Chopard did not believe K.P., the judge had "absolutely no doubt" something happened to K.P. "the night she was in that gang house." The judge then concluded, "The Motion to Quash is granted on behalf of the City of Waterloo." (Hrg. Tr., 8/31/16, p. 31, L. 1-22; p. 33, L. 23-25)

STANDARD OF REVIEW: A district court ruling on a question of discovery is reviewed for an abuse of discretion. "A reversal of a discovery ruling is warranted when the grounds underlying a district court order are clearly

unreasonable or untenable. A ruling based on an erroneous interpretation of a discovery rule can constitute an abuse of discretion." *Wells Dairy Inc. v. American Indus, Refrigeration, Inc.* 690 N.W. 2d 38, 43 (Iowa 2004), quoting *Exotica Botanicals v. Terra Inc.,* 612 N.W. 2d 801, 804 (Iowa 2000). When the conclusion is not supported by substantial evidence, it is an abuse of discretion. *State v. Tyler,* 867 N.W. 2d 136, 152 (Iowa 2015) Ordinarily, the Court will review a ruling denying discovery for abuse of discretion. When the ruling is challenged on a constitutional basis, however, the Court will employ a *de novo* review. *State v. Neiderbach, 837 NW 2d 180, 190 (Iowa 2013).*

The Merits

The subpoena *duces tecum* is authorized under Rule 1.1701 (1)(c). In the instant case, the subpoena in question was issued to the Chief of Police to provide reports for the Applicant at the Motion for Ruling on the Admissibility of Evidence. When Mr. Powers agreed to continue the June

2016 PCR trial as a courtesy to K.P., deadlines for discovery were re-set. (Order Setting Trial, 8/2/16). A person who is commanded to produce items is authorized under Rule 1.1701(4) to object to production on the basis of undue burden or expense. Under Rule 1.1701 (5), the person could object on the basis the information is inaccessible. Under both of the foregoing rules, the person who is commanded is afforded authority to object to production of information that is privileged or otherwise confidential. The City did not raise any of the foregoing protections. The investigative reports requested in the instant case are not confidential by the terms of the Open Records Act because the investigation was indisputably closed. Section 22.7(5), the Code. The only objection the City raised in the written motion was that the reports were "irrelevant" to the PCR issue. (Motion; App. 52) At the first motion hearing, the City raised only relevance as an objection in oral argument. The City did not appear at the second hearing. (Hrg. Tr., 7/25/16, p. 4, L. 13-17; pp. 24-25, L. 16-11) The officers of the WPD clearly operate as agents of the State, but the State never filed any objection to the subpoena. The State orally joined in

the objections to “relevance” of the reports in both hearings. (Hrg. Tr., 7/25/16, p. 8, L. 4-12, pp. 25-26, L. 25-1) (Hrg. 8/31/16, pp. 23-25, L. 15-11)

Of course, Applicant is at a distinct disadvantage in arguing that the reports properly fall within the scope of discovery defined in Rule 1.503 (1) because Applicant does not have the reports. Judge Stigler did quote a portion of one of the reports in the ruling he filed August 3, 2016. That quote included three sentences that show the State’s objection to relevance was invalid. In the May 2, 2011 report, Detective Chopard wrote:

> K.P. told me that since nobody believed her, she did not want to press charges. I explained to K.P. that if something happened to her that she needed to tell the truth. I explained to her that her story at this point did not match what both her friends had told me about the night. (Order, 8/31/16, P.3; App. 66).

A set out above, Chopard admitted in hearing testimony, that the

detective himself was one of the people K.P. was referring to when she said “nobody” believed her. (Hrg. Tr. 7/31/16, pp. 14-15, L. 20-3)

Just that small portion of one report demonstrates the reports are within the scope of discovery. As set out in Rule 1.503(1), information is within the scope if it appears reasonably calculated to lead to the discovery of admissible evidence. Plainly, the content of the story K.P. told the detective, and the content of what other witnesses told the detective, is the information that led the detective to disbelieve K.P.’s accusation. The information would be reasonably calculated to lead to discovery of admissible evidence to show K.P. made a false complaint of sexual abuse against other persons.

Prejudice

Relief from the improper denial of discovery does not require the usual type of showing of prejudice. “A reversal of a discovery ruling is warranted when the grounds underlying the district court order are clearly

unreasonable or untenable." *Wells Dairy v. American Indus Refrigeration,* 690 NW 2d 38, 43 (Iowa 2004). It is a tall order for a litigant to argue prejudice that would be shown by evidence he was not given. Nonetheless, the denial of the documents in the instant case shows Judge Stigler's ruling quashing the production is defective for several reasons. As a general matter, his conclusion that the complaint of being sexually abused by the gang members "has nothing to do with" the accusation against Mr. Powers was defective as a matter of law. Applicant pointed out two cases to Judge Stigler prior to the first hearing where this Court found evidence of other false complaints is not protected by the rape shield rule and is material to attacking a complaining witness's credibility and protecting a defendant's right to confront and cross-examine the witness. Those cases are: *Millam v. State,* 745 NW 2d 719,723 (Iowa 2008) and *State v. Baker ,* 679 NW2d 7, 9-11 (Iowa 2004). Applicant pointed out at the same time that K.P. made the false complaint at a time when Applicant could have used the evidence of the false complaint to move for a new trial

under Rules of Criminal Procedure 2.24(8) and (9). (Motion for Admissibility, 7/12/16, pp. 2-3; App. 43-44)

Secondly, the judge gave the Applicant no opportunity to argue the standard for discovery because he would not allow counsel for Applicant to see the reports. The judge never did state a reason for denying counsel the opportunity for confidential access that would allow him to argue the facts in the report that may be reasonably expected to lead to admissible evidence. There may well be references in the reports to statements K.P. made in reference to her accusations against her grandfather, and there are references to witnesses who have vital information about K.P.'s untruthfulness. Those witnesses may have heard K.P. make statements about her accusations against her grandfather. The judge's refusal to give a reason as to why counsel could not review the reports is in itself unreasonable and untenable.

Third, the Judge's statement as to why he believed Philip Powers had testified falsely in the first motion defies all logic and reason. That is discussed in detail in the argument, below. With the judge's denial of

counsel's opportunity to view the reports, the denial of discovery resulted in a wholly unfair hearing on the admissibility of the evidence of false complaint. The Court must reverse the trial court's ruling denying discovery, order the reports disclosed to Applicant, and remand the case for a new and fair hearing on Applicant's Motion on Ruling for Admissibility of Evidence.

II.

THE JUDGE ABUSED DISCRETION IN OVERRULING APPLICANT'S MOTION FOR RULING ON ADMISSIBILITY OF EVIDENCE BECAUSE HE DENIED APPLICANT THE OPPORTUNITY TO CONDUCT DISCOVERY TO DEVELOP THE EVIDENCE, FAILED TO AFFORD APPLICANT A FUNDAMENTALLY FAIR OPPORTUNITY TO BE HEARD, FAILED TO PROCEED IN AN UNBIASED MANNER, AND HE REACHED HIS CONCLUSIONS ON UNREASONABLE AND UNTENABLE GROUNDS.

PRESERVATION OF ERROR: The Motion to Quash the Public Defender had filed for K.P. in June of 2016 became moot when the Applicant agreed to continue the June trial date. Nonetheless, when the Court continued the trial date, the Motion was set for hearing to proceed on July 25, 2016, which was prior to the time designated for the new trial setting conference. Because there was no pending subpoena that could be quashed, Applicant took the opportunity to file the Motion for Ruling on Admissibility of Evidence in order to address an issue that was likely to arise in the July 25 hearing and in continuing litigation. (Motions; App. 40-44) On July 14, the Public Defender resisted Applicant's Motion for Admissibility, but rather than style the paper as a resistance, the Public Defender titled the document as Motion to Quash (Amended) (App. 45-46) That caption would seem to acknowledge that the Public Defender had no standing to challenge the admissibility of evidence at trial on the merits. Applicant then subpoenaed the Chief of Police to bring the police reports to the motion hearing in order to demonstrate the factual basis for pursuing the issue and

to assess the need for additional discovery on the issue. The City then moved to quash the subpoena *duces tecum,* and all motions were then set for the July 25 hearing. (App. 64) Before the Motions to Quash were addressed, the judge heard testimony from Philip Powers. Applicant put Philip on the stand to show the factual basis for the admissibility of K.P.'s false accusation against gang members and to show the need for the police reports in discovery. Seventeen days before the second hearing, Applicant filed his Supplement to Motion for Filing Documents. He pointed out that with all participants having the police reports except for Applicant, the hearing would have the effect of an *ex parte* proceeding. Applicant asserted the hearing would violate his state and federal due process constitutional rights to fundamental fairness and the statutory right to effective assistance of counsel. Applicant also reiterated that he would be unable to preserve error without knowing what was in the reports. (Supp. Mot. 8/14/16; App. 69-70) After Applicant's repeated attempts asking the judge to disclose the police reports, counsel for Applicant made a last request at the second hearing before cross-examining the police officer the

judge had summoned. That request was denied. (Hrg. Tr., 8/31/16, p.9, L. 16-24)

After Detective Chopard testified at the second hearing, Applicant's counsel informed the Court he did not need to rule upon admissibility at that time and until counsel was given the police reports, and allowed to do any additional discovery that might flow from the reports, the Court should not rule on admissibility. (Hrg. Tr., 8/31/16, pp. 26-29, L. 24-2) The judge then granted the Motion to Quash the production of the reports and ruled that any evidence of the false accusation against the gang members would be excluded from the PCR trial on the merits. (Hrg. Tr., pp. 33-34, L. 19-12)

STANDARD OF REVIEW: Rulings on admissibility of evidence are reviewed for an abuse of discretion. An abuse of discretion occurs where a ruling is entered on a basis that is clearly unreasonable or untenable. Abuse of discretion can result from erroneous interpretation of the law or when the conclusion is not supported by substantial evidence. *State v.*

Tyler, 867 N.W. 2d 136, 152 (Iowa 2015) Assignments of error for violation of constitutional rights are reviewed *de novo. State v. Neiderbach,* 837 NW 2d 180, 190 (Iowa 2013)

The Merits

Like the foregoing issue concerning the denial of police reports, Judge Stigler's ruling on admissibility was designed to dispose of the issue of other false accusations of sexual abuse. This was not the first time the judge had attempted to dispose of that claim for relief. The State had previously filed a Motion to Dismiss on the basis that two of Mr. Powers's claims had been decided on direct appeal. Applicant resisted that argument, but also pointed out the State's motion would actually be a Motion for Partial Summary Disposition. Mr. Powers had raised a third claim in his Application for PCR that was not a subject of the motion. Additionally, at the time of the hearing on the Motion to Dismiss, Applicant's Motion to Amend the Application to add the instant issue of other false accusations was pending. Another judge then allowed that amendment. In

his subsequent ruling, Judge Stigler dismissed the entire action. After Mr. Powers filed a Motion to Correct the ruling, a Notice of Appeal was filed, and a Limited Remand was granted, the judge corrected his ruling and reinstated the third claim from the original petition and the instant amended claim on the false accusation of other persons. (Motions and Rulings; App. 10-38)

On the instant issue, Judge Stigler did not simply rule upon whether Mr. Powers could offer evidence to prove the claim of false accusation. He did not rule on the question of whether evidence of another false claim would be relevant to the challenge to Mr. Powers's conviction. Judge Stigler reached the ultimate conclusion on the merits in this preliminary evidentiary motion by ruling that the accusation K.P. made against "three" gang members was not false. The explanation the judge pronounced as to how he reached that conclusion was unreasonable and untenable.

First, the judge stated he was in a better position than the detective to determine whether K.P. was telling the truth. Detective Chopard had interviewed all the witnesses and talked to K.P. more than once. He

conducted other investigation that Applicant has not been informed about. (Hrg., Tr., 8/31/16, pp. 10-11, L. 6-8) From his firsthand, formal investigation, Chopard determined he believed K.P. was not telling the truth. Judge Stigler stated "it is not an assessment of the officer to make a judgment as to whether she is credible or not. That is not his function in the criminal justice system." (Hrg. Tr., 8/31/16, pp. 30-31, L. 20-4). Of course, the entire point of Chopard's interviews of numerous witnesses was to determine the truth of the matter and who was telling the truth. The judge was not in a better position to determine the truth simply by reading Chopard's reports. Chopard actually talked to K.P. at least twice. The judge never talked to her. There is no substantial evidence in the record to support the judge's conclusion.

Secondly, Judge Stigler's fixation on Philip's description of Detective Chopard is without reason or logic. There is no conceivable explanation as to how Philip's failure to correctly estimate Chopard's weight, as he had observed it over five years previously, could be rationally related to Philip's credibility for telling the truth. More importantly, the judge lost track of just

what it was he believed Philip was untruthful about. When he first asked the City Attorney for a general description of Chopard, the judge said, " if Chopard was the person he talked to and he's been misidentified, I think that would have some relevance to this." (Hrg. Tr., 1, p. 26, L. 8-11) In the second hearing, Chopard testified he was indeed the detective Philip talked to. He did tell Philip the reasons he did not believe K.P.'s accusation, and admitted Philip could have understood him to be directly saying that he did not believe K.P. (Hrg. Tr., 2, pp. 11-16, L. 23-3) Philip had testified he did not know the name of the detective he talked to five years previously. Everything Philip said about the detective's statements in his testimony was consistent with Chopard's later testimony. (Hrg. Tr., 1, pp. 9-19, L. 21-21) Judge Stigler seemed to forget that Chopard testified he did not believe K.P. In his ruling, the judge concluded:

> There is no reason to believe
> that she made any false report
> to anybody about anything,
> and your one witness who stands
> to the contrary, Phil Powers,
> obviously has a bias in this,
> obviously has no personal
> knowledge and obviously did
> not tell the truth about who he

says made the statement to him.
(Hrg. Tr., p. 32, L. 8-14)

That conclusion was a reference back to the initial findings in his ruling to show Philip "is simply not telling the truth." His finding that Philip was not telling the truth was because Chopard is actually 280 pounds rather than 200. There is no logical line from these facts to the conclusion Philip was not telling the truth. (Hrg. Tr., 8/31/16, p. 29-30, L. 14-12) In any case, the judge's witness, Chopard, fully corroborated Philip's testimony.

Prejudice -- Due Process Violation

The constitutional protection against deprivation of life, liberty or property without the benefit of due process is protected in the Iowa Constitution at Article I, Section 9, and under the United States Constitution in the Fourteenth Amendment. Because this Court has never determined that a procedural due process claim should be evaluated differently under

the state constitution, the Court "will rely on principles developed in the federal case law in analyzing" both state and federal procedural due process claims. *War Eagle Village Apartments v. Plummer,* 775 N.W. 2d 714, 719, (Iowa 2009).

"Due process must be afforded where state action threatens to deprive an individual of a protected liberty or property interest." Where a protected due process interest is involved, this Court will "evaluate what process is due." The two fundamental requirements in affording due process are notice and the opportunity to be heard. The requirements, however, are flexible and the type of hearing required depends upon:

> (a) the private interests implicated; (b) the risk of an erroneous determination by reason of the process accorded and the probable value of added procedural safeguards; and (c) the public interests and administrative burdens, including costs that the additional procedure would involve. *Owens v. Brownlie, 610 NW 2d 860* (Iowa 2000).

The Court reiterated the same three-factor-analysis in another case and preceded the statement of the test by saying, “Procedural due process acts as a constraint on government action that infringes upon an individual’s liberty interest, such as the freedom from physical restraint.” *Holm v. District Court for Jones Co.,* 767 N.W. 2d 409, 417 (Iowa 2009). Mr. Powers attacks his convictions in the instant action on the premise the convictions were obtained in violation of his state and federal constitutional rights. The mandatory minimum sentence imposed April 11, 2011, requires his imprisonment continue for seventeen and a half years from that date. (App. for PCR, 12/2/13, p. 1; App. 4) Both federal and state law demonstrate Judge Stigler’s violations of Mr. Powers’s right to fundamental fairness in the PCR proceedings now in question.

In the federal courts, the fundamental fairness of a hearing is often addressed in the context of immigration removal hearings. “An applicant for withholding of removal or relief under CAT is entitled to a fair hearing under The Due Process Clause of the Fifth Amendment to the United States Constitution. (Cites) For a removal hearing to be fair, the arbiter

presiding over the hearing must be neutral, and the immigrant must be given the opportunity to fairly present evidence, offer arguments and develop the record." *Tun v. Gonzales,* 485 F.3d 1014, 1025 (8th Cir. 2007). In an unreported decision, the Iowa Court of Appeals quoted and approved a decision the district court reached in an action challenging a city administrator's unfairness in formal administrative proceedings. The description the district court, Judge Greve, provided in that case fits Judge Stigler's actions in the instant case perfectly:

> In this case, the record is quite clear from both the transcript and the written decision that [City Administrator] Craig Malin assumed a personal commitment to a particular result, that is, the denial of the license. The investigating done by Craig Malin both before the hearing and after the hearing, and the questioning of at least one witness *after* the Assistant City Attorney had concluded cross-examination of that witness, indicate a personal bias toward an outcome desired by Defendant Malin. This combination of all three functions of investigation, advocacy and adjudication, has the appearance of fundamental unfairness in this administrative hearing, thus vitiating its legal effect.
> *C Line, Inc. v. Malin and City of Davenport,* 2011 WL 6058580, p.3 (S.Ct. No. 10-1600) (emphasis supplied)

In the instant case, the judge's actions violated fundamental due process in six particulars:

1. The judge denied Applicant access to police reports from a closed investigation without stating any reason for the denial;

2. Allowed the City Attorney and Public Defender to participate in challenging the relevance of evidence, when the parties they were representing were not parties to the PCR and while all parties were in possession of the police reports *except* for Applicant;

3. Engaged in extensive advocacy by cross-examining the Applicant's witness at the first hearing *after* the City Attorney, the Public Defender and Assistant County Attorney had all cross-examined the witness;

4. Initiated his own investigation, beginning with his cross-examination of Applicant's witness and continuing by asking the City Attorney to obtain evidence for him, and continuing further by setting a second hearing no party had requested, summoning his own witness to testify;

5. Engaged in additional extensive advocacy at the second hearing by conducting cross-examination of the witness he had summoned, after denying Applicant's request to provide police reports to aid in his investigation; and

6. Reaching conclusions in his rulings that were not supported by substantial evidence in the record and were wholly unreasonable and untenable.

In each of these particulars, and in combination, the judge denied Mr. Powers the opportunity to be heard and to develop a record in a fundamentally fair hearing before a neutral and unbiased judge.

Conclusion

The Court must reverse the ruling on the Motion for Ruling on Admissibility of Evidence, order that the police reports be released to Applicant, and order the action reset for trial on the merits, allowing time for Applicant to conduct discovery.

REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 6.908(1), Appellant requests to be heard in oral argument.

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