No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOHNNY LEE JOHNSON,

Petitioner,

v.

WILLIAM SPERFSLAGE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. **WHETHER THE DUE PROCESS PROVISIONS OF THE FIFTH AND SIXTH AMENDMENTS REQUIRE A PLAIN ERROR REVIEW WHEN A DEFENDANT IS SHACKLED IN VIEW OF A JURY OR IF A STATE IS PERMITTED TO REVIEW THE MATTER ONLY UNDER AN INEFFECTIVE ASSISTANCE OF COUNSEL FRAMEWORK.**

Deck v. Missouri, 544 U.S. 622 (2005)

Illinois v. Allen, 397 U.S. 337 (1970)

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

CORPORATE DISCLOSURE STATEMENT

Not applicable in this criminal case.

LIST OF ALL DIRECTLY RELATED PROCEEDINGS

Court	Docket #	Caption	Judgment Date
8th Circuit Court of Appeals	18-1709	Johnny Lee Johnson v. William Sperfslage	April 26, 2019
U.S. District Court, Southern District of Iowa	4:11-cv-00087-RWP	Johnny Lee Johnson v. William Sperfslage	March 28, 2018
Iowa Supreme Court	15-0776	Johnny Lee Johnson v. State of Iowa	March 9, 2017
Iowa Court of Appeals	15-0776	Johnny Lee Johnson v. State of Iowa	September 14, 2016
Iowa District Court	PCCV081755	Johnny Lee Johnson v. State of Iowa	April 15, 2015 (Ruling on Remand)
Iowa Court of Appeals	13-1554	Johnny Lee Johnson v. State of Iowa	December 24, 2014
Iowa District Court	PCCV081755	Johnny Lee Johnson v. State of Iowa	September 19, 2013
Iowa Supreme Court	08-0320	State of Iowa v. Johnny Lee Johnson	March 15, 2010
Iowa Court of Appeals	08-0320	State of Iowa v. Johnny Lee Johnson	December 17, 2009,
Iowa District Court	FECR019288	State of Iowa v. Johnny Lee Johnson	February 18, 2008

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CITATION TO OPINION BELOW

The Opinion of the United States Eighth Circuit Court of Appeals in the case of *Johnson v. Sperfslage,* No. 18-1709 (8th Cir. 04/26/2019) is attached as Appendix A. The Ruling of the Honorable Robert W. Pratt for the United States District Court for the Southern District of Iowa (03/28/2018) is attached as Appendix B.

JURISDICTIONAL STATEMENT

The Eight Circuit Court of Appeals entered its ruling and opinion affirming the ruling of the United States District Court for the Southern District of Iowa on April 26, 2019. This Court's jurisdiction is appropriate under 28 U.S.C. § 1254(1), Mr. Johnson having asserted below and asserting in this Petition the deprivation of rights secured by the United States Constitution.

Jurisdiction of the United States Supreme Court is invoked under Supreme Court Rules 10 and 11 (hereinafter, "Rule 10" and "Rule 11"). Rule 10 provides that "a review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore." Jurisdiction of the United States Supreme Court is appropriate in this case pursuant to Rule 10(c) because the United States Court of Appeals has decided an important question of law that has not been, but should be, settled by this Court or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The issues presented by this appeal involve the constitutional provisions of the Fifth and Sixth Amendments to the United States Constitution. Those amendments provide:

Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

The Petitioner in this action is Johnny Lee Johnson, a person convicted under the laws of the State of Iowa. Johnson is currently being held as a prisoner by the State of Iowa at the Anamosa State Prison in Anamosa, Iowa.

On January 14, 2008, Petitioner Johnny Lee Johnson was convicted by the State of Iowa on two counts of first-degree murder. Johnson was sentenced on February 18, 2008 to life in prison. Johnson timely filed a direct appeal to the State of Iowa Court of Appeals. On December 17, 2009, the State of Iowa Court of Appeals

affirmed Johnson's conviction. Johnson applied to the Supreme Court of Iowa for further review of his direct appeal and was denied on March 15, 2010.

On February 25, 2011, Johnson filed an Application for Post-Conviction Relief in the Iowa District Court, raising several claims based on ineffective assistance of trial level and appellate level counsel. After development of his case in his state PCR proceedings, Johnson focused on three principle claims, including counsel's failure to object to shackling during trial. On September 19, 2013, the State of Iowa District Court entered its ruling on Johnson's PCR petition, and, based on the shackling issue, vacated Johnson's conviction on both counts of murder and ruled that he was entitled to a new trial. The district court found that Johnson's other claims of ineffective assistance were acceptable trial strategy and did not amount to ineffective assistance.

The State of Iowa appealed the district court's PCR ruling, and Johnson cross appealed. On December 24, 2013, the Iowa Court of Appeals entered its decision, finding against Johnson on all issues appealed. The appeals court found that the post-conviction court improperly shifted the burden of proof on the shackling issue to the State of Iowa. Consequently, the Court of Appeals remanded the issue back to the post-conviction court so that the lower court could make a ruling applying the correct standard.

On April 15, 2015, the post-conviction court considered Johnson's claims on remand. The lower court found that, while Johnson's trial counsel was ineffective for failing to object to the use of shackles, Johnson could not meet the burden of

proving resulting prejudice under the *Strickland* test. Thus, the court reinstated Johnson's two convictions for first degree murder. Johnson timely appealed the post-conviction court's ruling on remand. On September 14, 2016, the Iowa Court of Appeals entered its decision and ruled against Johnson. An Application for Further Review on the Iowa Court of Appeal's decision to deny post-conviction relief was denied by the Iowa Supreme Court on March 5, 2017.

Johnson filed a Petition for Writ of Habeas Corpus, by a person in state custody, with the United States District Court for the Southern District of Iowa on February 25, 2011. The petition was held in abeyance so that Johnson could exhaust his state claims. Johnson having exhausted his state claims, the United States District Court for the Southern District of Iowa gave leave to the Petitioner and counsel to file an amended petition which they did on May 19, 2017. The government filed its answer on June 13, 2017. The Court subsequently ordered briefing on the issues.

On March 28, 2018, the Honorable Robert W. Pratt entered an order denying Petitioner's §2254 motion. However, the Court exercised its authority to issue a certificate of appealability under 28 U.S.C. §2253(c) and Fed. R. App. P. 22(b) as to the shackling issue. The Court found that the Petitioner made a substantial showing of the denial of a constitutional right as to the shackling issue only. The Court denied the Petitioner a certificate of appealability as to the other two issues: involuntary confession and denial of expert witness.

The Petitioner proceeded in the Eighth Circuit Court of Appeals on his Certificate of Appealability with regard to the shackling issue. He also appealed the denial of the certificate of appealability as to the other two issues: involuntary confession and denial of expert witness. On April 26, 2019, the Eighth Circuit Court of Appeals entered its ruling affirming the lower court's findings. Mr. Johnson now timely petitions the United States Supreme Court for a Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

I. THE UNITED STATES SUPREME COURT SHOULD REVIEW THIS MATTER BECAUSE IOWA'S LACK OF A PLAIN ERROR REVIEW STANDARD DEPRIVES DEFENDANTS OF THE RIGHT TO DUE PROCESS OF LAW.

This case presents an issue of legal importance that transcends the facts and the parties involved. The Eighth Circuit has decided an important question of law in a way that conflicts with the Supreme Court's rulings in *Deck v. Missouri*, 544 U.S. 622 (2005) and *Illinois v. Allen*, 397 U.S. 337 (1970). The Eighth Circuit's interpretation has improperly ignored the due process problem created by the State of Iowa's lack of a plain error standard of review on appeal. The Supreme Court should address the issue because when an appellate court reviews a due process violation not raised by trial counsel only under an ineffective assistance of counsel standard, the burden impermissibly shifts to the defendant to prove his innocence under an ineffective assistance of counsel standard rather than allowing the appellate court to protect the fairness and integrity of the proceedings under a plain error finding when a substantial right is infringed.

To avoid erroneous deprivations of the right to due process, this court should clarify the standard of review on appeal when trial counsel fails to object to a fundamental due process error and the state court of appeals fails to employ a plain error standard of review.

A. Shackling: Due Process Violation

The Petitioner in this case was shacked at trial in view of the jury, an act which is inherently prejudicial and a violation of due process. Because Iowa does

not have a plain error rule, the post-trial proceedings focused only on the issue of ineffective assistance of counsel. When review is limited to an ineffective assistance of counsel standard, a fundamental error- such as shackling a defendant in the view of the jury- is ratified by the court. The deprivation of a fundamental right, the right to a fair trial, should not be denied due to a failing in the technical operation of the legal proceedings. Plain error is just that, an error that is plain on its face and that requires redress in order to protect the sanctity of the fundamental provisions of the United States Constitution.

The proceedings in this case including ineffective assistance of trial counsel, ineffective assistance of appellate counsel, and structural error, illustrate the constitutional problem. Because the State of Iowa does not employ the plain error doctrine, the due process issues evade substantive review. Petitioner asserts that he was denied the right to a fair trial and asks this Court to grant his petition for writ of certiorari.

1. Shackling: Ineffective assistance of Trial Counsel

Shackling is inherently prejudicial. Trial counsel failed to object to Johnson's shackles and failed to obtain adequate reason from the court for the shackles on the record. The failure of counsel on this issue cost Johnson a fair trial as well as the effective assistance of counsel.

The Fifth and Fourteenth Amendments prohibit the use of restraints at trial, unless justified by specific evidence in the particular case. *Deck v. Missouri*, 544 U.S. 622, 629 (2005). The right to appear before the jury free of restraints is "a

principle deeply imbedded in our law." *Id.* Shackling undermines the presumption of innocence, and may unfairly influence a jury to believe that the defendant is dangerous. *Id.* at 630. Further, the use of shackles "is itself something of an affront to the very dignity and decorum of judicial proceedings." *Illinois v. Allen*, 397 U.S. 337, 344 (1970).

The courtroom's formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment. *Deck v. Missouri,* 544 U.S. at 631. For these reasons, federal due process does not permit visible shackles without evidence of manifest necessity presented in the particular case. *Id.*; see also *Estelle v. Williams* 425 U.S. 501, 503 (1976) (making a defendant appear in prison garb poses such a threat to the "fairness of the fact-finding process" that it must be justified by an "essential state policy"). In the absence of a showing of manifest necessity, and a judicial order permitting restraints, a court's refusal to comply with its obvious and well-settled duty to prevent a defendant's unlawful shackling would have to be "deemed to constitute an abuse of discretion." *Illinois v. Allen*, 397 U.S. at 344.

The right to due process of law and the right to effective assistance of counsel are secured by the Fifth, Sixth, and Fourteenth Amendments. A criminal defendant has the right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984). To establish a claim of ineffective assistance of counsel, Petitioner must

show by a preponderance of the evidence that (1) counsel's performance fell outside the normal range of competency and (2) the deficient performance so prejudiced the defense as to deprive the criminal defendant of a fair trial. *Id.* at 697. In order to show prejudice, Petitioner must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694.

In the present case, Johnson was shackled during the trial in the view of the jury. The failure of counsel to object to the shackling fell below the normal range of competency for attorneys. A competent attorney would have been familiar with the "well-settled" duty to prevent shacking during trial. The right to due process of law and the right to effective assistance of counsel are secured by the Fifth, Sixth, and Fourteenth Amendments. Johnson alleges a violation of these federal constitutional rights by the State of Iowa.

2. **Shackling: Ineffective Assistance of Appellate Counsel**

The Petition alleges that appellate counsel failed to raise the shackling issue on direct appeal. In doing so, the Petition is referencing the argument raised in both the first and second post-conviction relief actions brought by the defendant in state court. In the second post-conviction appeal, counsel for the defendant sets out the argument that but for appellate counsel's ineffective assistance, the defendant could have benefited from an "abuse of discretion" standard on direct review rather than the more difficult "prejudice to the outcome of the case" standard on collateral review.

Johnson's post-conviction appellate counsel writes:

> It was error to dismiss the claims against Appellate Counsel for their failure to bring the claim on direct appeal and have it ruled upon with a standard that was appropriate and not impossible. The claims against Appellate Counsel must be analyzed under the abuse of discretion standard as if the claim had been brought on direct appeal. If the outcome is different, then the *Strickland* test is met.

See Final Brief of Appellant, filed March 18, 2016, Iowa Supreme Court No. 15-0776 (Dkt. 39).

This argument is imprecise because, in Iowa, when trial counsel commits ineffective assistance, the standard of review on direct appeal is the same standard of review as on state collateral appeal. Once trial counsel errored by failing to object to the shackling, the defendant's chance for an abuse of discretion review ended. The only way the defendant could have benefited from the abuse of discretion review is if trial counsel had objected to the shackling on the record. Thus, the defendant is left with only the "prejudice to the outcome of the case" standard employed in the ineffective assistance of counsel analysis for any and all post-trial reviews in Iowa.

This is because Iowa is one of only two states in the United States of America that does not use the "plain error" doctrine on appeal. Jon M. Woodruff, *Plain Error by Another Name: Are Ineffective Assistance of Counsel Claims a Suitable Alternative to Plain Error Review in Iowa?*, 102 Iowa L. Rev. 1811 (2017). The general rule is that an objection must be made at trial in order to preserve the matter for appellate review. *Id.* However, the plain error rule has been recognized as an exception that allows an appellate court to take notice of certain errors on

appeal even if they were not objected to at trial. In "exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States v. Atkinson*, 297 U.S. 157, 159-60 (1936). Indeed, the plain error rule has been codified in the federal rules under rule 52(b): "Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b).

Iowa's failure to employ the plain error rule is evident in the Iowa Appellate Court's review of the defendant's second post-conviction appeal. With regard to the shackling issue, the court recognized that trial counsel's performance was ineffective: "therefore, we consider the prior determination that Johnson's trial counsel failed to perform an essential duty undisputed." *Johnson v. State*, No. 15-0776 at p. 5 (Iowa App. 2016). Then, citing the *Strickland* standard, the court writes:

> The same standards discussed when analyzing Johnson's ineffectiveness-of-trial-counsel claim apply when analyzing his ineffectiveness-of-appellate-counsel claim. Johnson must demonstrate that his appellate counsel failed to perform an essential duty and that he was prejudiced by counsel's failure.

See *Id.* (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

Shackling is inherently prejudicial. See *Deck v. Missouri*, 544 U.S. 622, 629 (2005). This is a matter of constitutional law decided by the United States Supreme Court. *Id.* The analysis by the Iowa Court of Appeals in Johnson's various post-trial relief efforts underscores the fundamental issue: once the trial attorney dropped the

ball on the shackling issue, the true substance of the constitutional violation would never again be reviewed by the Iowa court. Because the court will only review the issue in terms of ineffective assistance of counsel, the burden shifts from the state to the defendant. Rather than requiring the court to justify its use of an inherently prejudicial action, the defendant has to prove that he would have been found innocent if not for the court's inherently prejudicial action.

Thus, the defendant was denied due process, not just by trial counsel's error, but vis-a-vi Iowa's ineffective review process for fundamental due process claims not properly raised at trial. If a reviewing court refuses to use plain error, then that court refuses to review the constitutional substance of the case. That is what ultimately happened here. If the errors of the trial court and trial counsel result in an established and blatant due process violation (shackling), then the harm is *malum in se*. A trial is de facto fundamentally unfair when it embodies a continuing and well-settled violation of due process (shackling in this case). What the Iowa appellate process does is makes it effectively impossible to redress the *malum in se* violation by repeatedly examining it as an attorney conduct issue. Because the inherent prejudice of the shackling could not be properly addressed in the state court, the defendant now asks the United States Supreme Court to recognize plain error when it sees it.

If trial counsel had objected to the shackling, then the review would have been for abuse of discretion. As cited above, in the absence of a showing of manifest necessity, and a judicial order permitting restraints, a court's refusal to comply with

its obvious and well-settled duty to prevent a defendant's unlawful shackling would have to be "deemed to constitute an abuse of discretion." *Illinois v. Allen*, 397 U.S. at 344. And, as the result from Johnson's first post-conviction relief action exhibits, a finding of abuse of discretion would necessitate a new trial. However, because trial counsel failed to object to the shackling, any subsequent claim is necessarily in the more difficult context of ineffective assistance of counsel.

The federal court, on the other hand, does have the plain view doctrine. See Fed. R. Crim. P. 52(b). And, the applicant asks that this court recognize the clearly established rule against shackling a defendant at trial absent clearly articulated reasons by the court. In failing to redress this constitutional violation, the State of Iowa has made an unreasonable application of federal law. Shackling is inherently prejudicial. This is a matter of constitutional law decided by the United States Supreme Court. *Deck v. Missouri*, 544 U.S. 622, 629 (2005). The failure of trial counsel to object to shackling in this case, coupled with Iowa's lack of a "plain error" doctrine on appeal, created a legal no man's land wherein the defendant cannot obtain redress for a direct violation of his right to due process and his right to a fair trial. The Fifth, Sixth and Fourteenth Amendments are violated when a defendant is denied due process and denied effective assistance of counsel as alleged in Grounds One, Three, and Five of the Petition.

3. Shackling: Structural Error

The final allegation in the Petition is that Johnson's shackling at trial and his trial counsel's failure to object created a structural error that rendered

Johnson's criminal trial fundamentally unfair. Structural errors are those errors that "ordinarily relate to the fundamental rights involving the structure of the trial." *Arizona v. Fulminante*, 499 U.S. 279, 307-310 (1991). The Supreme Court has stated that when structural errors occur, automatic reversal is required. *Rivera v. Illinois*, 556 U.S. 148 (2009); see also *Neder v. United States*, 527 U.S. 1 (1999) ("we have found an error to be structural, and thus subject to automatic reversal, only in a very limited class of cases.") The Supreme Court has recognized that structural error occurs when: (1) counsel is completely denied, actually or constructively, at a crucial stage of the proceeding; (2) where counsel does not place the prosecution's case against meaningful adversarial testing; or (3) where surrounding circumstances justify a presumption of ineffectiveness, such as where counsel has an actual conflict of interest in jointly representing multiple defendants. *United States v. Cronic*, 466 U.S. 648, 658 (1984).

The allegation in the present applicant's case is that he was constructively denied counsel at trial, a crucial stage of the proceedings. Trial counsel was ineffective to the point that not only did they fail to object to the use of shackles in front of the jury, but they agreed to allow the trial judge to tell the jury that Johnson was in shackles. Overlooking a constitutional violation this egregious is akin to having no counsel at all. It affects the entire framework within which the trial proceeds because it negates the indicia of innocence. The presumption of innocence is a fundamental constitutional right. The presence of shackles taints the juror's minds from the moment that they step foot into the courtroom and the

implication of dangerousness on the part of the defendant impacts every stage of the proceedings.

Because the State of Iowa does not employ the plain error doctrine, the issue evades substantive review. Instead, the only review is in the ineffective assistance of counsel context. If the only chance this defendant had at fundamental fairness was counsel who allowed him to be shackled in front of the jury, then he essentially had no counsel at all. This is structural error that requires automatic reversal.

The right to a fair trial and the right to effective assistance of counsel are guaranteed by the Fifth, Sixth, and Fourteenth Amendments. Johnson claims that the State of Iowa violated his Fifth, Sixth, and Fourteenth Amendment rights by denying him a fundamentally fair trial.

Issue of Exceptional Importance

The Eighth Circuit Court of Appeals erroneously determined that shackling a defendant at trial in view of the jury was not inherently prejudicial and a violation of the right to due process of law under the Fifth and Fourteen Amendments to the United States Constitution. This decision will allow the Iowa appellate courts to continue to evade a substantive review of fundamental due process errors by allowing them to focus on the ineffective assistance of counsel standard. The danger is the continued erosion of citizen's rights to due process and a fair trial under the law. Petitioner-Appellant therefore asks this Court to protect the provisions of the constitution guaranteeing the right to due process and fairness in criminal proceedings.

CONCLUSION

For the foregoing reasons it is respectfully requested that the Supreme Court grant this Petition for Writ of Certiorari.

Respectfully submitted this 21st day of July 2019.

/s/ Dennis E. McKelvie

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APPENDIX A

Opinion of the United States Eighth Circuit Court of Appeals, *Johnny Lee Johnson v. William Sperfslage*, No. 18-1709 (8th Cir. 04/26/2019).

United States Court of Appeals
For the Eighth Circuit

No. 18-1709

Johnny Lee Johnson

Petitioner - Appellant

v.

William Sperfslage

Respondent - Appellee

Appeal from United States District Court
for the Southern District of Iowa - Des Moines

Submitted: January 15, 2019
Filed: April 26, 2019
[Unpublished]

Before GRUENDER, WOLLMAN, and SHEPHERD, Circuit Judges.

PER CURIAM.

Johnny Lee Johnson appeals the district court's[1] denial of his petition for habeas corpus under 28 U.S.C. § 2254. He argues that he received ineffective

[1]The Honorable Robert W. Pratt, United States District Judge for the Southern District of Iowa.

assistance of counsel during trial and on direct appeal from his Iowa conviction for two counts of first-degree murder. We affirm.

On April 29, 2007, Johnson shot and killed his estranged wife and the man she was dating. Johnson's teenage daughter witnessed him in the act of murdering her mother, after which Johnson declared, "It is over. She was f'ing him. I'm going to jail, and I don't care." State v. Johnson, 778 N.W.2d 218, 2009 WL 4842480, *1 (Iowa Ct. App. 2009) (unpublished table decision). Shortly thereafter Johnson called his sister-in-law and said, "I have some sad news. I shot Kim." Id. at *1 n.1. In a later phone call he told her that he had "shot them both." Id. When Johnson later met his brother at the sheriff's office to turn himself in, he told his brother that he had likely scraped his hand while "beating them . . . to make sure they were dead." Id. at *1 (alteration in original). Johnson again confessed to the killings during interrogation by police.

Physical evidence also linked Johnson to the crime scene. Law enforcement officers recovered Johnson's Czechoslovakian pistol from where he had told them he had thrown it and confirmed that it matched the shell casings from the crime scene. Johnson's DNA was found on a beer can near his wife's apartment, as were his muddy footprints. Finally, his wife's blood was found on his blue jeans.

Before trial began, it was decided that Johnson would wear shackles on his legs. How that decision was made is not clear from the record, but Johnson evidently did not object. Johnson confirmed during a pretrial conference that he had spoken with his counsel regarding the shackles and consented to the court's instructing the jury that they should assign no significance to the shackles. The court stated that it would inform the jury that Johnson had agreed to wear shackles so that the sheriff's deputies could patrol the wintry roads instead of standing in the courtroom. There is no record, however, of the court's actual statement to the jury.

Johnson did not challenge the shackling on direct appeal, but later sought post-conviction relief, claiming that his trial and appellate counsel had been ineffective for, *inter alia*, failing to object to his shackling at trial and failing to raise the issue on direct appeal. A state trial court initially granted Johnson a new trial, but the Iowa Court of Appeals reversed, holding that Strickland v. Washington, 466 U.S. 668 (1984), governed Johnson's claims for ineffective assistance of counsel arising from the shackling. Johnson v. State, 860 N.W.2d 913, 919-20 (Iowa Ct. App. 2014). On remand, the trial court found that Johnson could not show a reasonable probability that the result of his trial would have been different in the absence of the errors he alleged. See Strickland, 466 U.S. at 694. The court of appeals affirmed. Johnson v. State, 886 N.W.2d 617, 2016 WL 4803734, *6 (Iowa Ct. App. 2016) (unpublished table decision). The federal district court subsequently denied Johnson's habeas petition, granting a certificate of appealability only as to the shackling issue.

"In reviewing a federal district court's denial of habeas relief, we review findings of fact for clear error and conclusions of law *de novo*." Ervin v. Bowersox, 892 F.3d 979, 983 (8th Cir. 2018). Relevant here, Johnson must show that the state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). "[T]he application of Supreme Court holdings must be objectively unreasonable, not merely wrong." Ervin, 892 F.3d at 983 (internal quotation marks omitted).

Johnson does not argue on appeal that he can demonstrate prejudice under Strickland. He contends instead that prejudice should be presumed based on either the holding in Deck v. Missouri, 544 U.S. 622 (2005), or the doctrine of structural error. We conclude that neither applies here.

In Deck, the shackling issue was raised on direct appeal. The Court held that "where a court, without adequate justification, orders the defendant to wear shackles

that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation"; instead, the government must prove beyond a reasonable doubt that the error was harmless. Id. at 635. Because Deck was decided on direct appeal, however, it did not clearly establish a standard for collateral proceedings.

After analyzing Deck and other cases from federal and state courts, the Iowa Court of Appeals agreed with the majority of jurisdictions that Johnson should be required to show prejudice to establish ineffective assistance of counsel. See, e.g., Marquard v. Sec. for Dep't of Corr., 429 F.3d 1278, 1313-14 (11th Cir. 2005); People v. Robinson, 872 N.E.2d 1061, 1071-72 (Ill. 2007). That conclusion was not "an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, 562 U.S. 86, 103 (2011). In Steen v. Schmalenberger, 687 F.3d 1060, 1063-64 (8th Cir. 2012), we denied a similar habeas petition, holding that the North Dakota Supreme Court did not unreasonably interpret the law when it required a petitioner to show in a collateral challenge that he was prejudiced by wearing an orange prison jumpsuit during his trial. There has been no intervening Supreme Court decision clearly establishing a different rule. Indeed, the standard adopted by the Iowa Court of Appeals is consistent with the Supreme Court's subsequent decision in Weaver v. Massachusetts, 137 S. Ct. 1899, 1911 (2017), which held that "when a defendant raises a public-trial violation via an ineffective-assistance-of-counsel claim, Strickland prejudice is not shown automatically."

Johnson argues alternatively that his counsel's performance was so deficient that it constructively denied his right to counsel and thus constituted structural error. The Iowa Court of Appeals held that Johnson had failed to show a denial of his right to counsel. Because Johnson fails to submit any legal authority rendering that decision unreasonable, we reject his argument that structural error occurred during his trial. See 28 U.S.C. § 2254(d)(1).

Finally, we deny Johnson's request to expand the certificate of appealability to embrace the other issues he raised in the district court.

The judgment is affirmed.

United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

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April 26, 2019

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RE: 18-1709 Johnny Johnson v. William Sperfslage

Dear Counsel:

The court has issued an opinion in this case. Judgment has been entered in accordance with the opinion. The opinion will be released to the public at 10:00 a.m. today. Please hold the opinion in confidence until that time.

Please review Federal Rules of Appellate Procedure and the Eighth Circuit Rules on post-submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. Note particularly that petitions for rehearing and petitions for rehearing en banc must be received in the clerk's office within 14 days of the date of the entry of judgment. Counsel-filed petitions must be filed electronically in CM/ECF. Paper copies are not required. No grace period for mailing is allowed, and the date of the postmark is irrelevant for pro-se-filed petitions. Any petition for rehearing or petition for rehearing en banc which is not received within the 14 day period for filing permitted by FRAP 40 may be denied as untimely.

Michael E. Gans
Clerk of Court

YML

Enclosure(s)

cc: Mr. John S. Courter
Mr. Johnny Lee Johnson
Mr. Benjamin Milton Parrott

District Court/Agency Case Number(s): 4:11-cv-00087-RP

APPENDIX B

Ruling of the United States District Court for the Southern District of Iowa, the Honorable Robert W. Pratt presiding, March 28, 2018.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

JOHNNY LEE JOHNSON, Petitioner, vs. WILLIAM SPERFSLAGE, Respondent.	4:11-cv-00087-RWP **RULING AND ORDER DISMISSING CASE**

Johnny Lee Johnson filed this petition for writ of habeas corpus pro se under 28 U.S.C. § 2254, challenging his Guthrie County, Iowa convictions for two counts of murder in the first degree. The Court then appointed counsel to represent Johnson. Counsel filed a formal request to stay the proceedings in order for Johnson to to exhaust claims in state court. Respondent did not resist the request for a stay. On April 15, 2011, the Court granted the request to stay the case. The state court proceedings concluded on March 5, 2017. Johnson then filed an amended petition. ECF No. 35.

The parties have filed briefs on the merits of the issues raised in the petition (ECF Nos. 41, 44) and the case is now fully submitted and ready for ruling. For the following reasons, the Court denies the petition, and grants a certificate of appealability on the shackling issue.

I. FACTUAL AND PROCEDURAL BACKGROUND

On April 29, 2007, Johnson shot and killed his estranged wife, Kim Johnson, and the man she was dating, Greg White. The facts underlying Johnson's conviction are set forth in detail in the Iowa Court of Appeals' decision affirming his conviction. *State v. Johnson*, No. 08-0320, 2009 WL 4842480, 780 N.W.2d 249 (Ia. Ct. App. Dec. 17, 2009). Johnson's teenage daughter Jessica witnessed part of the murders. After shooting and beating the victims on their heads, Johnson told Jessica, "It is over. She was f'ing him. I'm going to jail, and I don't care." *Id.* at *1-2. Jessica then attempted to call 911 and told a neighbor, Johnson's mother, and Johnson's

brother that Johnson had killed her mother. *Id.* Johnson was handcuffed and brought to the sheriff's office. Special Agent Mitch Mortvedt began to interview Johnson by 1:39 am and the interview concluded almost two hours later. Mortvedt continued the interview at 10:00 and concluded the interview by about 11:30 am. *Id.* During the course of those two interviews, Johnson confessed to shooting the victims. *Id.*

Johnson proceeded to trial on the two first-degree murder charges. *Id.* Johnson's defense counsel did not dispute he killed two people, instead arguing the circumstances did not satisfy the elements of first degree murder. Johnson was shackled at the ankles during trial. There is no record indicating why it was decided shackling was warranted.

> Neither of Johnson's trial attorneys remembered specifically objecting to Johnson being shackled; however, one was "certain" he would not have simply agreed to Johnson being shackled. Both attorneys believed an agreement must have been reached, balancing potential security concerns and the choice between having uniformed deputies present in the courtroom or having Johnson shackled. Prior to voir dire, the trial judge informed the jury Johnson was wearing shackles and that no conclusion was to be drawn from that fact. It is unclear whether the jury could see Johnson was wearing shackles because he was seated when the jury entered the courtroom, was wearing long trousers, and was seated behind counsel table, which was partially shielded from the jury box by another table and file boxes.

Johnson v. State, 886 N.W.2d 617 (Iowa Ct. App. 2016), *cert. denied*, 138 S. Ct. 148, 199 L. Ed. 2d 88 (2017).

A jury convicted Johnson of first degree murder as to both victims. Johnson appealed his conviction. On appeal, he argued counsel was ineffective for failing to move to suppress his post-arrest statements and failed to object to their introduction at trial. *Johnson*, 780 N.W.2d 249. The Iowa Court of Appeals found under the totality of the circumstances Johnson's statements were voluntary and introduction of the statements did not prejudice Johnson. *Id.* Johnson's request for further review was denied by the Iowa Supreme Court on March 15, 2010. Johnson then filed a postconviction relief action, contending counsel was ineffective for failing to pursue an intoxication defense, failing to request voir dire be recorded, and failing to object to

shackling at trial. The postconviction relief trial court granted relief on Johnson's claim that counsel should have challenged the shackling and granted Johnson a new trial. The court, applying reasoning set forth in *Deck v. Missouri*, 544 U.S. 622, 626-29 (2005), required the State to prove beyond a reasonable doubt Johnson was not prejudiced by being shackled at trial. The State appealed application of that standard of proof. The Iowa Court of Appeals reversed the grant of the new trial, finding the trial court had applied the wrong burden of proof on the shackling issue and denying relief on all other claims. The court found when a postconviction applicant raises an ineffective-assistance counsel claim alleging counsel breached an essential duty by failing to object to the applicant's shackling at trial, the applicant retains the burden of showing a reasonable probability the outcome would have been different but for the shackling. *Johnson v. State*, 860 N.W. 2d 913 (Ia. Ct. App. Dec. 24, 2014). The case therefore was remanded to the district court for further decision on the shackling issue.

On remand, court the district court found that despite trial counsel's breach of an essential duty in failing to object to the shackling, Johnson had failed to carry his burden to prove a reasonable probability of a different result. The Iowa Court of Appeals affirmed that determination. *Johnson v. State*, No. 15-0776, 2016 WL 4803734, 886 N.W.2d 617 (Iowa Ct. App. Sept. 14, 2016). The Iowa Supreme Court denied further review. Petitioner now seeks relief in this 28 U.S.C. § 2254 proceeding.

Petitioner seeks relief based on claims that: (1) counsel was ineffective for failing to object to Johnson's shackling at trial and the shackling constituted a structural error; (2) counsel was ineffective for failing to move to suppress Johnson's post arrest statements and involuntary confession; and (3) the postconviction relief court abused its discretion by denying Johnson's motion for a state funded expert to testify regarding his level of intoxication during and prior to the crime.

At this stage of the proceedings, this Court's role is not to determine whether *any* errors

occurred during Johnson's trial or postconviction proceedings. Federal habeas review exists as "a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary correction through appeal." *Woods v. Donald*, 135 S.Ct. 1372, 1376 (2015) *quoting Harrington v. Richter*, 562 U.S. 86, 102-103 (2011). The federal habeas court conducts a limited, deferential review of state court decisions. *Nash v. Russell*, 807 F.3d 892, 897 (8th Cir. 2015). The claims set forth above are considered under that deferential standard.

II. ANALYSIS

Standard of Review

A federal court may consider an application "for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). For claims properly before a federal court, a writ of habeas corpus shall be granted only if the prior adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1) and (2).

"[A]n 'unreasonable application of' those holdings must be 'objectively unreasonable,' not merely wrong; even 'clear error' will not suffice." *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014) (citing *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003)). This "difficult to meet" standard requires a petitioner to demonstrate "'that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Id.* (*quoting Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

When a state prisoner such as Johnson "files a petition for writ of habeas corpus in federal court we are directed to undertake only a limited and deferential review of underlying state court decisions." *Collier v. Norris*, 485 F.3d 415, 421 (8th Cir. 2007) (*quoting Morales v. Ault*, 476 F.3d 545, 549 (8th Cir. 2007). "A federal court may not issue the writ simply because it 'concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.'" *Lyons v. Luebbers*, 403 F.3d 585, 592 (8th Cir. 2005) (*quoting Williams v. Taylor*, 529 U.S. 362, 412-13) (2000).

Johnson claims counsel performed deficiently. In order to be entitled to relief on a claim counsel was ineffective, Petitioner is required to show: (1) counsel's performance fell below an objective standard of reasonableness, and (2) the deficiency was prejudicial to the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show prejudice, the petitioner must show there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Both determinations are mixed questions of fact and law. *Strickland*, 466 U.S. at 698.

The Court addresses the individual claims for relief with the standards set forth above in mind.

A. Shackling Claims

The Federal Constitution forbids the use of visible shackles during the guilt and penalty phases of a trial unless that use is justified by an essential state interest such as courtroom security, specific to the defendant at trial. *Deck v. Missouri*, 125 S.Ct. 2007 (2005). Johnson was shackled at trial. The record does not reflect Johnson was shackled as a result of a security need specific to Johnson. There is no record trial counsel objected to the use of shackles. Johnson contends trial and appellate counsel were ineffective for failing to object to his shackling at trial.

Johnson raised this claim in postconviction relief proceedings, and the Iowa Court of Appeals denied him relief.

In order to be entitled to relief at this stage of the proceedings, Johnson must show not only that an error occurred but also that the "state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. Johnson contends his trial was fundamentally unfair because he was shackled.[1] He contends counsel's failure to object to the shackling was such an egregious violation it was akin to having no counsel at all. As such, Johnson contends the shackling was a structural error that requires an automatic reversal of his conviction.

The Iowa Court of Appeals concluded differently. In denying relief, the Iowa Court of Appeals analyzed *Deck*. In that case, the Supreme Court held on direct appeal of the penalty phase of a criminal case no prejudice is required to prove a due process violation when a defendant is routinely shackled, in view of the jury, and without an individualized reason identifying what essential state interests were met by shackling. In that factual and procedural situation, the burden shifts to the State to "prove beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained." *Deck,* 544 U.S. at 643-45.

In this case, Johnson did not object to the shackling at trial or on direct appeal. In his postconviction relief proceedings, Johnson raised the challenge as a claim that counsel was ineffective for failing to challenge the shackling. In that context, the Iowa Court of Appeals determined Johnson retained the burden of showing a reasonable probability the outcome would have been different but for the shackling. The evidence in Johnson's case was overwhelming,

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[1]Johnson raises the challenge to shackling as multiple slightly differing claims. To the extent Johnson attempts to raise an independent claim of "plain error,"Johnson fails to show that, that claim was presented in state court. The claim therefore has not been exhausted. 28 U.S.C. § 2254(b). For that reason and all other reasons set forth in Respondent's brief, couched as a free standing plain error claim, the claim is denied.

and Johnson therefore failed to meet his burden to show, absent shackling, the result in his case would have been different. Relief therefore was denied.

The Iowa Court of Appeals' determination is consistent with other courts considering the issue. In denying relief, the Court weighed the measures considered by the trial court to limit prejudice stemming from the shackles by restricting visibility of the shackles and the court's plan to give a neutral reason for their use. Decisive to the decision was the strength of the evidence against Johnson. In a similar case, the Ninth Circuit Court of Appeals applied the same analysis, and found the California Supreme Court reasonably concluded that even if the defendant's attorney had objected to the restraint and even if the shackle had been removed for trial, it was not reasonably likely that the outcome of the trial would have been different. *Walker v. Martel*, 709 F.3d 925, 943 (9th Cir. 2013). *See also*, *Jones v. Florida*, 834 F.3d 1299 (11th Cir. 2016) (*Strickland* standard applies to shackling claim); *Steen v. Schmalenberger*, 687 F.3d 1060 (8th Cir. 2012) (finding North Dakota Supreme Court did not unreasonably apply *Strickland* in determining Steen had not established he was prejudiced by being required to wear orange prison jumpsuit during trial).

> In the criminal justice system, the constant, indeed unending, duty of the judiciary is to seek and to find the proper balance between the necessity for fair and just trials and the importance of finality of judgments. When a structural error is preserved and raised on direct review, the balance is in the defendant's favor, and a new trial generally will be granted as a matter of right. When a structural error is raised in the context of an ineffective-assistance claim, however, finality concerns are far more pronounced. For this reason, and in light of the other circumstances present in this case, petitioner must show prejudice in order to obtain a new trial.

Weaver v. Massachusetts, 137 S. Ct. 1899, 1913 (2017)

Johnson did not challenge use of the shackles at trial. Had he done so, the trial court could have put on record the reasons shackles were of particular need in this case, or the court could have decided not to use them. *Id.* Johnson argues his claim of error should be construed as a structural error, and he should be granted a new trial without being required to show prejudice.

As of 2017 there was "disagreement among the Federal Courts of Appeals and some state courts of last resort about whether a defendant must demonstrate prejudice . . . . in which a structural error is neither preserved nor raised on direct review but is raised later via a claim alleging ineffective assistance of counsel." *Weaver*, 137 S.Ct. at 1907. The *Weaver* court made clear not all structural errors entitle a defendant to a new trial. Structural errors do not lead to fundamental unfairness in all cases. *Id.* at 1908. The *Weaver* court held that although the right to a public trial is structural, it is subject to exceptions. Similarly, the *Deck* court held use of visible shackles should be avoided, but their use can be justified in individual cases.

For the reasons set forth in *Weaver*, the Iowa Court of Appeals' determination that the *Strickland* standard applied was a reasonable determination of the law. The Iowa Court of Appeals' determination there was no reasonable probability the outcome of the trial would have been different had counsel objected to the shackles was not an unreasonable determination of fact or law. Relief on this claim is denied.

B. Failure to Move to Suppress Post Arrest Statements and Confession

Johnson contends counsel was ineffective by failing to move to suppress post-arrest statements and a confession. Johnson states at the time he made the statements he also made several requests for an attorney, and the requests were ignored and the interrogation continued. Johnson states the record shows he expressed his desire for an attorney three separate times. Johnson does not outline the context of those requests, but the records of the case provide the surrounding context.

Johnson raised this claim on direct appeal. In addressing his claim, the Iowa Court of Appeals noted that when a suspect invokes his right to counsel during a custodial interrogation, the police must stop questioning immediately until an attorney is present. *Johnson*, 778 N.W. 2d at *3. The Court further found once the right to counsel has been invoked, the suspect is not subject to further police interrogation unless the accused initiates further communication with

police evincing a willingness and a desire for a generalized discussion about the investigation. *Id.*

The Court outlined the requests for counsel as follows:

> In this case, Johnson was subjected to two separate sessions of custodial interrogation by Special Agent Mortvedt on the morning of April 30, 2007, the first of which began several hours after he turned himself in to police. Prior to any questioning, Johnson read the Miranda warning aloud to Special Agent Mortvedt. Johnson said he did not know whether he wanted to talk to police about the incident, and asked, "So do I need a lawyer?" He then asked again, "Do I need a lawyer?" Special Agent Mortvedt responded, "Well, I ... I can't give any advice, Johnny. Um, I mean that's certainly your right" and continued the interrogation.
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> Johnson's questions at this point were not sufficient to invoke his right to presence of an attorney. "Merely asking whether counsel is needed is not sufficient to invoke the right to counsel and the protections provided by such invocation." *State v. Washburne*, 574 N.W.2d 261, 267 (Iowa 1997); *see also Harris*, 741 N.W.2d at 6 (determining the suspect's question, "If I need a lawyer, tell me now" was insufficient to invoke his right to counsel). As such, Special Agent Mortvedt was permitted to continue questioning Johnson after this exchange. *Harris,* 741 N.W.2d at 6 ("Officers have no obligation to stop questioning an individual who makes an ambiguous or equivocal request for an attorney.").
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> Special Agent Mortvedt proceeded to ask Johnson some background questions. As the questioning turned to Johnson's actions on the evening of April 29, 2007, the following exchange occurred:
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> MORTVEDT: What'd you do after the bonfire then?
> JOHNSON: I don't know. I can't even tell you what else I did. I better not without a lawyer present.
> MORTVEDT: Okay.
> JOHNSON: I know what I did.
> MORTVEDT: I'm a ... I ... what's that? You know what you did?
> JOHNSON: Yeah, I was frickin' drunk and I went in to see her. I wanted to talk to her.
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> Johnson's statements place at issue whether a reasonable officer, in light of the circumstances, would have understood the statements as a request for an attorney. *See Edwards*, 451 U.S. at 484-85, 101 S.Ct. at 1885, 68 L.Ed.2d at 386. Johnson's statements, "I can't even tell you what else I did. I better not without a lawyer present" may be viewed as analogous to the defendant's statements in *Harris*, wherein the defendant stated, "I don't want to talk about it. We're going to do it with a lawyer. *Harris*, 741 N.W.2d at 7. In *Harris*, the Iowa Supreme Court concluded, "Harris clearly and unequivocally requested an attorney at this point in the interrogation." *Id.* (citing *Davis*, 512 U.S. at 461-62, 114 S.Ct. at 2356, 129 L.Ed.2d at 373. Unlike the officers in Harris, however, Special Agent Mortvedt properly discontinued the questioning by his response, "Okay."

> However, Johnson reinitiated communication with Special Agent Mortvedt when, without further questioning, Johnson stated, "I know what I did." Special Agent Mortvedt simply parroted Johnson's statement in question form, in responding, "I'm a ... I ... what's that? You know what you did?" Johnson then began to tell what happened, "Yeah, I was frickin' drunk and I went in to see her. I wanted to talk to her."
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> Johnson's statement clearly demonstrated "a willingness and a desire for a generalized discussion about the investigation." *Bradshaw*, 462 U.S. at 1045-46, 103 S.Ct. at 2834, 77 L.Ed.2d at 412. Johnson's statement therefore did not violate the *Edwards* rule, and Special Agent Mortvedt's decision to proceed with the interrogation was not improper. Questioning continued and Johnson subsequently confessed to the shootings.

State v. Johnson, 778 N.W.2d 218 (Iowa Ct. App. 2009).

"When a suspect requests counsel during an interrogation, police must cease questioning until counsel has been made available or the suspect reinitiates communication with the police." *United States v. Havlik*, 710 F.3d 818, 821 (8th Cir. 2013).

> The Supreme Court clarified the *Edwards* rule in *Davis v. United States*, 512 U.S. 452(1994), saying that "if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning." *Id.* at 459, 114 S.Ct. 2350. To implicate *Edwards*, a suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." Id. There is no requirement that an officer must ask clarifying questions when a suspect makes an ambiguous statement regarding counsel. *Id.* at 461, 114 S.Ct. 2350. Applying these principles, the Court in *Davis* held the statement "[m]aybe I should talk to a lawyer" was equivocal, and not an invocation of the right to counsel for purposes of *Miranda* and *Edwards*. Id. at 462, 114 S.Ct. 2350.

Id.

The Iowa Court of Appeals found the statements made by Johnson were voluntary and counsel was not ineffective for failing to move to suppress them. Those determinations are supported by the case law outlined above. The Court further found Johnson had failed to show any prejudice by the use of the statements. There was overwhelming other evidence of his guilt including that Johnson:

> told Bonney that he would like to "get his hands" on White; Johnson's teenage daughter was an eyewitness to the murder of her mother as she recognized her father after his sweatshirt hood fell down revealing his face; Johnson told his daughter, "It's over. She was f'ing him. I'm going to jail, and I don't care"; Johnson parked a block away from the apartment although there was parking right outside the apartment; Johnson's DNA was on a beer can found near his wife's apartment; Johnson's muddy footprints were found near the apartment; Johnson's wife's blood was found on his blue jeans; eight shell casings matching Johnson's Czechoslovakian pistol were found in and around the apartment; Johnson admitted to his brother and sister-in-law, "I was stupid. I drove to town with a gun"; and Johnson explained to his brother that a scrape on his hand must have occurred "while he was beating [them] to make sure [they] were dead

Johnson, 778 N.W.2d at *5.

The evidence of guilt was overwhelming. Johnson fails to show a reasonable probability suppression of any of his statements would have affected the result of his trial. The Iowa Court of Appeals was not incorrect or objectively unreasonable in determining that counsel was not ineffective for failing to move to suppress Johnson's statements.

Relief on this claim is denied.

C. Right to Intoxication Expert during Postconviction Relief Proceedings

Johnson contends his right to present a full and fair defense was denied when the post-conviction court denied his request for a state funded expert to testify regarding his level of intoxication during and prior to the time of the murders. Johnson states intoxication and his mental state at the time of the crime was a vital mitigating circumstance to the two charges of first degree murder. Johnson claims the State of Iowa violated his Sixth Amendment rights by denying him the ability to call an expert witness on his behalf at his postconviction trial. Respondent contends the claim fails because there is no federal constitutional right to an expert witness to assist counsel at postconviction relief proceedings. As Respondent notes, the cases relied upon by Petitioner, *Ake. v. Oklahoma*, 470 U.S. 68 (1975) and *McWilliams v. Dunn*, 137 S.Ct. 1790 (2017) involve the provision of an expert mental health witness for trial preparation, not postconviction proceedings, and the court finds no caselaw providing a basis for a federal

constitutional right to an expert witness to assist counsel at postconviction relief proceedings.

In addition, the State of Iowa provided Johnson fees for an intoxication expert prior to trial. The expert evaluated Johnson's case and determined it is not likely he was intoxicated. On appeal from the denial of postconviction relief, the Iowa Court of Appeals noted Johnson had attempted to secure an expert who would testify he was intoxicated, but failed to do so because the hired expert did not agree Johnson was intoxicated to the point his judgment was impaired. The Court found the postconviction trial court did not abuse its discretion in denying Johnson's motion for a state funded expert. *Johnson*, 860 N.W. 2d 913.

Even at trial, the Eighth Circuit Court of Appeals has held appointment of an expert is only required if the defendant shows "a reasonable probability that an expert would aid in his defense, and that denial of expert assistance would result in an unfair trial." *Davis v. Norris*, 423 F.3d 868, 876 (8th Cir. 2005) *citing Little v. Armontrout*, 835 F.2d 1240, 1244 (8th Cir.1987).

Johnson fails to raise a reasonable probability an intoxication expert would have aided his defense. Iowa courts require a high level of intoxication to support a finding of no specific intent to commit first degree murder; the intoxication must be to the extent that the designing or framing of such purpose is impossible, and the defense is not sustained by mere evidence of intoxication. *State v. Sudbeck*, 885 N.W.2d 217 (Iowa Ct. App. 2016). Ample evidence supported the jury's determination that Johnson was able to form the specific intent to commit first degree murder.

The Iowa Court of Appeals was not incorrect or objectively unreasonable in determining that the postconviction court did not abuse its discretion in denying his request for an expert witness on intoxication at postconviction proceedings.

Relief on this claim is denied.

III. SUMMARY AND DENIAL OF CERTIFICATE OF APPEALABILITY

The Iowa courts did not render a decision that was contrary to federal law as determined

by the Supreme Court, and the Iowa courts did not make a decision based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. The petition is therefore **denied**, and the case is **dismissed.**

Pursuant to Rule 11(a) of the Rules Governing Section 2254 Proceedings in the United States Courts, the court must issue or deny a certificate of appealability when it enters a final order adverse to a petitioner. District Courts have the authority to issue certificates of appealability under 28 U.S.C. § 2253(c) and Fed. R. App. P. 22(b). "A certificate of appealability may issue under [this section] only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Such a showing means "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Petitioner has made a substantial showing of the denial of a constitutional right as to the shackling issue, therefore the Court **grants** a certificate of appealability as to that issue.

Johnson may request issuance of a certificate of appealability on the remaining issues by a judge on the Eighth Circuit Court of Appeals. *See* Fed. R. App. P. 22(b).

IT IS SO ORDERED.

Dated this ___28th___ day of March, 2018.

Robert W. Pratt

ROBERT W. PRATT
U.S. DISTRICT JUDGE