IN THE SUPREME COURT OF IOWA
NO. 16-1650

DAVID M. POWERS,

Applicant-Appellant,

v.

STATE OF IOWA

Respondent-Appellee,

On Appeal From The District Court For Black Hawk County
The Honorable George Stigler

Brief Of The Innocence Network, The Innocence Project Of Iowa, And The Midwest Innocence Project As *Amici Curiae* In Support Of The Applicant-Appellant

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The Innocence Network is an affiliation of organizations dedicated to providing pro bono legal and investigative services to individuals seeking to prove their innocence of crimes for which they have been convicted.[1] The Network also works to redress the underlying causes of wrongful convictions.

With organizations located across the United States—including the Innocence Project of Iowa and the Midwest Innocence Project—and around the world,[2] the Innocence Network is committed to ensuring that individuals

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[1] Pursuant to *Iowa Rule of Appellate Procedure* 6.906(4)(d), *Amici Curiae* states that no counsel for a party authored this brief in whole or in part. No party, counsel for a party, or any other person made a monetary contribution intended to fund the preparation or submission of this brief.

[2] Innocence Network member organizations include: the Actual Innocence Clinic at the University of Texas, After Innocence, Alaska Innocence Project, Association in Defense of the Wrongly Convicted (Canada), Arizona Innocence Project, Boston College Innocence Program, California Innocence Project, Center on Wrongful Convictions, Committee for Public Counsel Services Innocence Program, Connecticut Innocence Project, Downstate Illinois Innocence Project, Duke Center for Criminal Justice and Professional Responsibility, The Exoneration Initiative, Georgia Innocence Project, George C. Cochran Mississippi Innocence Project, Griffith University Innocence Project (Australia), Hawaii Innocence Project, Idaho Innocence Project, Illinois Innocence Project, Innocence and Justice Project at the University of New Mexico School of Law, Innocence Institute of Point Park University, Innocence Network UK, Innocence Project Arkansas, Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project at UVA School of Law, Innocence Project New Orleans, Innocence Project New Zealand, Innocence Project Northwest Clinic, Innocence Project of South Dakota, Innocence Project of Texas, Irish Innocence Project at Griffith College, Justice Brandeis Innocence Project, Justice Project, Inc., Kentucky Innocence Project, Life After Innocence, Medill Innocence Project, University of Miami Innocence Clinic, Michigan Innocence Project, Mid-Atlantic Innocence Project, Midwest Innocence Project, Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project, New York Law School Post-Conviction Innocence Clinic, North

are guaranteed access to potentially exculpatory evidence. To that end, the Innocence Network, the Innocence Project of Iowa, and the Midwest Innocence Project have an interest in freeing the judicial system of any barriers to accessing evidence.

Carolina Center on Actual Innocence, Northern Arizona Justice Project, North California Innocence Project, Office of the Public Defender (State of Delaware), Office of the Ohio Public Defender, Wrongful Conviction Project (State of Ohio), Ohio Innocence Project, Oklahoma Innocence Project, Oregon Innocence Project, Osgoode Hall Innocence Project (Canada), Pace Post-Conviction Project, Palmetto Innocence Project, Pennsylvania Innocence Project, Reinvestigation Project (Office of the Appellate Defender), Resurrection After Exoneration, Rocky Mountain Innocence Center, Sellenger Centre Criminal Justice Review Project (Australia), Texas Center for Actual Innocence, Texas Innocence Network, Thomas M. Cooley Law School Innocence Project, Thurgood Marshall School of Law Innocence Project, University of Baltimore Innocence Project Clinic, University of British Columbia Law Innocence Project (Canada), University of Leeds Innocence Project (UK), Wake Forest University Law School Innocence and Justice Clinic, Wesleyan Innocence Project, West Virginia Innocence Project, Wisconsin Innocence Project, and Wrongful Conviction Clinic at Indiana University.

INTRODUCTION

The path to proving actual innocence must be free of roadblocks to accessing exculpatory evidence. This principle is pivotal in criminal proceedings, where a defendant's access to evidence bearing on the viability of the prosecution's case is a constitutional guarantee. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

While often considered at the criminal trial level, this principle is of no lesser importance in the post-conviction relief context, where the discovery rules contemplate robust access to documentary evidence. *See* Iowa R. Civ. P. 1.503(1) ("[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party."). Indeed, the broader discovery power contemplated by the Iowa Rules of Civil Procedure applies here, making open disclosure the rule and not the exception.

The controlling procedural rules thus promote an open exchange of evidence—like *Brady*'s disclosure requirement—and serve to enhance the

truth-finding function of judicial proceedings and thereby reduce the risk that actually innocent individuals will remain imprisoned.

ARGUMENT

I. The Law Strives To Correct Power And Informational Imbalances Between The State And Individuals.

The power and resources of a single criminal defendant or post-conviction relief applicant pale in comparison to those of the State. These imbalances inhere in the very nature of a criminal investigation itself—controlled at all times by law enforcement—thereby creating a wide informational disparity. The legal system, however, has repeatedly sought to ameliorate this imbalance.

The United States Supreme Court's recognition of an inherent power imbalance when the State is adverse to a single individual is at the root of its constitutional jurisprudence. *See McCoy v. Court of Appeals of Wisconsin, Dist. 1*, 486 U.S. 429, 445 (1988) ("Standing alone, [the habeus petitioner] is hardly a match against the formidable resources the State has committed to keeping him behind bars."); *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938) ("[The Sixth Amendment's counsel guarantee] embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty.").

The function of the *Brady* doctrine itself—elements of which inform the analysis here—is a quintessential illustration of the law correcting informational disparities between State and accused. Legal commentators have observed that it is "[b]ecause of this imbalance of access to relevant evidence, either before trial or during the adjudication phase of the case, [that] the government is required to disclose to the defense certain evidence collected during the investigation of the crime."[3] Thus, *Brady*'s recognition that due process guarantees equal access to exculpatory evidence ameliorates the disparity between the resources and power of the State and those of the criminal defendant.

Even in the wake of *Brady* and its progeny, however, wrongful convictions of the actually innocent commonly result from barriers to exculpatory evidence created by official misconduct. In 2016 alone, 42% of all exonerations involved official misconduct in some fashion.[4] In fact, 45% of the first 1,600 individual exonerations occurring between January of 1989 and May of 2015 stemmed from evidence of official misconduct.[5]

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[3] Cynthia E. Jones, *The Right Remedy for the Wrongly Convicted: Judicial Sanctions for Destruction of DNA Evidence*, 77 FORDHAM L. REV. 2893, 2899-901 (2009).

[4] *Exonerations in 2016*, NAT'L REGISTRY OF EXONERATIONS (Mar. 7, 2017), http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2016.pdf.

[5] *The First 1,600 Exonerations*, THE NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Documents/1600_Exonerations.pdf (last visited Apr. 3, 2017).

Importantly, "the most common" form of official misconduct involves "police or prosecutors (or both) concealing exculpatory evidence."[6]

Criminal defendants in the State of Iowa have unfortunately been impacted by such misconduct, as evident from the recent revelation that two Des Moines Police Department officers are alleged to have planted evidence to implicate at least one criminal defendant.[7] The alleged misconduct has resulted in the Des Moines Police Department opening an internal investigation into all of the cases the two officers were involved in from August 2013 onward.[8] Evidence of the officers' wrongdoing has resulted in one exoneration, and has cast doubt on other convictions.[9]

To be clear, Powers has not claimed the existence of official misconduct of this magnitude as a basis for overturning his conviction.

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[6] *Exonerations in 2016*, NAT'L REGISTRY OF EXONERATIONS (Mar. 7, 2017), http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2016.pdf; *see also infra* Part II.

[7] Charly Haley, *Police: 2 officers out after planting evidence*, THE DES MOINES REGISTER (Dec. 6, 2016), http://www.desmoinesregister.com/story/news/crime-and-courts/2016/12/06/two-des-moines-officers-investigated-evidence-tampering-narcotics-joshua-judge-tyson-teut/95032928/.

[8] *Id.*

[9] Grant Rodgers, *Iowan exonerated in Des Moines evidence-planting case*, THE DES MOINES REGISTER (Jan. 23, 2017), http://www.desmoinesregister.com/story/news/crime-and-courts/2017/01/23/iowan-exonerated-des-moines-evidence-planting-case-joshua-judge-tyson-teut-kyle-jacob-weldon/96954048/; Grant Rodgers, *Lawyers probe possible evidence planting by former Des Moines police*, THE DES MOINES REGISTER (Mar. 6, 2017), http://www.desmoinesregister.com/story/news/crime-and-courts/2017/03/06/lawyers-probe-possible-evidence-planting-former-des-moines-police/98808038/.

Rather, he has sought only the fair and open discovery of investigative records maintained by the Waterloo Police Department.[10] But the same risk created when officials "bury" exculpatory evidence during a criminal prosecution is present when a post-conviction relief applicant is denied access to evidence during discovery without sufficient justification: the denial of information necessary to prove the actual innocence of the wrongfully accused.

II. Production Of Police Reports Has Resulted In Numerous Exonerations.

Refusing to allow a post-conviction relief applicant to access police reports bearing directly on the strength of the prosecution's case would set a dangerous precedent that is contrary to the well-reasoned authority of this and other jurisdictions. Notably, this Court has recognized police reports as being precisely the type of documents that are likely to contain exculpatory evidence. *See generally Harrington v. State*, 659 N.W.2d 509 (Iowa 2003). In *Harrington*, the applicant had been convicted of first degree murder in connection with the shooting death of a man at an automobile dealership. *Id.* at 514. The conviction was based on witness

[10] The investigative police reports sought by Petitioner pertain to a complaint made by his alleged victim, K.P., against several individuals after Petitioner's criminal conviction and before his sentencing. Petitioner requested these documents on the belief they would reveal that Waterloo Police Department officers did not believe K.P.'s allegations, and that the reports would therefore reflect directly on her credibility.

testimony placing him near the crime scene and "minimal" physical evidence. *Id.* at 514-15. Years after the criminal trial and one post-conviction relief proceeding, the applicant learned the State had failed to disclose eight police reports revealing that investigating officers had originally suspected that another man, Charles Gates—who had been seen walking near the dealership on several occasions during the days leading up to the crime—was the perpetrator. *Id.* at 517-19.

The court held that the State's failure to turn over the police reports deprived the applicant of exculpatory evidence, and—citing out of state authority—reasoned that "only access to the documents themselves would have provided the range and detail of information necessary to fully understand the implications of the police investigation." *Id.* at 523 (citations omitted).

The court also relied heavily on the notion that presentation of the police reports would have detracted from the reliability of the prosecution's principal witness at trial, decreasing the likelihood that the jury would have convicted the applicant. *Id.* at 524. Further, the deprivation affected Harrington's "trial preparation and trial strategy" because it prevented counsel from "zero[ing] in on Gates in his trial preparation and at trial" and using "Gates as the centerpiece of a consistent theme that the State was

prosecuting the wrong person." *Id.* Ultimately, the court reasoned the reports should have been turned over because they could have created reasonable doubt in the minds of the jurors that the petitioner was guilty of murder. *Id.* at 525.

Moreover, several exonerations occurring outside of Iowa have also resulted from the disclosure of police reports. The rape conviction of Andre Ellis in Alabama, for example, was overturned in large part because prosecutors failed to disclose police reports containing exculpatory evidence.[11] The reports included portions of police interviews containing statements by both the interviewing officers and interviewees expressing doubt as to whether the victim had actually been raped. *Id.* The reports also revealed police had initially investigated a different suspect and that the victim had given multiple inconsistent statements during police interviews. *Id.*

The exoneration of Glenn Ford is also instructive.[12] Ford had been convicted of murder based on weak physical and circumstantial evidence. *Id.* Several subsequently discovered police reports, which had not been disclosed prior to the criminal trial, revealed the police had received tips

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[11] *Andre Ellis*, NAT'L REGISTRY OF EXONERATIONS (Dec. 10, 2014), http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4565.
[12] *Glenn Ford*, NAT'L REGISTRY OF EXONERATIONS (June 29, 2015), http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4395.

from informants implicating individuals other than Ford, that police officers testified falsely at trial, and that key witnesses had previously made conflicting statements. *Id.*

Like Powers, each of these criminal defendants were deprived of information supporting their claim of actual innocence. Unlike Powers, however, these individuals were afforded access to the exculpatory evidence during subsequent post-conviction relief proceedings, allowing them to prevail on their claim of actual innocence.

III. The Procedural Rules Applicable To Post-Conviction Relief Actions Favor Robust Access To Evidence And Demand Production Of Investigative Police Reports.

The issue this Court is being asked to resolve on appeal is whether Powers is entitled to the police reports he subpoenaed from City of Waterloo Police Department Officer Daniel J. Trelka and to question K.P. about reports of sexual assault she made with the Department.

Denying access to police reports of the kind subpoenaed by Powers risks depriving post-conviction relief applicants of a meaningful opportunity to prove their actual innocence. It is vital in the post-conviction relief context to understand what evidence existed at the time of the criminal trial or sentencing, for example, to properly evaluate and assert claims of ineffectiveness or official misconduct. Thus, foreclosing the benefit of

broad discovery renders applicants powerless to prove the very claims available to them when seeking post-conviction relief.

At the very least, an applicant should be permitted to obtain such reports during discovery, independently gauge their value and applicability to applicant's trial strategy, and offer the reports at trial. The court may very well rule that the documents are inadmissible, but at least counsel would have gained an understanding of their contents sufficient to articulate a well-reasoned basis for their admissibility. Even if the court were ultimately to exclude the reports, their disclosure would still have furthered the purpose of discovery: to "avoid[] surprise" and allow the issues to be "refined and defined" before trial. *See Gerace v. 3-D Mfg. Co., Inc.*, 522 N.W.2d 312, 320 (Iowa Ct. App. 1994).

Moreover, foreclosing discovery of investigative police reports is inconsistent with the broad dictates of the Iowa Rules of Civil Procedure applicable to post-conviction relief actions. These requirements—properly applied—represent the mechanism through which to correct power and informational imbalances between the State and individual applicant.

In Iowa, actions for post-conviction relief "are not *criminal* proceedings, but rather are *civil* in nature." *Jones v. State*, 479 N.W.2d 265, 269 (Iowa 1991) (citations omitted) (emphasis in original). As such,

"[a]ll rules and statutes applicable in civil proceedings including pretrial and discovery procedures are available to the parties." Iowa Code § 822.7; *see also Nuzum v. State*, 300 N.W.2d 131, 132-33 (Iowa 1981) ("Rules and statutes governing the conduct of civil proceedings are applicable to postconviction proceedings.").

In relevant part, the Iowa rules provide that "[p]arties may obtain discovery regarding **any matter**, not privileged, which is **relevant to the subject matter in the pending action**, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party." Iowa R. Civ. P. 1.503(1) (emphasis added). Importantly, "[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *Id.*

The scope of material subject to a civil litigant's subpoena power is similarly broad. To successfully avoid compliance with a lawfully issued subpoena, the party from whom documents are sought has the burden to establish a countervailing interest demanding that the documents not be produced, such as privilege, confidentiality, undue burden, or expense to the party in possession. *See* Iowa R. Civ. P. 1.1701(a), (b)(2), and (d).

Taken together, the grounds for quashing a subpoena reveal the statutory purpose is to protect non-parties, who lack an interest in the underlying litigation, from intrusive "fishing expeditions" imposing an undue burden or expense. *See* Iowa R. Civ. P. 1.1701(d); *see also In re A.K.*, No. 14-0211, 2014 WL 1495472, at *12 (Iowa Ct. App. Apr. 16, 2014) (quashing subpoena requesting information from a non-party as an improper "fishing expedition" where only nexus to underlying litigation was that the non-party was "friends on Facebook" with testifying witness.).

Quashing a subpoena issued to an investigating police department, however, would not further this purpose. An investigating police department is a non-party only in the barest sense.[13] The obligations imposed by *Brady*, for example, also apply to investigating police departments. *See Kyles v. Whitley*, 514 U.S. 419, 438 (1995) (applying *Brady*'s disclosure requirements to information in possession of police department, even if not actually known by prosecutor). This continuity of interest between police and prosecutor suggests documents in the possession of the police department should be entitled to far less protection than

[13] One legal commentator aptly described the fine distinction between police and prosecution as follows: "Police are an arm of the prosecution; they typically work closely with prosecutors, who, while theoretically charged with responsibility to 'do justice,' in practice often develop a conviction psychology in which catching and convicting the suspect is the highest value." Keith A. Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 SETON HALL L. REV. 893, 898 (2008).

documents held by truly unaffiliated non-parties lacking any interest in the underlying litigation.[14] Moreover, a simple request for investigative reports—which in Powers' case amounted to a dozen or so sheets of paper—does not impose any undue expense or burden on a police department.

CONCLUSION

The rules of discovery and the scope of material subject to a civil litigant's subpoena power surely are broad enough to encompass the police reports at issue here. These procedural mechanisms—properly applied—protect the ability of a post-conviction relief applicant to access exculpatory evidence and thereby establish his or her actual innocence. Without access to the information investigated by the State, the scale will always tip in the favor of the State, whether the defendant is guilty or innocent.

[14] That the legislature has guaranteed public access to the very category of documents at issue here is particularly instructive. *See* Iowa Code § 22.7(5) (excluding public access to "[p]eace officers' investigative reports" only if the "information is part of an ongoing investigation."). By Officer Trelka's own admission at hearing, the Waterloo Police Department had closed its investigation into K.P. criminal complaint. *See* Ex. H to Application for Interlocutory Appeal (Partial Transcript of Motion Hearing, at Tr. 11:13-16).

Accordingly, this Court should hold the trial court erred by quashing Petitioner's subpoena and ruling he could not question K.P. about her subsequent report of sexual assault.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitations of IOWA R. APP. P. 6.903(1)(g)(1) and (2) because it contains 3,089 words, excluding the parts of the brief exempted by IOWA R. APP. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirement of IOWA R. APP. P. 6.903(1)(e) and the type-style requirements of IOWA R. APP. P. 6.903(1)(f) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 14 point font.

/s/ Mitch G. Nass

PROOF OF SERVICE AND CERTIFICATE OF FILING

I hereby certify that on May 1, 2017, I served the counsel below via U.S. Mail. I further certify that I electronically filed the foregoing with the Clerk of the Supreme Court of Iowa using the Iowa Electronic Document Management System, which will send notification of such filing to the counsel below:

/s/ Mitch G. Nass

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