No. 19–5351

IN THE SUPREME COURT OF THE UNITED STATES

JOHNNY LEE JOHNSON,

Petitioner,

v.

WILLIAM SPERFSLAGE,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE IOWA DISTRICT COURT FOR GUTHRIE COUNTY

STATE OF IOWA,	)	FECR019288
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JOHNNY LEE JOHNSON,	)	**PROCEEDINGS**
Defendant.	)	(JURY TRIAL)

VOLUME I OF II

The above-entitled matter came on for jury trial before the Honorable Paul R. Huscher, Judge of the Fifth Judicial District, and jury, commencing on the 8th day of January, 2008, at the Guthrie County Courthouse, Guthrie Center, Iowa.

P R O C E E D I N G S

(The proceedings commenced in chambers at or about 9:58 a.m., January 8, 2008, with the court, Mr. Hammerand, Ms. Benton, Mr. Miler, and defendant present.)

THE COURT: The record should reflect that we are in chambers prior to the commencement of trial.

The defendant is present with counsel, as well as the State's.

There are a couple of matters that need to be addressed. It is the court's understanding that yesterday in the pretrial conference the parties agreed that jury voir dire would not be reported; is that correct?

MR. MILER: That is correct, Your Honor.

MR. HAMMERAND: Yes, Your Honor.

THE COURT: All right. It is the court's understanding that openings and closings will be reported.

If there is an issue regarding voir dire and either party wishes to make a record, of course they will have the opportunity to do that.

The other matter is concerning Mr. Johnson and courthouse security. And it is the court's understanding that there was some, apparently, discussion yesterday about or arrangements made for Mr. Johnson to be seated before the jury's brought in and to remain seated until they are out of the courtroom. And I guess some additional efforts

to try to make as inconspicuous as possible the fact that he's wearing shackles.

And there have been some discussions this morning with counsel. I've suggested that perhaps it would be sensible to tell the jury up-front that Mr. Johnson is wearing shackles, and perhaps explain to them the reason for that in such a manner that they will not be left to debate about it or to wonder about it.

My suggestion was that I would simply tell the jurors this morning that they may notice that Mr. Johnson is wearing shackles, and that that's done because we do have security policies for the courtroom and the courthouse, and that because we have three doors to the courtroom, that it would require a number of deputies to be present. That our trial is expected to take seven or eight days, during the winter, when we like to have the deputies out on the street and patrolling the county. And that in order to alleviate that need, to have those deputies tied up for a week, that Mr. Johnson has agreed to the shackles. That he has no plans to go anywhere and has agreed to wear those so that we can eliminate the need to keep all of those deputies here.

Something along those lines. And that it might take care of any speculation on the part of the jurors.

Mr. Miler, have you had an opportunity to discuss

that with your client?

MR. MILER: We have, Your Honor.

And I know that the court was just giving a rough description of how you would advise the jury, but we would ask that in addition to what the court just indicated, that they be advised that there are no conclusions to be drawn from the fact that he has the shackles on.

Otherwise, we have discussed this matter with Mr. Johnson, and we are agreeable to the court's proposal.

THE COURT: Okay. Mr. Johnson, is that acceptable with you?

THE DEFENDANT: Very much so, Your Honor.

THE COURT: All right.

THE DEFENDANT: Thank you.

THE COURT: I assume it is acceptable with the State?

MR. HAMMERAND: Yes, Your Honor.

THE COURT: Okay. Anything else that we need to address on the record before we start?

MR. MILER: Nothing on behalf of the defense.

MR. HAMMERAND: Not on behalf of the State.

THE COURT: All right. I guess that's it.

(The proceedings in chambers were in recess at or about 10:02 a.m.)

(A jury was impaneled, selected, and duly sworn

IN THE COURT OF APPEALS OF IOWA

No. 9-623 / 08-0320
Filed December 17, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOHNNY LEE JOHNSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Guthrie County, Paul R. Huscher, Judge.

Johnny Lee Johnson appeals from the judgment and sentence entered on his convictions for two counts of murder in the first degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Thomas Gaul, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor and Doug Hammerand, Assistant Attorneys General, and Mary Benton, County Attorney, for appellee.

Heard by Sackett, C.J., and Vaitheswaran and Danilson, JJ.

DANILSON, J.

Johnny Lee Johnson appeals from the judgment and sentence entered on his convictions for two counts of murder in the first degree. He contends his counsel was ineffective in failing to move to suppress his post-arrest statements to police. Because we find Johnson"s counsel was not ineffective, we affirm.

I. Background Facts and Proceedings.

Sometime in March 2007, Johnson"s wife, Kim Johnson, left the family"s home in Coon Rapids and moved to an apartment in nearby Bayard. Johnson"s teenage daughter, Jessica, moved in with Kim, and his teenage son, Josh, remained with him. In early April 2007, Johnson ran into an acquaintance, Mark Bonney, at the lumberyard in Bayard. Johnson asked Bonney if he knew that Kim had begun dating Greg White, and stated that he would like to get "his hands on" White. Bonney warned Johnson that White was strong and that he carried knives, but did not give serious consideration to Johnson"s comment.

On the evening of April 29, 2007, Johnson built a bonfire at his home and drank "four or five" cans of beer. He then retrieved a loaded handgun from inside his home and drove to Kim"s apartment in Bayard. Johnson parked about a block away from the apartment at just after 10:00 p.m. He was wearing a black sweatshirt with the hood pulled up over his head. As Johnson approached the apartment he noticed the wooden front door was open. Through the screen door, Johnson saw White in the kitchen, wearing only pajama pants. White did not notice Johnson outside the door.

Johnson knelt and shot White three times through the screen door. He then entered the apartment and shot White once more. Kim ran from Jessica"s

bedroom, saw White on the floor, and ran back into the bedroom screaming and trying to shut the door behind her. Johnson followed Kim into the bedroom and shot her four times. He then went back into the hall and beat White on the head with the butt of his gun to make sure he was dead, crushing his skull. Johnson reentered the bedroom and beat the back of Kim"s head with his gun, also crushing her skull. At that point, Jessica tried to push him off Kim, but he shoved her back to the bed. Johnson"s hood fell away from his face, and Jessica realized he was her father. Johnson told her, "It is over. She was f"ing him. I"m going to jail, and I don"t care." Johnson then left the apartment.

Jessica checked her mother for a pulse and tried to call 911. A neighbor, Shanda Thomas, heard the gunshots and ran outside. Jessica told Thomas that "her fucking dad shot her mom." As they waited for police to arrive, Jessica called her grandmother. Thomas heard Jessica tell her grandmother, "You need to get over here. Your fucking son shot my mom." Jessica then called her uncle, Joseph Johnson, and said, "Your fucking brother shot my mom."

Soon after receiving the call from Jessica, Joseph also received a call from Johnson. Johnson asked, "Did you hear what I did?" to which Joseph responded, "Yes, Jessie told me."[1] Joseph talked his brother into meeting him at the Guthrie County Sheriff"s Office to turn himself in. When they arrived at the

[1] Johnson also spoke to his sister-in-law, Teresa Johnson, twice shortly after the shooting. The first time he said, "I have some sad news. I shot Kim." In his next phone conversation with Teresa, Johnson told her, "I shot them both" and told her, "You"re going to have to take care of the children, because I"m going to jail probably." He continued, "I was stupid. I drove to town with a gun." Johnson explained to Teresa that he had gotten drunk and had driven to town to see if Kim was with another man, and if she was, "he was either going to do something, or he was going to kill them."

sheriff"s office, Johnson noticed a scrape on his hand and told Joseph that he must have gotten it while "beating them . . . to make sure they were dead."

Johnson was handcuffed and brought inside the sheriff"s office. Officer Jeremy Long read Johnson his *Miranda* rights, asked him a few questions, booked him, and placed him in a jail cell. At 1:27 a.m. Johnson submitted to a breath test, which measured his blood alcohol at .019. Johnson also gave a DNA sample.[2] At 1:39 a.m. Special Agent Mitch Mortvedt began to interview Johnson. The interview concluded at 3:38 a.m. Mortvedt interviewed Johnson again later that morning, from 10:02 to 11:31 a.m. During the course of these interviews, Johnson confessed to the shootings of Kim and White. Johnson explained the marital problems he and Kim had been going through, his discovery that Kim was dating someone else, and what led him to shoot the victims earlier that evening. Johnson also described exactly where he had thrown his gun on his drive home.[3]

On June 4, 2007, the State filed a trial information charging Johnson with two counts of murder in the first degree. Johnson pled not guilty. A jury trial began on January 8, 2008. During the trial, Johnson"s counsel tried to limit Johnson"s culpability to a manslaughter charge.[4] At the close of the evidence,

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[2] Several evidentiary findings tied Johnson to the crime scene. DNA tested from the mouth of a Budweiser can found on the ground outside the apartment matched Johnson"s. A muddy footprint consistent with Johnson"s size 9 1/2 Dickies boots was discovered near the apartment. In addition, blood found on Johnson"s jeans tested positive with Kim"s DNA.

[3] The Iowa Division of Criminal Investigation (DCI) later confirmed that Johnson"s C2-52 Czechoslovakian pistol had fired all eight shell casings found at Kim"s apartment.

[4] Johnson"s counsel argued that Johnson had acted out of a sudden passion when he observed "a man standing half naked" in his estranged wife"s apartment. In support of that strategy, Johnson"s counsel decided to place Johnson"s somewhat sympathetic post-arrest statements (in which Johnson described that "it all happened so

Johnson"s motion for judgment of acquittal was denied. On January 14, 2008, the jury returned verdicts finding Johnson guilty as charged. Johnson filed a motion for a new trial and a motion in arrest of judgment. Following a hearing, the court denied both motions. Johnson was sentenced to a life sentence on each count, to be served concurrently. He now appeals.

II. Ineffective Assistance of Counsel.

We conduct a de novo review of ineffective assistance of counsel claims. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). To establish a claim of ineffective assistance of counsel, a defendant must prove (1) counsel failed to perform an essential duty and (2) prejudice resulted to the extent it denied the defendant a fair trial. *Id.* A defendant"s failure to prove either element by a preponderance of the evidence is fatal to a claim of ineffective assistance. *State v. Polly*, 657 N.W.2d 462, 465 (Iowa 2003). Although we generally preserve ineffective assistance of counsel claims for postconviction proceedings, we consider such claims on direct appeal if the record is sufficient. *State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006). In this case, the record is sufficient to address Johnson"s claim.

To prove counsel breached an essential duty, a defendant must overcome a presumption that counsel was competent and show that counsel"s performance was not within the range of normal competency. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). Although counsel is not required to predict changes in the law, counsel must exercise reasonable diligence in deciding whether an issue is worth

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fast," that he went "crazy for an instant," and that he "just frickin"—frickin" went nuts") before the jury without subjecting him to cross-examination.

raising. In accord with these principles, we have held that counsel has no duty to raise an issue that has no merit. *State v. Dudley*, 766 N.W.2d 606, 620 (Iowa 2009). To prove prejudice resulted, a defendant must show there is a reasonable probability that but for counsel"s unprofessional errors the result of the proceeding would have been different. *Ledezma v. State*, 626 N.W.2d 134, 143 (Iowa 2001).

Because counsel has no duty to raise a meritless issue, the validity of Johnson"s constitutional claim must be determined. *See Dudley*, 766 N.W.2d at 620. Constitutional claims are reviewed de novo. *State v. Bumpus*, 459 N.W.2d 619, 622 (Iowa 1990). "If his constitutional challenges are meritorious, we will then consider whether reasonably competent counsel would have raised these issues and, if so, whether [Johnson] was prejudiced by his counsel"s failure to do so." *Id*.

Johnson contends his trial counsel was ineffective in failing to move to suppress his post-arrest statements to police and object to their introduction at trial. He argues his right to counsel under the Fifth Amendment of the United States Constitution (and the comparable provision of the Iowa Constitution, article 1, section 9) was violated because police improperly continued interrogation and obtained his statements after he had requested an attorney.[5]

[5] Johnson alleges his right to counsel was also violated under the Sixth Amendment of the United States Constitution (and its Iowa counterpart, article 1, section 10). These provisions, however, are not applicable. The issue here is whether Johnson invoked his right to counsel during initial questioning following his arrest.

In contrast, the rights to counsel under the Sixth Amendment and article 1, section 10 attach upon the initiation of adversarial criminal proceedings, generally by formal charge, arraignment, preliminary hearing, information, or indictment. *State v. Peterson*, 663 N.W.2d 417, 426 (Iowa 2003). An arrest by itself, with or without a warrant, falls far short of an official accusation by the state against the suspect. *State v.*

Johnson alleges his counsel breached an essential duty by failing to seek suppression of his statements, and that he was prejudiced by this omission because "counsel would have had a good chance for success" had a motion to suppress been filed. Johnson also contends the "inculpatory statements were critical evidence against [him] and played a substantial role in linking [him] to the crime . . . ."

In *Miranda v. Arizona*, 384 U.S. 436, 478, 86 S. Ct. 1602, 1630, 16 L. Ed. 2d 694, 726 (1966), the United States Supreme Court determined the Fifth and Fourteenth Amendments require the police to inform a suspect he has a right to remain silent and a right to counsel during a custodial interrogation. Absent *Miranda* warnings and a valid waiver of those rights, statements made during a custodial interrogation are inadmissible. *Miranda*, 384 U.S. at 479, 86 S. Ct. at 1630, 16 L. Ed. 2d at 725; *State v. Harris*, 741 N.W.2d 1, 5 (Iowa 2007). When a suspect invokes his right to counsel during a custodial interrogation, the police must stop questioning immediately until an attorney is present. *State v. Walls*, 761 N.W.2d 683, 686 (Iowa 2009).

The request for counsel must be unambiguous and unequivocal; that is, a suspect must articulate his desire to have counsel present sufficiently clear that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. *See, e.g.*, *Harris*, 741 N.W.2d at 7. Although it is generally considered good police practice to clarify a suspect"s unclear request, officers have no obligation to stop questioning when an ambiguous or equivocal

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Johnson, 318 N.W.2d 417, 434 (Iowa 1982); *see also* Iowa R. Crim. P. 2.4(2) (noting that an information or indictment must be filed in order to prosecute indictable offenses). As such, we will not address Johnson"s arguments under these provisions.

request occurs. *Davis v. United States*, 512 U.S. 452, 461-62, 114 S. Ct. 2350, 2356, 129 L. Ed. 2d 362, 373 (1994); *Harris*, 741 N.W.2d at 7; *State v. Morgan*, 559 N.W.2d 603, 609 (Iowa 1997).

When a suspect has invoked his right to counsel, he is not subject to further police questioning "unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 1885, 68 L. Ed. 2d 378, 386 (1981). Even when a conversation is initiated by the suspect and reinterrogation follows, the prosecution still has the burden to show the subsequent events indicated a valid waiver of his rights. *Oregon v. Bradshaw*, 462 U.S. 1039, 1044, 103 S. Ct. 2830, 2834, 77 L. Ed. 2d 405, 412 (1983). In other words, when reinitiating questioning with police, the suspect must have "evinced a willingness and a desire for a generalized discussion about the investigation." *Id.* at 1045-46, 103 S. Ct. at 2834, 77 L. Ed. 2d at 412.

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.[6] 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.

[6] The second session of interrogation did not contain any references to Johnson's right to counsel.

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.”).

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:

> 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.

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."

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.

Through a pro se brief, Johnson further argues his counsel should have moved to suppress his statements as involuntary.[7] We disagree. Shortly after

[7] Specifically, Johnson contends the circumstances surrounding the interrogations rendered his statements involuntary because:

> [W]hile under the influence of alcohol, confined to a cell, [he] was interrogated at least twice, in the middle of the night, for several hours at

the shootings, Johnson (after calling his brother and informing him that he had shot Kim) decided to turn himself in to police. Officer Long read Johnson his *Miranda* rights, and Johnson later read the *Miranda* rights aloud to Special Agent Mortvedt. He informed both officers that he had law enforcement experience, as he had previously been employed as a police officer for several years in Maine. The first interrogation began shortly after his arrival at the sheriff"s office and lasted less than two hours. The second interrogation began more than six hours later and lasted less than one and one-half hours. Johnson understood the questions he was asked and appeared to be of normal intelligence. Although Johnson contends he was impaired due to the influence of alcohol, we note that his breath test revealed a blood alcohol content of .019, significantly below what is considered the legal limit for impairment.[8]

Under the totality of the circumstances, we find Johnson"s statements were voluntary. *See, e.g.*, *State v. Countryman*, 572 N.W.2d 553, 558-59 (Iowa 1997); *State v. Pierson*, 554 N.W.2d 555, 561 (Iowa Ct. App. 1996). We find Johnson"s pro se argument to be without merit.

Because Johnson has failed to show counsel failed to perform an essential duty, there is no need to address the State"s claim that the failure to file a motion to suppress was due to trial strategy of defense counsel. However, we feel compelled to address the second prong Johnson is required to prove to establish his claim of ineffective assistance of counsel: prejudice. *Ledezma*, 626

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a time, that he knows of, by a „Special Agent" . . . in order to secure incriminating statements, admissions and several material confessions[.]

[8] A person commits the offense of operating while intoxicated if the person operates a motor vehicle while having an alcohol concentration of .08 or more. *See* Iowa Code § 321J.2(1)(b).

N.W.2d at 142 ("If the claim lacks prejudice, it can be decided on that ground alone without deciding whether the attorney performed deficiently.").

To establish prejudice, Johnson must prove a reasonable probability that, but for his counsel"s failure, the result of the proceeding would have been different. *Maxwell*, 743 N.W.2d at 196. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Ledezma*, 626 N.W.2d at 143 (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984)).

Here, there was overwhelming evidence of Johnson"s guilt without regard to his own statements. For example, 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."

Upon our review of the facts of this case, we conclude Johnson"s Fifth Amendment right to counsel was not violated.[9] Even if we assume there is merit to the claims, Johnson has failed to show any prejudice arose. As a result, trial counsel was not ineffective in failing to raise this meritless claim.

III. Conclusion.

We conclude Johnson"s right to counsel under the Fifth Amendment was not violated during police interrogation after his arrest and his statements were admissible. No prejudice arose in any event. Therefore, we find Johnson"s counsel did not render ineffective assistance by not making such claims. We affirm Johnson"s convictions.

AFFIRMED.

[9] Similarly, we conclude Johnson was not denied effective representation when his counsel failed to challenge the statements under article 1, section 9 of the Iowa Constitution.

IN THE IOWA DISTRICT COURT IN AND FOR GUTHRIE COUNTY

JOHNNY LEE JOHNSON, **Petitioner,** **vs.** **STATE OF IOWA,** **Respondent.**	**Case No. PCCV081755** **RULING ON PETITIONER'S APPLICATION FOR POST-CONVICTION RELIEF**

Petitioner's application for post-conviction relief came on for hearing on August 6 and 7, 2013. Petitioner appeared in person with his attorney, Karmen Anderson. Respondent, State of Iowa, appeared by Guthrie County Attorney, Mary Benton, and Assistant Guthrie County Attorney, Tim Benton. The Court hereby enters its findings of fact, conclusions of law, and ruling on Petitioner's application for post-conviction relief.

I

SUMMARY OF FACTS

The underlying facts have been previously summarized, and other facts were developed at this hearing.[1]

In March 2007 Johnson and his wife Kimberly separated. Kimberly moved into an apartment in Bayard with the couple's teenage daughter, Jessica. Their teenage son, Josh, remained with Johnson. By early April Johnson knew that Kimberly had been dating, or had at least been seen with, Greg White.

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[1] State v. Johnson, 2009 W.L. 484, 2480 (Ia. App.); Ruling on State's Motion for Summary Disposition, filed February 26, 2013.

During the evening of April 29, 2007, Johnson drank "four or five" cans of beer at his home. Around 10:00 p.m., Johnson, dressed in a dark hooded sweatshirt and blue jeans, took his CZ-52 .32 caliber semiautomatic pistol with an eight-round magazine and at least one can of beer, and drove the approximately 5½ miles to Kimberly's apartment in Bayard. He parked some distance from the apartment. Johnson approached the apartment on foot. As he approached the apartment, he noticed the wooden front door was open. Johnson saw White through the screen door in the kitchen, eating a bowl of ice cream, wearing only pajama pants. Johnson waited 10 to 15 seconds, assumed a kneeling position, and shot White twice through the screen door. White fell to the floor. Johnson then entered the apartment through the screen door and shot White a third time. The investigation and autopsy established that two of these three gunshot wounds would have been fatal.[2]

Kimberly was in 15-year-old Jessica's bedroom when they heard the shots. Kimberly went into the hallway, saw White on the floor, and turned and ran back to Jessica's bedroom. She tried to close the door behind her. Johnson fired down the hallway toward Kimberly, missed, and followed her into Jessica's bedroom. He then shot Kimberly four times as Jessica watched. Although the medical examiner testified that Kimberly may have survived one shot, any one of the remaining three gunshot wounds would have been fatal.[3]

Johnson then left Jessica's bedroom, returned to the kitchen where White had fallen, and struck him at least twice on the head with the butt of the handgun.

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[2] Exh. 35, pgs. 331-339.
[3] Exh. 35, pgs. 324-325.

Johnson then returned to Jessica's bedroom and similarly beat the back of Kimberly's head with the handgun.

While Johnson was beating his dead wife's head with the butt of his handgun, Jessica, who at this point had not yet seen the perpetrator's face because his sweatshirt hood was pulled up, attempted to push Johnson away from her mother. Johnson pushed Jessica back onto the bed. The hood of Johnson's sweatshirt fell away from his face, and Jessica realized that her father had just killed her mother. Johnson then made some statement referring to Kimberly's relationship with White. He also said, "It is over. She was f***ing him. I'm going to jail, and I don't care." He then left the apartment.

Jessica attempted to dial 911 from inside the apartment but was unsuccessful. She left the apartment where a neighbor, who had heard the gunshots, found Jessica, comforted her and dialed 911. Jessica told this neighbor that her father had shot her mother. The 911 call was received at 10:23 p.m. At 10:25 p.m. a Guthrie County Sheriff's deputy was dispatched in response to that call.

Jessica phoned her grandmother, Johnson's mother, and her uncle, Johnson's brother, Joe Johnson, and told both of them that her father had just shot her mother. Johnson called his brother Joe and asked him, "Did you hear what I did?" Joe responded, "Yes, Jessie told me." His brother advised him to surrender to law enforcement. Johnson also called his sister-in-law, Teresa Johnson, and told her, "I have some sad news. I shot Kim." He spoke with Teresa again shortly after this first call, and told her, "I shot them both." He asked Teresa to care for the children

because, as he put it, he was "going to jail probably." He told Teresa that he was "stupid, had driven to town with a gun." Johnson stated that he also told Teresa that he had been drunk when he drove to town with the handgun. Johnson drove himself to the Guthrie County Sheriff's office where he met his brother Joe and surrendered to authorities.

After he surrendered, Johnson was questioned about the location of the gun. According to Guthrie County Deputy Jesse Swensen, Johnson was unable to give clear, articulate responses to those questions. According to Swensen, Johnson appeared confused. Field sobriety tests were conducted by then Guthrie County Deputy Rob Pearson. Pearson conducted a horizontal gaze nystagmus test which Johnson failed. He also conducted the nine-step walk and turn test, which Johnson failed. Johnson also failed the one-leg stand test. A preliminary breath test was performed at 12:42 a.m., and the results of the PBT were .035. A urine test showed an alcohol level of .029. At 1:27 a.m. Johnson submitted to a DataMaster breath test which measured his blood alcohol level at .019-.02.[4]

Pearson testified at this hearing that he now believes Johnson, as a former law enforcement officer trained in conducting field sobriety tests, feigned intoxication. In his opinion, this is the only explanation for the discrepancy between the field sobriety test failures and the relatively low PBT, urine, and breath test results.[5]

Johnson was read his Miranda rights and was interviewed twice by the Division of Criminal Investigation Special Agent Mitch Mortvedt. The first interview began at

[4] Hearing transcript, pgs. 224-230; Petitioner's Exhs. 28, 29, 30, 31.
[5] Hearing transcript, pg. 240.

1:34 a.m. on Monday, April 30, and ended at 3:38 a.m. The second interview began at 10:02 a.m. and ended at 11:31 a.m. These interviews were electronically recorded and ultimately transcribed. The recordings were shown to the jury during the criminal trial, and the jury was provided copies of the interview transcripts.[6]

During those interviews, Johnson admitted shooting both Kimberly and White. Johnson further told Mortvedt that he had drank up to four beers earlier that evening after 9:00 p.m. when his son Josh had gone to bed. During the interview, Johnson repeatedly asserted that he was "drunk," "half plastered," or very intoxicated when he shot his wife and White. He claimed that his memory was "fuzzy," and that he "just went nuts" when he saw White in his wife's residence with his daughter. Johnson stated several times that he had gone "fricking nuts." He further claimed that he had no intention of killing either White or Kimberly when he first approached the residence. According to Johnson, he went to the residence to talk to Kimberly. He did not, however, have any explanation for why he went to Kimberly's residence that night with a gun. He stated that he "wouldn't have done this if I was sober." He admitted throwing the gun into the ditch after the shootings as he fled the scene. He told Mortvedt where the gun could be found.

II

PREPARATION OF DEFENSE

Johnson was charged by county attorney's information with two counts of first degree murder. Gerald "Jake" Feuerhelm and Todd Miler were appointed to

[6] Respondent's Exhs. GG, HH, JJ, KK.

represent him. In preparing a defense, Feuerhelm and Miler obtained court approval to retain expert witnesses at state expense. They retained the services of a private investigator who, at least in part, interviewed potential witnesses.[7]

Counsel also retained forensic toxicologist Dr. Craig Rypma. Rypma holds a Ph.D. in clinical psychology, a master's degree in human development, and a bachelor's degree in psychology. He has extensive forensic experience, as well as experience in diagnosing and treating alcohol and other substance addiction issues.[8] He has testified as an expert psychologist in dozens of cases.[9]

Counsel filed a notice of intent to rely upon the affirmatives defenses of intoxication and diminished responsibility in November 2007.[10] Johnson was ordered transported to Rypma's office where he was evaluated on November 20.[11] In addition to an approximately two-hour interview, Rypma reviewed documents provided by counsel and conducted and scored five personality or psychological tests.[12] Rypma also reviewed psychiatric records relating to Johnson's previous treatment at Audrain Medical Center and St. Mary's Health Center in Missouri in 2005.[13] After conducting his evaluation, Rypma concluded that there was "no question" that Johnson was sane at the time of the killings and the defense of

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[7] Exhs. 2, 8, 32. Hearing transcript, pg. 138.
[8] Exh. B.
[9] Exh. C.
[10] Exh. 1.
[11] Exh. 2; Respondent's Exh. D.

[12] Exh. NN, pgs. 10-11.
[13] Exhs. E and F; Exh. NN, pg. 25.

diminished capacity "was very weak."[14] There was not, in his opinion, "a good diminished capacity argument."[15] Rypma met with Miler and Feuerhelm on December 8, provided them with his preliminary evaluation, and was instructed not to proceed any further.[16] Counsel withdrew their affirmative defenses on January 4, 2008.

Rypma testified by deposition for this hearing that he saw no evidence that Johnson was peculiarly susceptible to alcohol.[17] Rypma further testified that the seven-month period between the event date and the evaluation was "as close as you typically get to the actual event."[18] Despite the time delay, Rypma could not identify or diagnose any personality or psychological disorders or conditions which would have supported an insanity or diminished capacity defense.

III

CRIMINAL TRIAL PROCEEDINGS

Pretrial record. The criminal case was originally assigned to Judge William Joy. Judge Joy conducted a pretrial conference on January 7, 2008, the day before the trial was scheduled to begin.[19] As pertinent to this proceeding, there was no on-record discussion about shackling Johnson during the trial. But apparently after the decision had been made to shackle Johnson during the trial, Judge Joy discussed on-the-record with counsel in Defendant's presence the procedure which would be

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[14] Exh. NN pg. 19.
[15] Exh NN, pg. 23.
[16] Exh NN, pgs. 31-32.
[17] Exh NN, pg. 34.
[18] Exh NN, pg. 13.
[19] Respondent's Exh. EE.

followed following initial juror orientation. Prospective jurors would be excused from the courtroom, and law enforcement would then bring Johnson into the courtroom from the jury room. The panel would then be brought back into the courtroom. Though Judge Joy broached the topic at the beginning of the pretrial conference, neither side expressly waived the reporting of voir dire.[20]

Unfortunately, Judge Joy became ill overnight. He called Judge Paul R. Huscher at about 6:00 a.m. on the morning of the first day of trial.[21] There was no discussion during that telephone conversation about any specific issues related to the trial. Prior to commencement of the trial, a record was made in chambers during which counsel confirmed that voir dire would not be reported.[22] The following record was then made:

> THE COURT: The other matter is concerning Mr. Johnson and courthouse security. And it is the court's understanding that there was some, apparently, discussion yesterday about or arrangements made for Mr. Johnson to be seated before the jury's brought in and to remain seated until they are out of the courtroom. And I guess some additional efforts to try to make as inconspicuous as possible the fact that he's wearing shackles.
>
> And there have been some discussions this morning with counsel. I've suggested that perhaps it would be sensible to tell the jury up-front that Mr. Johnson is wearing shackles, and perhaps explain to them the reason for that in such a manner that they will not be left to debate about it or to wonder about it.
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> My suggestion was that I would simply tell the jurors this morning that they may notice that Mr. Johnson is wearing shackles, and that that's done because we do have security policies for the courtroom and the courthouse, and that because we have three doors

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[20] Exh. EE, pgs. 59-60.
[21] Exh. 40, pgs. 5-6.
[22] Respondent's Exh. A.

to the courtroom, that it would require a number of deputies to be present. That our trial is expected to take seven or eight days during the winter when we like to have the deputies out on the street and patrolling the county. And that in order to alleviate that need, to have those deputies tied up for a week, that Mr. Johnson has agreed to the shackles. That he has no plans to go anywhere and has agreed to wear those so that we can eliminate the need to keep all of those deputies here.

Something along those lines. And that it might take care of any speculation on the part of the jurors.

Mr. Miler, have you had an opportunity to discuss that with your client?

MR. MILER: We have, Your Honor.

And I know that the court was just giving a rough description of how you would advise the jury, but we would ask that in addition to what the court just indicated, that they be advised that there are no conclusions to be drawn from the fact that he has shackles on.

Otherwise, we have discussed this matter with Mr. Johnson, and we are agreeable to the court's proposal.

THE COURT: Okay. Mr. Johnson, is that acceptable with you?

THE DEFENDANT: Very much so, Your Honor.

THE COURT: All right.

THE DEFENDANT: Thank you.

THE COURT: I assume it is acceptable with the State?

MR. HAMMERAND: Yes, Your Honor.

THE COURT: Okay. Anything else that we need to address on the record before we start?

MR. MILER: Nothing on behalf of the defense.

MR. HAMMERAND: Not on behalf of the State.

THE COURT: All right. I guess that's it.

Judge Huscher testified that the procedure discussed during that pre-voir dire conference was followed during the trial. He further testified that he told the

jurors that Johnson would be shackled during the trial, substantially as discussed during the pre-voir dire conference.[23] According to his recollection, the jurors were told that Johnson was wearing shackles and told that "they weren't to draw any adverse conclusions or any conclusions from the fact that he had shackles."[24] Judge Huscher believed the decision to shackle Johnson had been made the day before by Judge Joy, and the admonition was intended to avoid prejudice should the jurors see the shackles.[25]

The State had not requested shackling, nor did Johnson or his counsel object.[26] No evidence was presented, either on or off the record, suggesting Johnson posed "a threat to himself or the public" during trial.[27]

Johnson's ankles were shackled throughout the trial.[28] The shackles consisted of silver metal manacles connected by an approximately 18-inch chain.[29]

B. Visibility of shackles. The configuration of the Guthrie County courtroom is depicted in State's exhibit B. The jury box is situated along the south wall of the courtroom, and contains two-rows of six chairs. The two counsel tables are perpendicular to the jury box. The table used by Johnson and his attorneys abutted, or came very close to abutting, the west end of the jury box.

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[23] Exh. 40, pgs. 12-13.
[24] Exh. 40, pgs. 14-15.
[25] Exh. 40, pg. 18, 30.
[26] Exh. 40, pgs. 19-20.
[27] Pet. Exh. 40, pgs. 20-21.
[28] Hearing transcript, pg. 32 [Huscher deposition and Feuerhelm testimony]
[29] Exh. U

The jury box is somewhat elevated from the floor of the courtroom. The front of the box is solid and approximately 36 to 42 inches high. An approximately twelve-inch bump-out is located approximately two-thirds down the length of the front of the box, looking east to west.

The jury room is located immediately east of the box. Jurors entering the courtroom from the jury room would look directly at Defendant's counsel table. The last two jurors in the front row on the west end of the box are seated immediately to the right of Defendant and Defendant's counsel, and, when standing, had a clear view of Johnson, at least when the jurors and Johnson were standing.[30]

During voir dire twelve prospective jurors were seated in the box and two were seated in front of the east end of the box. The remaining prospective jurors were seated on benches behind the counsel tables. The tables and benches were separated by a railing, again between 36 inches to 42 inches in height. This railing is predominantly solid with intermittent vertical spaces between panels.[31]

Two alternate jurors were also chosen. Of the fourteen jurors selected, three were seated in the box during voir dire and the remaining eleven were seated on the benches behind the railing. The two prospective jurors seated in chairs in front of the box were struck. Both alternates, neither of whom deliberated, were seated behind the railing during voir dire.[32]

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[30] Hearing transcript pgs. 215-216.
[31] Res. Exh. V.
[32] Pet. Exh. 34; Hearing transcript pgs. 274-275.

Other than the procedure outlined by Judge Joy during the pretrial conference, no particular effort was made to conceal the shackles from the jury. For example, no curtain was placed in front of the counsel tables. During the trial, Johnson sat either in the chair closest to the jury box or in the middle chair.[33] Defense counsel recall keeping boxes under the counsel table, at least intermittently. These boxes would have impeded a clear view of Johnson's legs from the front.

Though it is possible that none of the twelve jurors who rendered the verdict saw the shackles, I consider that very unlikely. It is particularly likely that the two jurors who were seated closest to the Defendant's table over a period of five days saw the shackles.[34] It is also likely that jurors seated behind the railing during voir dire saw the shackles. Had Judge Huscher believed the shackles would not be visible, he likely would not have given the admonition he did.

C. Defense strategy. Neither party disputes that the State proved beyond a reasonable doubt that Johnson shot and killed Kimberly Johnson and Greg White on April 29, 2007. Over the course of approximately three and a half days the State offered eyewitness testimony, pre-custodial admissions, in-custody confessions, and law enforcement investigative and forensic evidence establishing these facts beyond any doubt.

In light of the overwhelming and uncontroverted evidence, Johnson's trial counsel adopted the strategy that would minimize any sentence. They argued that

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[33] Hearing transcript pg. 27 [Feuerhelm and Johnson testimony].
[34] Hearing transcript pg. 72. Feuerhelm testified that, "I can't say how those two would not have been able to see his feet. At least not as I recall the set up." Hearing transcript, pg. 45.

the killings were not willful, deliberate, or premeditated, and were not perpetrated with malice aforethought. In other words, defense counsel attempted to convince the jury that Johnson was guilty of voluntary manslaughter rather than first or second degree murder. In arguing this theory, counsel relied extensively upon the statements Johnson made during his recorded interviews with DCI Special Agent Mitch Mortvedt.[35]

D. Jury verdict, sentence and appeal. The case was submitted to the jury at 11:41 on January 14, and the jury returned guilty verdicts on both counts of first degree murder at 2:28 pm.[36] On February 18, 2008, Johnson was sentenced to two concurrent life sentences, without the possibility of parole, ordered to pay $150,000 to each of the two estates of the victims, and to pay restitution.

Johnson appealed the convictions, and the convictions were affirmed by the Iowa Court of Appeals on December 17, 2009. In its opinion, the court of appeals considered Johnson's claim that trial counsel was ineffective in failing to move to suppress Johnson's post-arrest confessions. The court of appeals held that trial counsel was not ineffective for failing to move to suppress the statements because they were not made after invocation of Johnson's Fifth Amendment right to counsel. The court went further and held that even if trial counsel had breached an essential duty by failing to move to suppress the statements, Johnson was not prejudiced because there was no reasonable probability that the outcome would have been different had the statements been suppressed.

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[35] Pet. Exh. 35, pgs. 432-454.
[36] Pet. Exh. 35, pgs. 468-469.

IV

POST-CONVICTION PROCEEDINGS

Johnson filed a pro se application for post-conviction relief under Iowa Code Chapter 822 on February 25, 2011. Counsel was appointed and an amended application was filed. The State filed a motion for summary disposition of the post-conviction claims. That motion was denied by ruling filed on February 26, 2013.

At various stages of the proceedings, Johnson has raised the following claims of ineffective assistance of counsel:

1. Trial counsel's failure to adequately investigate and pursue diminished responsibility and intoxication defenses;

2. Trial counsel's failure to produce expert testimony regarding the effect of Johnson's alcohol consumption upon his state of mind;

3. Trial counsel advising Johnson to not testify at the trial;

4. Trial counsel's failure to object to use of shackles during the trial;

5. Trial counsel's failure to move for a change of venue;

6. Trial counsel's failure to seek an immediate mental or physical evaluation;

7. Appellate counsel's failure to raise on direct appeal the Court's order that Johnson be shackled during trial;

8. Appellate counsel's failure to assign error to the trial court's submission of instruction number 17 relating to the inference of malice by use of a firearm;

In his post PCR hearing submission, Johnson focuses upon the following claims:

1. Failure to investigate, pursue or develop evidence pertinent to Johnson's claimed intoxication;

2. Failure to request that voir dire be reported; and

3. Counsels' failure to object to shackling during trial.[37]

V

ANALYSIS

A. PCR standards. A claimant alleging ineffective assistance of counsel must prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Clay*, 824 N.W.2d 488, 495 (Iowa 2012); *State v. Carroll*, 767 N.W.2d 738, 741 (Iowa 2009). Trial counsel's performance is measured against an "objective standard of reasonableness . . . under prevailing professional norms." *Clay,* 824 N.W.2d 495. Trial counsel is presumed to have performed his or her duties competently. A breach of an essential duty "occurs when counsel makes such serious errors that he or she 'was not functioning as the 'counsel' guaranteed the Defendant by the Sixth Amendment.'" *Clay,* 824 N.W.2d 495. Improvident trial strategy, miscalculated trial tactics, and even mistakes in judgment do not necessarily amount to ineffective assistance of counsel. *Clay*, 824 N.W.2d 496; *State v. Ondayog*, 722 N.W.2d 778 (Iowa 2006).

A PCR claimant must prove prejudice by a preponderance of the evidence. This does not, however, mean that the claimant must prove that a different result would have been reached. The test has been stated as follows:

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[37] Pet. Proposed Findings and Conclusions, pgs. 1-3.

> [T]he prejudice prong of the *Strickland* test does not mean a defendant must establish that counsel's deficient conduct more likely than not altered the outcome in the case. A defendant need only show that the probability of a different result is sufficient to undermine confidence in the outcome. *State v. Maxwell*, 743 N.W.2d 185, 196 (Iowa 2008) (quoted at *Clay*, 824 N.W.2d 496).

B. Non-shackling claims. But for trial counsel's failure to object to the use of shackles, Johnson's ineffective assistance claims would fail. Most of these claims relate to trial strategy which, even in hindsight, was clearly reasonable as measured by an objective standard of competence. Trial counsel did investigate and pursue the diminished responsibility and intoxication defenses. With court authorization, they retained Dr. Craig Rypma. If his opinions had been offered at trial, they would not necessarily have been beneficial to Johnson. Rypma was qualified to assess the effect of alcohol consumption upon Johnson's emotional and psychological state. Trial counsel was not compelled to search the ends of the earth for an expert who could have offered a contrary opinion. The jury had "the necessary framework to assess" Johnson's claim that his passions were inflamed as a result of voluntary alcohol consumption. See e.g. *State v. Jordan*, No.2-1111\11-0431 (Ia. App. 2013).

Johnson claims that counsel was ineffective for not requesting that voir dire be reported. Even if this was an essential duty in 2008, prejudice cannot be shown. Johnson has not shown, nor even suggested, that any one of the twelve jurors who returned the verdict was or could have been challenged for cause. In his post-hearing submission, Johnson suggests that the failure to have voir dire reported relates to the decision to not file a motion for change of venue. There is no evidence

that any of the twelve jurors was biased or not capable of serving as a fair and impartial juror. Attorney Feuerhelm credibly testified that Johnson "wanted the case tried [in Guthrie County]." According to Feuerhelm, Johnson believed that "he had a good reputation in this community, and the jurors would listen to the evidence."[38] This testimony was not refuted.

Johnson has also asserted, at least on occasion, that counsel was ineffective for advising him not to testify. First, this was a tactical decision which was reasonable under the circumstances. Counsel was particularly concerned about cross-examination of Johnson with certain correspondence in which Johnson stated that he "chose death over divorce."[39] Second, Johnson knowingly and voluntarily waived his right to testify.[40]

Johnson has claimed that counsel was ineffective for failing to call character witnesses or offer other evidence of his non-violent nature. Witnesses identified by Johnson as potential witnesses were interviewed by an investigator, and counsel and Johnson mutually decided to not call witnesses.[41] The tactical decision was made not to call witnesses. There is no evidence that calling character witnesses would have altered the verdict, nor is that a reasonable inference under the circumstances.

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[38] PCR hearing transcript pg. 92.
[39] PCR hearing transcript pgs. 78-80; Exh. DD.
[40] Pet. Exh. 35, pgs. 402-403.
[41] PCR hearing transcript, pgs. 138-139.

In summary, with respect to the non-shackling claims, Johnson failed to prove that trial counsel breached an essential duty and failed to prove that, even if such a duty had been breached, prejudice resulted.

C. Shackling claim. I addressed the shackling issue in a pretrial order filed on August 2, 2013. I have reviewed Petitioner and Respondent's post-hearing submissions and considered the evidence presented at the hearing. In my view, that ruling accurately reflects the analysis to be applied in considering Johnson's shackling claim. I adopt that reasoning and holding in this ruling.

In summary, based primarily upon the holdings in *Deck v. Missouri*, 544 U.S. 622 (2005); *State v. Wilson*, 406 N.W.2d 442 (Iowa 1987); and *Dickerson v. Missouri*, 269 S.W.3d 889 (Mo. 2008), in order to prevail upon the claim of ineffective assistance for failing to object to the use of shackles, the following analysis should be applied:

1. Johnson must prove that trial counsel breached an essential duty by failing to object to the use of physical restraints during trial.

2. Johnson must prove that he was in fact "visibly" restrained during trial in violation of the principles enunciated in *Deck* and *Wilson*. This element may be established either by proving the restraints used during trial were actually visible to the jury or that the jurors were otherwise consciously aware of the use of restraints.

3. To establish *Strickland* prejudice, Johnson must prove that had an objection been raised, the trial court would probably have prohibited the use of

physical restraints during trial or would have imposed conditions upon their use that would have prevented the jury from seeing or otherwise learning of the restraints.

4. If Johnson proved the first three elements, the burden would then shift to the State to overcome the presumption of prejudice beyond a reasonable doubt.[42]

A. Breach of duty. With respect to the first element, there is no doubt that trial counsel breached an essential duty by failing to object to the use of physical restraints during trial. *State v. Wilson* was filed in 1987, and courts and counsel have been on notice since then that in Iowa shackling will be considered inherently prejudicial because such practice "gives rise to an unmistakable brand of guilt or creates an unacceptable risk the jury may consciously or subconsciously be influenced in their deliberations. 406 N.W.2d 449. If there is a request that a Defendant be shackled during the trial, the reasons for shackling must be stated on the record. *Wilson*, 406 N.W. 2d 449-450. Attorney Miler admitted as much during his testimony at the PCR hearing:

> Q. Did you have a duty to, what you know now, based on what you know now, did you have a duty to object to the use of shackles on Mr. Johnson during trial?
>
> A. Yes.
>
> Q. And did you have a duty to place the burden on the State to prove why he should have shackles on?

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[42] Ruling filed Aug. 2, 2013, pgs. 10-11.

A. Yes.

Q. And did you have a duty to make a record on that issue?

A. Apparently, yes.

Q. Mr. Johnson was actually shackled during the trial, right?

A. I'm almost certain of it, yes.[43]

B. Visible shackling. Next, Johnson carried the burden to prove that he was in fact shackled during the trial in violation of the principles enunciated in *Deck* and *Wilson*. There is no doubt at this juncture that his ankles were in fact shackled throughout the trial. The State, however, argues that the shackles were not "visible", as that term is used in *Deck*. As a factual matter, more likely than not one or more of the twelve jurors saw Johnson in shackles during the course of the five-day trial.

More important, there is no doubt the jurors were consciously aware of the fact that Johnson was wearing shackles because they were told he was. Though *Deck* uses the term "visible," there is no practical, and thus no legal, distinction between visibly shackling a defendant and telling the jury that he is shackled. In both circumstances the jury becomes consciously aware of that fact. Johnson thus proved the second element.

C. Justification for shackling. Johnson also carried the burden to prove that had an objection been raised, the trial court would probably have prohibited the use of shackles during the trial or would have imposed conditions upon their use that

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[43] Hearing transcript pgs. 124-125.

would have prevented the jury from seeing or otherwise learning of the restraints. If a *Wilson* objection had been made, the State would have been required to prove that Johnson posed a courtroom security risk or that he was likely to attempt an escape. See e.g. *Deck v. Missouri*, 544 U.S. 629; *State v. Wilson*, 406 N.W.2d 450; *State v. Noelting-Petra*, No. 3-050\11-2123 (Ia. App. 2013) (permitting use of shackles when defendant "threatened to disrupt court proceedings if he were unrestrained" based upon a record including statements during a "jail scuffle" threatening deputies); *State v. Griffin*, No. 3-009\11-0012 (Ia. App. 2013) (reversing a conviction when defendant was tried in shackles without particularized justification).

In this case there is no evidence that Johnson was a threat to courtroom security. Witnesses testified that he was a "good inmate." He never threatened to escape. He never threatened law enforcement or court personnel orally or in writing. He had no prior criminal record.[44] Had an objection to the use of shackles been asserted and a hearing held, either shackles would not have been used at all -- the more likely result—or a more systematic attempt would have been made to conceal the shackles from all jurors at all times.

D. Prejudice. The final, and most difficult, question is whether the evidence of first degree murder was so overwhelming as to overcome the inherent prejudice resulting from the shackling.[45] If the only issue was whether the jury could have returned a manslaughter conviction consistent with the evidence and the law,

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[44] Hearing transcript, pgs. 20-21,32-35,104, 117-120, 252-253.

[45] One court stated that the burden is such that "any other result would have bordered on jury nullification." *People v. Robinson*, 872 N.E.2d 1061, 1074 (Ill. App. 2007)

Johnson's claim would fail as a matter of law. Iowa Code § 707.4[46] defines the crime of voluntary manslaughter as follows:

> A person commits voluntary manslaughter when that person causes the death of another person, under circumstances which would otherwise be murder, if the person causing the death acts solely as the result of sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a person and there is not an interval between the provocation and the killing in which a person of ordinary reason and temperament would regain control and suppress the impulse to kill. . . . Voluntary manslaughter is an included offense under an indictment for murder in the first or second degree.

In *State v. Thompson,* 2013 WL 4483527 (Iowa), the supreme court affirmed a trial court's refusal to submit a voluntary manslaughter instruction in a first degree murder trial. Defendant Thompson told law enforcement that he became involved in a fight or argument with the female victim after consuming about eighteen beers. The victim left the couple's bed and slapped Thompson. Thompson pushed her against a wall. The yelling continued, and the woman left the house and climbed into her daughter's car. According to Thompson, she "flipped him off." Thompson retrieved a rifle, went back outside, saw the woman "flip him off" again, and fired a shot at the car "without aiming." Thompson claimed that he only intended to scare the victim with this first shot, not shoot her. He approached the car, saw she had been shot but was still alive, and shot her a second time "to put her out of her misery." After a jury trial, he was convicted of second degree murder.

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[46] Counsel have not suggested any material changes to the pertinent statutes since 2007, and I am unaware of any. For convenience, I will refer to the 2013 code.

In considering the trial court's decision to not submit voluntary manslaughter as a lesser included offense, the supreme court noted that lesser offenses "must be submitted to the jury as included within the charged offense if, but only if, they meet both the appropriate legal and factual tests." Voluntary manslaughter satisfies the legal test because the statute says so. But under these facts defendant had failed to satisfy the factual test. The factual test involves "an ad hoc determination whether there is a factual basis in the record for submitting the included offense to the jury." *Id.,* quoting *State v. Sangster,* 299 N.W. 2d 661, 663 (Iowa 1980). The slapping, yelling and obscene gestures were insufficient as a matter of law to establish provocation justifying submission of a manslaughter instruction.

In this case, there was absolutely no provocation, let alone serious provocation. Johnson ambushed these victims without warning and without provocation. The trial court submitted a manslaughter instruction because Johnson requested it and the State did not object.[47] Had the State objected, the instruction may not have been given at all. The end result was that defense counsel was given far greater latitude to maneuver than Johnson had any legal right to. Any verdict acquitting Johnson of murder but guilty of voluntary manslaughter would have been akin to jury nullification.

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[47] Exh. 35, pg. 406; Court Exh. A, Instructions 20-22. The State objected to the manslaughter instruction because the definition of "serious provocation" was apparently not stock language. It did not object to submission of voluntary manslaughter as a lesser included offense.

The question then is whether the State proved that Johnson was guilty of first degree murder, rather than second degree murder, beyond a reasonable doubt. As pertinent to this case, murder is defined as killing another person "with malice aforethought, either express or implied." Iowa Code section 707.1 (2013). Murder in the first degree occurs when, in addition to malice aforethought, the killing is committed "willfully, deliberately, and with premeditation." Iowa Code section 707.2 (2013).

Malice is a "condition of mind [that] prompts one to do a wrongful act intentionally, without legal justification or excuse." *State v. Reeves,* 636 N.W. 2d 22, 25 (Iowa 2001). "Because it is a state of mind, it is often proved by, and may be inferred from, circumstantial evidence." *Id.* The use of a deadly weapon, accompanied by an opportunity to deliberate, supports an inference of deliberation and premeditation. *Reeves,* 636 N.W. 2d 25; *State v. Frazer,* 267 N.W. 2d 34, 38-39 (Iowa 1978).

As recounted above, there was substantial evidence that justified the jury's determination that these murders were willful, premeditated and deliberate. There was also some evidence they were not. Johnson had consumed some alcohol and claimed he was intoxicated. There was some objective evidence, though disputed, that he was intoxicated. Evidence of intoxication can be used to defend a specific intent crime, including first degree murder. Iowa Code section 701.5 (2013); *State v. Broughton,* 425 N.W. 2d 48, 49 (Iowa 1988)("Intoxication, of course, is not a complete defense to a crime; it is relevant, however, in proving the person's specific

intent . . . or in proving any element of a public offense .") Johnson and Kimberly's separation, the emotional effect that had on Johnson, and the brutality of the murders were consistent with Johnson acting in a fit of rage and without premeditation. The use of the firearm permitted the jury to infer malice and, combined with the undisputed opportunity to deliberate, premeditation. On the other hand, there was evidence that Johnson had a permit to carry a weapon and often in fact carried a firearm.[48]

The reason shackling is considered inherently prejudicial is that it "brands" the defendant with the stigma of guilt and tends to deprive the defendant of the benefit of the constitutional presumption of innocence. In this case Johnson's defense was that he acted in the heat of passion, and that these murders were not premeditated. By shackling Johnson, the jury was given the impression that he was at the time of trial either dangerous or a flight risk, both of which undermined this defense.

The State did not carry its burden to prove beyond a reasonable doubt that the shackling did not prejudice Johnson. The shackling substantially undermines confidence in these verdicts. A new trial must be ordered.

VI

RULING

IT IS, THEREFORE, ORDERED THAT:

1. Petitioner's application for post-conviction relief is granted. Petitioner's convictions on two counts of first-degree murder in *State of Iowa v.*

[48] Exh. 34, pg. 171.

Johnny Lee Johnson, Iowa District Court for Guthrie County, FECR019288, are vacated. Defendant is entitled to a new trial on those charges.

2. The clerk shall file a copy of this ruling in file FECR019288 and direct that file to the presiding judge for further proceedings.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
PCCV081755	JOHNNY LEE JOHNSON VS STATE OF IOWA

So Ordered

Randy V. Hefner, District Court Judge,
Fifth Judicial District of Iowa

IN THE COURT OF APPEALS OF IOWA

No. 13-1554
Filed December 24, 2014

JOHNNY LEE JOHNSON,
Applicant-Appellee/Cross-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Guthrie County, Randy V. Hefner, Judge.

The State appeals and Johnny Johnson cross-appeals from the district court's grant of Johnson's application for postconviction relief. **REVERSED AND REMANDED ON APPEAL; AFFIRMED ON CROSS-APPEAL.**

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Mary Benton, County Attorney, and Timothy Benton, Assistant County Attorney, for appellant/cross-appellee State.

Karmen Anderson of the Law Office of Karmen Anderson, Des Moines, for appellee/cross-appellant.

Heard by Vogel, P.J., and Miller and Mahan, S.JJ.* Tabor, J., takes no part.

*Senior judges assigned by order pursuant to Iowa Code section 602.9206 (2013).

VOGEL, P.J.

The State appeals from the postconviction court's grant of Johnny Johnson's application for postconviction relief, which vacated his two convictions for first-degree murder and ordered a new trial. After finding trial counsel breached an essential duty by not objecting to Johnson being in leg shackles, the postconviction court then shifted the burden onto the State to prove—beyond a reasonable doubt—the shackling did not contribute to the guilty verdict. Within the ineffective-assistance-of-counsel framework, and citing *Strickland v. Washington*, 466 U.S. 668 (1964), the State asserts the burden should have remained with Johnson to show there was a reasonable probability the result of the trial would have been different had trial counsel objected to the leg shackles.

Johnson cross-appeals, arguing the postconviction court erred when it denied his request for a state-funded expert for the postconviction hearing, who would theoretically testify about Johnson's level of intoxication at the time of the killings. Johnson also claims the court was in error when it denied his request for a protective order regarding attorney-client privilege from the underlying criminal case. Johnson's final claim asserts appellate counsel was ineffective for failing to raise the issue of Johnson's shackling on direct appeal.

On the State's appeal, we conclude the postconviction court erred in its burden-shifting analysis. Consequently, we reverse the grant of Johnson's application for postconviction relief and remand the case to the postconviction court to apply the proper standard. On Johnson's cross-appeal, we conclude his motion for a protective order and his request for a state-funded expert were both properly denied. However, because Johnson's claim that appellate counsel was

ineffective for failing to bring the shackling claim on direct appeal will either be rendered moot or be subsumed within the postconviction court's ruling, we deny this claim.

I. Factual and Procedural Background

Our court, in affirming Johnson's two convictions for first-degree murder, summarized the underlying facts of the case in the following manner:

> Sometime in March 2007, Johnson's wife, Kim Johnson, left the family's home in Coon Rapids and moved to an apartment in nearby Bayard. Johnson's teenage daughter, Jessica, moved in with Kim, and his teenage son, Josh, remained with him. In early April 2007, Johnson ran into an acquaintance, Mark Bonney, at the lumberyard in Bayard. Johnson asked Bonney if he knew that Kim had begun dating Greg White, and stated that he would like to get "his hands on" White. Bonney warned Johnson that White was strong and that he carried knives, but did not give serious consideration to Johnson's comment.
>
> On the evening of April 29, 2007, Johnson built a bonfire at his home and drank "four or five" cans of beer. He then retrieved a loaded handgun from inside his home and drove to Kim's apartment in Bayard. Johnson parked about a block away from the apartment at just after 10:00 p.m. He was wearing a black sweatshirt with the hood pulled up over his head. As Johnson approached the apartment he noticed the wooden front door was open. Through the screen door, Johnson saw White in the kitchen, wearing only pajama pants. White did not notice Johnson outside the door.
>
> Johnson knelt and shot White three times through the screen door. He then entered the apartment and shot White once more. Kim ran from Jessica's bedroom, saw White on the floor, and ran back into the bedroom screaming and trying to shut the door behind her. Johnson followed Kim into the bedroom and shot her four times. He then went back into the hall and beat White on the head with the butt of his gun to make sure he was dead, crushing his skull. Johnson reentered the bedroom and beat the back of Kim's head with his gun, also crushing her skull. At that point, Jessica tried to push him off Kim, but he shoved her back to the bed. Johnson's hood fell away from his face, and Jessica realized he was her father. Johnson told her, "It is over. She was f'ing him. I'm going to jail, and I don't care." Johnson then left the apartment.
>
> Jessica checked her mother for a pulse and tried to call 911. A neighbor, Shanda Thomas, heard the gunshots and ran outside.

> Jessica told Thomas that "her fucking dad shot her mom." As they waited for police to arrive, Jessica called her grandmother. Thomas heard Jessica tell her grandmother, "You need to get over here. Your fucking son shot my mom." Jessica then called her uncle, Joseph Johnson, and said, "Your fucking brother shot my mom."
>
> Soon after receiving the call from Jessica, Joseph also received a call from Johnson. Johnson asked, "Did you hear what I did?" to which Joseph responded, "Yes, Jessie told me." Joseph talked his brother into meeting him at the Guthrie County Sheriff's Office to turn himself in. When they arrived at the sheriff's office, Johnson noticed a scrape on his hand and told Joseph that he must have gotten it while "beating them . . . to make sure they were dead."
>
> Johnson was handcuffed and brought inside the sheriff's office. Officer Jeremy Long read Johnson his *Miranda* rights, asked him a few questions, booked him, and placed him in a jail cell. At 1:27 a.m. Johnson submitted to a breath test, which measured his blood alcohol at .019. Johnson also gave a DNA sample. At 1:39 a.m. Special Agent Mitch Mortvedt began to interview Johnson. The interview concluded at 3:38 a.m. Mortvedt interviewed Johnson again later that morning, from 10:02 to 11:31 a.m. During the course of these interviews, Johnson confessed to the shootings of Kim and White. Johnson explained the marital problems he and Kim had been going through, his discovery that Kim was dating someone else, and what led him to shoot the victims earlier that evening. Johnson also described exactly where he had thrown his gun on his drive home.

State v. Johnson, 08-0320, 2009 WL 4842480, at *1–2 (Iowa Ct. App. Dec. 17, 2009).

Johnson was convicted of the two first-degree-murder charges following a jury trial that commenced on January 8, 2009. Johnson's defense consisted of disputing the first-degree murder requirement that the killings be "willful, deliberate, and with premeditation." *See* Iowa Code §§ 707.1, .2(1) (2007). Instead, while not disputing he killed two people, Johnson argued he was guilty of voluntary manslaughter.

Prior to trial, a discussion was held in chambers regarding Johnson's shackling during trial. The State did not request that Johnson be shackled and trial counsel did not object. Although Johnson had made no threats and was cooperative with law enforcement and court personnel, Johnson indicated that the manner of shackling was agreeable to him. No record was made with respect to whether there was a specific need that Johnson be shackled, though the trial court did make a record noting how the jury was to be informed of Johnson's shackling. Specifically, the court indicated it would tell the jury prior to voir dire that, because the trial was being held in winter, the deputies were needed to patrol the county rather than be kept in the courtroom for a week-long trial.[1] Because voir dire was not reported, there is no record regarding what the jury was actually told.

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[1] The record shows the following exchange occurred with regard to the shackling issue:

> The Court: The other matter is concerning Mr. Johnson and courthouse security. And it is the court's understanding that there was some, apparently, discussion yesterday about arrangements made for Mr. Johnson to be seated before the jury's brought in and to remain seated until they are out of the courtroom. And I guess some additional efforts to try to make as inconspicuous as possible the fact that he's wearing shackles.
>
> And there have been some discussions this morning with counsel. I've suggested that perhaps it would be sensible to tell the jury up-front that Mr. Johnson is wearing shackles, and perhaps explain to them the reason for that in such a manner that they will not be left to debate about it or to wonder about it.
>
> My suggestion was that I would simply tell the jurors this morning that they may notice that Mr. Johnson is wearing shackles, and that that's done because we do have security policies for the courtroom and the courthouse, and that because we have three doors to the courtroom, that it would require a number of deputies to be present. That our trial is expected to take seven or eight days during the winter when we like to have the deputies out on the street and patrolling the county. And that in order to alleviate that need, to have those deputies tied up for a week, that Mr. Johnson has agreed to the shackles. That he has no plans to go anywhere and has agreed to wear those so that we can eliminate the need to keep all of those deputies here. Something along those lines.

On February 25, 2011, Johnson filed an application for postconviction relief, and a hearing was held from August 6 to 7, 2013. The district court entered a ruling on September 19, granting in part and denying in part Johnson's application. The court concluded that, with respect to all of Johnson's claims that did not relate to the shackling issue, he had failed to show trial counsel breached an essential duty. However, the court, after employing the reasoning espoused in *Deck v. Missouri*, 544 U.S. 622, 626-29 (2005), *State v. Wilson*, 406 N.W.2d 442, 448-50 (Iowa 1987), and *Dickerson v. Missouri*, 269 S.W.3d 889, 892-93 (Mo. 2008), shifted the burden onto the State and found it failed to prove beyond a reasonable doubt that Johnson was not prejudiced by the shackling at trial. Specifically, it concluded that because Johnson's defense was based on the lack of premeditation, the shackling prejudiced the jury such that they could conclude Johnson was a dangerous person and/or a flight risk. Consequently, the court found trial counsel was ineffective for failing to object to the shackling, and the State failed to prove beyond a reasonable doubt that the shackling did not

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> And that it might take care of any speculation on the part of the jurors. [Defense counsel], have you had an opportunity to discuss that with your client?
>
> [Defense Counsel]: We have, Your Honor. And I know that the court was just giving a rough description of how you would advise the jury, but we would ask that in addition to what the court just indicated, that they be advised that there are no conclusions to be drawn from the fact that he has shackles on. Otherwise, we have discussed this matter with Mr. Johnson, and we are agreeable to the court's proposal.
>
> The Court: Okay. Mr. Johnson, is that acceptable with you?
> The Defendant: Very much so, Your Honor.
> The Court: All right.
> The Defendant: Thank you.
> The Court: I assume it is acceptable with the State?
> [The State]: Yes, Your Honor.

prejudice Johnson. It therefore vacated the convictions and ordered a new trial. The State appeals, and Johnson cross-appeals.

II. Shackling

The State conceded at oral argument the trial court should have articulated acceptable reasons why Johnson was shackled pursuant to *Deck*, 544 U.S. at 624 (holding: (1) a due process violation occurs if the defendant is shackled in the presence of the jury, without articulated reasons why the shackling is necessary; (2) prejudice need not be shown if this occurs; and (3) *on direct appeal*, the burden then shifts to the government to prove beyond a reasonable doubt the shackling did not contribute to the verdict). However, the State argues, because Johnson's claim is presented within the context of ineffective assistance of trial counsel, under *Strickland*, 466 U.S. at 694, the burden remains with Johnson to show, but for counsel's breach of duty in failing to object to the shackling, there is a reasonable probability the outcome of the trial would have been different. Hence, it asserts, the postconviction court erred in shifting the burden onto the State to show beyond a reasonable doubt the shackling did not affect the verdict and, failing in its proof, vacating Johnson's convictions. The State further contends if the correct burden of proof is applied, Johnson cannot succeed on his claim due to the overwhelming evidence supporting all statutory elements of first-degree murder.

"Generally, postconviction relief proceedings are reviewed for correction of errors at law." *Reilly v. Iowa Dist. Ct.*, 783 N.W.2d 490, 493 (Iowa 2010). However, claims of alleged violations of constitutional rights are reviewed in "light of the totality of circumstances and the record upon which the postconviction

court's ruling was made." *Id.* (internal quotations omitted). "This is the functional equivalent of de novo review." *Id.* Additionally, a postconviction-relief applicant asserting an ineffective-assistance-of-counsel claim must prove by a preponderance of the evidence that counsel breached an essential duty and that he was prejudiced by counsel's failure. *Strickland*, 466 U.S. at 698.

The United States Supreme Court has held—on a direct appeal of the penalty phase of a capital case—no showing of actual 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 the shackling. *Deck*, 544 U.S. at 643–45. This holding is based on the inherently prejudicial nature of shackling. *Id.* at 626–27 (citing *Holbrook v. Flynn*, 475 U.S. 560, 568 (1986)). If a due process violation is established, 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." *Id.* at 635; *see also Chapman v. California*, 386 U.S. 18, 24 (1967).

Our Iowa Supreme Court, on direct appeal of a criminal conviction, has found shackling to be inherently prejudicial, but "on rare occasions . . . [it] may be justified despite the fact that some prejudice will occur." *State v. Wilson*, 406 N.W.2d 442, 449 (Iowa 1987). Without finding a due process violation in the absence of articulated reasons for the shackling, it held the State has the burden to show the necessity for physical restraints. *Id.* Additionally, the district court must "place in the record in the presence of the defendant and counsel the reasons for shackling and give them an opportunity to make their objections known." *Id.* at 449–50 (holding no abuse of discretion where the trial court

ordered the defendant to be shackled due to his past history of escape attempts, but that in cases of shackling, the court, "upon agreement of the defendant, should instruct the jury against bias before taking evidence"). It further held the reason given for shackling is reviewable for an abuse of the trial court's discretion. *Id.* at 450.

Our Iowa case law has yet to address the issue of shackling within the context of an ineffective-assistance-of-counsel claim; specifically, whether the burden remains on the applicant to show he was prejudiced by counsel's failure to object to either the shackling or the lack of reasons articulated by the district court as to what essential state interests were served by the shackling. We do note the majority of jurisdictions have held that, when asserting an ineffective-assistance claim, the applicant retains the burden of showing the outcome of the proceeding would have been different but for the shackling, and that the breach of duty for failing to object to shackling by itself does not necessarily result in prejudice. *See Marquard v. Sec. for Dep't of Corr.*, 429 F.3d 1278, 1313–14 (11th Cir. 2005) (finding, in a habeas corpus action, the state supreme court did not improperly conclude the defendant failed to carry his burden showing he was prejudiced by shackling during the penalty phase; it further noted that, due to the overwhelming evidence of the defendant's culpability, the outcome of the sentencing proceeding would not have been different because, even after *Deck*, the postconviction applicant "still has the burden in his IAC-shackling claim to establish a reasonable probability that, but for his trial counsel's failure to object to shackling, the result of [the proceeding] would have been different"); *Fountain v. United States*, 211 F.3d 429, 436 (7th Cir. 2000) (holding that, due to the

overwhelming evidence of the defendant's guilt, applicant failed to carry his burden showing he was prejudiced by counsel's failure to object to the shackling);[2] *People v. Robinson*, 872 N.E.2d 1061, 1071–72 (Ill. App. Ct. 2007) (holding the trial court erred in shackling the defendant without stating particularized reasons; however, because of the overwhelming evidence in the State's case, the defendant did not meet his burden of showing he was prejudiced by trial counsel's failure to object to the court's error, and the State had proved beyond a reasonable doubt the error was harmless); *Stephenson v. State*, 864 N.E.2d 1022, 1038 (Ind. 2007) (holding the defendant bears the burden of establishing *Strickland* prejudice when asserting an ineffective-assistance claim based on shackling);[3] *but see Dickerson v. State*, 269 S.W.3d 889, 893–94 (Mo. 2008) (determining that if the defendant "establishes that he was visibly shackled, without the requisite finding of necessity," prejudice is automatically established).

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[2] The district court, in declining to follow the circuit courts' reasoning, relied on the fact that these were habeas corpus actions that required a different standard of review. However, because federal courts are bound to reverse the state court's decision if it "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law," *see* 28 U.S.C. section 2254(d)(1) (2011), the federal courts are bound by the same *Strickland* and *Deck* standards our court is now employing. Consequently, the reasoning found in the Eleventh and Seventh Circuit opinions cited herein is applicable to this case. Furthermore, the district court asserted the decisions occurred pre-*Deck*, which is not a concern with the *Marquard* and *Fountain* opinions.

[3] The district court distinguished these cases for a variety of reasons, including the differing facts and how *Deck* cannot be applied retroactively to the underlying trials in these cases. Nonetheless, we conclude the reasoning espoused in these opinions is sound, and we decline to follow the jurisdictions that hold if the claimant "establishes that he was visibly shackled, without the requisite finding of necessity," the claimant effectively demonstrates prejudice, without having to show the outcome of the proceeding would have been different but for counsel's error. *See Dickerson*, 269 S.W.3d at 894.

We agree with the majority of jurisdictions that it remains the applicant's burden to demonstrate prejudice when claiming ineffective assistance of counsel based on the lack of an objection to shackling, or counsel's failure to require the district court to make a particularized finding on the record as to why the shackling was necessary. Specifically, we hold that, when a postconviction applicant raises an ineffective-assistance claim alleging counsel breached an essential duty by failing to object to the applicant's shackling at trial, the applicant still must show a reasonable probability the result of the proceeding would have been different but for counsel's breach of duty.[4] *See Strickland*, 466 U.S. at 695.

The State also argues that had an objection to the shackling been made, the probability of a different result at trial is low. To prove Johnson committed two counts of murder in the first degree, the State needed to establish Johnson acted with malice aforethought, killing his two victims "willfully, deliberately, and with premeditation." Iowa Code §§ 707.1 & .2(1); *see also State v. Heemstra*, 721 N.W.2d 549, 552 (Iowa 2006) (noting the elements required to prove first-

[4] The district court, in concluding that, regardless of the ineffective-assistance framework, it was the State's burden to prove beyond a reasonable doubt Johnson was not prejudiced, related its concern that an "incongruous result" would occur if the defendant still bore the burden of proving prejudice. Specifically, the court found that:

> [A] defendant could lose his or her right to a fair trial by deployment of visible shackling when counsel was so ineffective that no objection was even raised. But if counsel had raised an objection, a conviction obtained in violation of *Deck* would be overturned without a showing of actual prejudice.

While we understand this concern, that is not the result reached by this opinion. Rather, our holding conforms to the *Strickland* standard by requiring the applicant to retain the burden of proving a reasonable probability the outcome of the trial would have been different but for counsel's failure to object to the shackling or the lack of articulated reasons by the district court. Within the postconviction forum, the applicant has the opportunity to demonstrate a reasonable probability the outcome of the proceeding would have been different absent counsel's breach of duty. This does not result in an incongruous outcome, but is in fact the proper framework in which to conduct the analysis of an ineffective-assistance claim.

degree murder). While Johnson did not deny he killed the two victims, he asserted he was guilty of voluntary manslaughter[5] because the elements for first-degree murder convictions were lacking. The State contends, however, that any claim of "sudden, violent, and irresistible passion" was greatly overshadowed by Johnson's "willful, deliberate and premeditated" actions. This evidence includes Johnson: (1) stating to his friend, Mark Bonney, that he wanted to "get his hands on" White two to three weeks before the murders; (2) going into his house the night of the murders to retrieve his gun; (3) driving five and one-half miles to his wife's apartment; (4) parking his car approximately one block away from the apartment; (5) obscuring his face by wrapping himself in a hooded sweatshirt; (6) positioning himself by kneeling outside the apartment's screen door; (7) waiting several seconds before firing his gun; (8) proceeding to shoot White three times; (9) shooting White once more after entering the residence; (10) chasing Kim down the hallway, and opening the daughter's bedroom door before shooting Kim; (11) bludgeoning both White and Kim in the back of their heads with the butt of his gun multiple times, "to make sure they were dead;" and (12) declaring to his daughter after shooting the victims that Kim "was f-ing" White. As the State argues, these uncontested facts overwhelmingly prove

[5] Voluntary manslaughter occurs:

> [W]hen [the defendant] causes the death of another person, under circumstances which would otherwise be murder, if the person causing the death acts solely as the result of sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a person and there is not an interval between the provocation and the killing in which a person of ordinary reason and temperament would regain control and suppress the impulse to kill.

Iowa Code § 707.4.

Johnson "willfully, deliberately, and with premeditation" killed White and Kim, thereby satisfying the disputed elements of proof for first-degree murder.

Notwithstanding these contentions, the appropriate course for this court to take is to remand the case back to the district court for it to apply the correct *Strickland* standard for a postconviction-relief proceeding. *See State v. Robinson*, 506 N.W.2d 769, 770–71 (Iowa 1993) (noting if an appellate court "find[s] an incorrect legal standard was applied, we remand for new findings and application of the correct standard"). Specifically, the district court must decide whether Johnson, as the postconviction applicant, met his burden showing that, but for counsel's failure to object to the decision to have Johnson shackled, there is a reasonable probability the outcome of the proceeding would have been different. *See Strickland*, 466 U.S. at 695.

III. Waiver of Attorney-Client Privilege

Johnson, in his cross-appeal, argues the postconviction court erred in denying his motion for a protective order asserting the presence of attorney-client privilege. He argues that, because he has been granted a new trial based on the court's grant of his postconviction application, the "well has been poisoned" now the State has had the opportunity to view all previously-privileged documents. As a remedy, Johnson urges that the case be dismissed.

We review rulings regarding discovery for an abuse of discretion. *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000). The district court is vested with wide discretion when ruling on issues of discovery, and we will not disturb its decision unless it is clearly unreasonable and not supported by substantial evidence. *Id.*

Our supreme court has noted that the concern for attorney-client privilege "disappears during postconviction relief proceedings." *State v. Tate*, 710 N.W.2d 237, 241 n.2 (Iowa 2006). This is due to the fact the defendant waives the privilege when he puts at issue the effectiveness of counsel. *See generally State v. Tensley*, 249 N.W.2d 659, 662 (Iowa 1977) (holding the defendant cannot assert attorney-client privilege after waiving that right). Therefore, the postconviction court did not abuse its discretion in denying Johnson's motion for a protective order for previously-privileged documents.

IV. Expert Testimony

Johnson next asserts the postconviction court erred in denying his request for a state-funded expert to testify during the postconviction hearing regarding his level of intoxication during and prior to the crime.

We review the court's decision whether or not to grant the defendant's application for a state-funded expert for an abuse of discretion. *State v. Van Scoyoc*, 511 N.W.2d 628, 630 (Iowa Ct. App. 1993).

In its ruling, the postconviction court noted a state-funded expert who would testify about Johnson's level of intoxication would be redundant at best. At trial, Johnson 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. Consequently, we agree with the postconviction court's conclusion that another, state-funded expert would not in any way further Johnson's case, and therefore the court did not abuse its discretion in denying Johnson's motion for a state-funded expert.

V. Ineffectiveness of Appellate Counsel

Johnson's final claim alleges appellate counsel was ineffective for failing to raise the shackling issue as part of Johnson's direct appeal. However, this issue will either be rendered moot, or subsumed within, the postconviction court's ruling regarding the ineffective-assistance-of-trial-counsel claim. This follows because, if the postconviction court finds trial counsel was ineffective, Johnson will be granted a new trial; concomitantly, if the court rules that Johnson's claim is without merit, appellate counsel would not have been ineffective for failing to raise a meritless issue. Consequently, we decline to either address the merits or preserve this claim.

VI. Conclusion

Having considered Johnson's claims, we conclude the postconviction court properly denied his request for a state-funded expert and motion for a protective order. We deny his ineffective-assistance-of-appellate-counsel claim. However, we conclude the postconviction court erred in its burden-shifting analysis. Consequently, we affirm the postconviction court's orders regarding Johnson's motions for appointment of an expert and protective order, but reverse the court's grant of his application for postconviction relief and order for a new trial. We remand the case back to the postconviction court to apply the correct standard to Johnson's ineffective-assistance-of-trial-counsel claim, which will also resolve the appellate ineffective-assistance-of-counsel claim.

REVERSED AND REMANDED ON APPEAL; AFFIRMED ON CROSS-APPEAL.

IN THE IOWA DISTRICT COURT IN AND FOR GUTHRIE COUNTY

JOHNNY LEE JOHNSON, **Petitioner,** **vs.** **STATE OF IOWA,** **Respondent.**	**Case No. PCCV081755** **RULING FOLLOWING REMAND**

On December 24, 2014, the Iowa Court of Appeals filed an opinion reversing this court's vacation of Petitioner's conviction on two counts of first degree murder in the case of *State of Iowa v. Johnny Lee Johnson*, Iowa District Court for Guthrie County, FECR019288. The court of appeals remanded the case for further proceedings. Procedendo issued on February 17, 2015.

A hearing was held on April 13, 2015, to determine appropriate relief in light of the court of appeals' opinion. Petitioner appeared by Karmen Anderson, his attorney. The State appeared by Timothy Benton, Assistant Guthrie County Attorney. Counsel agreed that further evidence was not required and that relief consistent with the court of appeals' opinion could be entered based upon the record previously made.

I.

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

The court of appeals held that Johnson's trial counsel was ineffective for failing to object to the use of shackles during the jury trial. According to the court of appeals, after establishing that trial counsel had breached an essential duty, Johnson then carried the burden to "show a reasonable probability the result of the [trial] would have been different but for counsel's breach of duty."[1]

The answer to this question is relatively simple. Johnson did not establish a reasonable probability that had he not been shackled the jury would have reached a different verdict with respect to either charge. To conclude that a reasonable probability existed that a different verdict would have resulted would require psychoanalyzing the individual juror's view of the evidence with shackling compared to how they may have viewed the evidence had Johnson not been shackled. This is impossible, and in fact this problem is at least one of the reasons shackling is considered to be inherently prejudicial.

The answer to the court of appeals' first question is thus no, Johnson did not prove a reasonable probability of a different verdict had he not been shackled.

[1] Court of Appeals Opinion, p. 11.

II.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Johnson also asserted a claim for ineffective assistance of appellate counsel. I dismissed that claim on February 26, 2013, in ruling on the State's motion for summary disposition. I based my ruling on the fact that no record had been made regarding the reasons for the shackling and trial counsel did not object to the shackling. Error had not been preserved.[2]

In its opinion, the court of appeals addressed Johnson's claim of ineffective-assistance-of-appellate-counsel as follows:

> Johnson's final claim alleges appellate counsel was ineffective for failing to raise the shackling issue as part of Johnson's direct appeal. However, this issue will either be rendered moot, or subsumed within, the postconviction court's ruling regarding the ineffective-assistance-of-trial-counsel claim. This follows because if the postconviction court finds trial counsel was ineffective, Johnson will be granted a new trial; concomitantly, if the court rules that Johnson's claim is without merit, appellate counsel would not have been ineffective for failing to raise a meritless issue. Consequently, we decline to either address the merits or preserve this claim. [3]

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[2] In light of the court of appeals holding that in the context of a PCR proceeding prejudice is not presumed, my ruling dismissing this claim may have been erroneous. The shackling/ineffective-assistance-of-trial counsel issue could have been raised on direct appeal. If the appellate court had ruled on that claim on direct appeal, the convictions may have been reversed under the inherent prejudice rule. Of course, had the appellate court preserved the claim for a possible PCR proceeding, the PCR claimant may lost the benefit of the inherent or presumed prejudice analysis, according to the court of appeals' rationale. In other words, the burden of proof may depend upon whether the appellate court handles the issue on direct appeal or preserves it for PCR.

[3] Court of Appeals Opinion, p.15.

The court of appeals thus remanded the case "to apply the correct standard to Johnson's ineffective-assistance-of-trial-counsel claim, which would then also resolve the appellate ineffective-assistance-of-counsel claim." [4] As I interpret the court of appeals' opinion and the scope of the remand, once I decide that Johnson failed to carry his burden to prove a reasonable probability of a different verdict, resolution of the ineffective-assistance-of-appellate counsel claim must necessarily follow.

Johnson did not carry his burden to prove a reasonable probability of a different result. Thus his claim of ineffective-assistance-of-appellate-counsel also fails.

III.

RULING

IT IS, THEREFORE, ORDERED THAT:

Petitioner's application for postconviction relief is denied. Petitioner's convictions on two counts of first degree murder in *State of Iowa versus Johnny Lee Johnson*, Iowa District Court for Guthrie County, FECR 019288, are hereby reinstated.

[4] Court of Appeals Opinion, p.15.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
PCCV081755	JOHNNY LEE JOHNSON VS STATE OF IOWA

So Ordered

Randy V. Hefner, District Court Judge,
Fifth Judicial District of Iowa

IN THE COURT OF APPEALS OF IOWA

No. 15-0776
Filed September 14, 2016

JOHNNY LEE JOHNSON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Guthrie County, Randy V. Hefner, Judge.

An applicant appeals the denial of his application for postconviction relief.

AFFIRMED.

Karmen Anderson of the Law Office of Karmen Anderson, Des Moines, for appellant.

Thomas J. Miller, Attorney General, and Darrel Mullins, Assistant Attorney General, for appellee State.

Considered by Vogel, P.J., and Doyle and Bower, JJ.

VOGEL, Presiding Judge.

Johnny Johnson appeals the denial of his application for postconviction relief, asserting the district court erred in determining he was not prejudiced by his trial counsel's breach of an essential duty. He also claims his appellate counsel was ineffective. Because we find the district court properly concluded Johnson failed to meet his burden to establish prejudice and Johnson's appellate counsel was not ineffective, we affirm.

I. Background Facts and Proceedings

In 2008, Johnson was convicted of two counts of murder in the first degree. Johnson's convictions were affirmed on direct appeal. *State v. Johnson*, No. 08-0320, 2009 WL 4842480, at *6 (Iowa Ct. App. Dec. 17, 2009). In 2011, Johnson filed an application for postconviction relief, which was partially based on his trial counsel's failure to object to Johnson being shackled during the trial and on his appellate counsel's failure to raise the issue of Johnson's shackling on direct appeal.

In 2013, the court ruled on Johnson's postconviction action and determined his trial counsel breached an essential duty by failing to object to Johnson being shackled during trial. The court then shifted the burden to the State to prove beyond a reasonable doubt the shackling did not prejudice Johnson at trial. After determining the State failed to meet its burden, the court vacated Johnson's convictions and ordered a new trial.

On appeal, this court reversed the grant of Johnson's application for postconviction relief. *Johnson v. State*, 860 N.W.2d 913, 922 (Iowa Ct. App. 2014). We determined the postconviction court incorrectly shifted the burden to

the State to prove prejudice did not occur in Johnson's ineffectiveness claim against his trial counsel. *Id.* at 919–20 ("We agree with the majority of jurisdictions that it remains the applicant's burden to demonstrate prejudice when claiming ineffective assistance of counsel based on the lack of an objection to shackling . . . ."). We then remanded Johnson's case back to the postconviction court for it to apply the proper standard regarding prejudice. *Id*. at 921.

On remand, the postconviction court found that despite Johnson's trial counsel's breach of an essential duty, Johnson failed to "carry his burden to prove a reasonable probability of a different result." Accordingly, the court rejected Johnson's ineffective-assistance-of-counsel claim as to his trial counsel and denied his application for postconviction relief. Johnson appeals.

II. Standard of Review

"The standard of review on appeal from the denial of postconviction relief is for errors at law." *Everett v. State*, 789 N.W.2d 151, 155 (Iowa 2010) (quoting *McLaughin v. State*, 533 N.W.2d 546, 547 (Iowa 1995)). However, alleged "violations of . . . constitutional rights are reviewed 'in light of the totality of the circumstances and the record upon which the postconviction court's ruling was made.'" *Reilly v. Iowa Dist. Ct.*, 783 N.W.2d 490, 493 (Iowa 2010) (citation omitted). "This is the functional equivalent of de novo review." *Id.*

III. Ineffectiveness of Trial Counsel

Johnson argues the postconviction court erred in its consideration of his ineffectiveness-of-trial-counsel claim. Specifically, Johnson claims his trial counsel was ineffective in failing to object to his shackling and that this failure

prejudiced him at trial. The State asserts the district court properly concluded Johnson was not prejudiced by his trial counsel's breach of an essential duty.

Counsel is ineffective when counsel's performance, measured against objective standards, falls below professional norms. *State v. Clay*, 824 N.W.2d 488, 494–95 (Iowa 2012). "In order to succeed on a claim of ineffective assistance of counsel, a defendant must prove: (1) counsel failed to perform an essential duty; and (2) prejudice resulted." *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008).

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.

A. Failure to Perform an Essential Duty

Several prior proceedings in this case have already determined Johnson's trial counsel failed to perform an essential duty. The postconviction court determined Johnson's trial counsel failed to perform an essential duty in its initial postconviction ruling. This court acknowledged that determination in the appeal

of that ruling. *Johnson*, 860 N.W.2d at 917. Additionally, on remand, the postconviction court reaffirmed this determination. The State has not challenged this determination on appeal; therefore, we consider the prior determination that Johnson's trial counsel failed to perform an essential duty undisputed.

B. Prejudice

When counsel has been determined to have breached an essential duty, the claimant must then establish prejudice, by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). The applicant must show prejudice by a preponderance of the evidence. *Clay*, 824 N.W.2d at 496. "In determining whether this standard has been met, we must consider the totality of the evidence . . . ." *State v. Graves*, 668 N.W.2d 860, 882–83 (Iowa 2003).

In our decision following the first postconviction ruling, this court detailed the evidence presented against Johnson at his trial:

> This evidence includes Johnson: (1) stating to his friend, Mark Bonney, that he wanted to "get his hands on" White two to three weeks before the murders; (2) going into his house the night of the murders to retrieve his gun; (3) driving five and one-half miles to his wife's apartment; (4) parking his car approximately one block away from the apartment; (5) obscuring his face by wrapping himself in a hooded sweatshirt; (6) positioning himself by kneeling outside the apartment's screen door; (7) waiting several seconds before firing his gun; (8) proceeding to shoot White three times; (9) shooting White once more after entering the residence; (10) chasing Kim down the hallway, and opening the daughter's bedroom door before shooting Kim; (11) bludgeoning both White and Kim in the back of their heads with the butt of his gun multiple times, "to make sure they were dead"; and (12) declaring to his daughter after shooting the victims that Kim "was f-ing" White.

Johnson, 860 N.W.2d at 920–21. At trial, Johnson did not deny he killed the victims. *Id.* at 920. Instead, Johnson argued he was guilty of voluntary manslaughter because the elements for first-degree murder were lacking. *Id.* "To prove Johnson committed two counts of murder in the first degree, the State needed to establish Johnson acted with malice aforethought, killing his two victims 'willfully, deliberately, and with premeditation.'" *Id.* (quoting Iowa Code §§ 707.1, .2(1) (2007)).

Based on the totality of the evidence presented at Johnson's trial, the jury had sufficient evidence to conclude he was guilty of first-degree murder. *See Graves*, 668 N.W.2d at 882–83. To the best of trial counsel's memory six years after the trial in the postconviction hearing, Johnson was shackled. Absent the prejudice that may have resulted from Johnson being shackled, the evidence against him remained overwhelming. Hence, Johnson did not demonstrate a reasonable probability the result of his trial would have been different.

Because Johnson failed to establish the prejudice prong, we conclude the postconviction court properly rejected his ineffectiveness claim against his trial counsel.

IV. Ineffectiveness of Appellate Counsel

Johnson next claims the postconviction court erred in its consideration of his ineffectiveness-of-appellate-counsel claim. Specifically, Johnson argues his appellate counsel was ineffective in failing to raise the issue of him being shackled on direct appeal. The State asserts the trial record was not sufficient for appellate counsel to raise the shackling issue on direct appeal.

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. *Maxwell*, 743 N.W.2d at 195.

A. Failure to Perform an Essential Duty

Whether counsel failed to perform an essential duty is measured against the objective standard of a reasonably competent practitioner. *Id.* at 195–96. We begin with the presumption that counsel performed their duties competently, and "this court 'avoid[s] second-guessing and hindsight.'" *Id.* at 196 (alteration in original) (quoting *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001)). Further, we analyze the claim based on the totality of the circumstances. *Id.*

Johnson's appellate counsel failed to perform an essential duty if a reasonably competent practitioner would have raised the issue of Johnson's shackling on direct appeal. *See id.* at 195–96. The answer to this question is dependent on the level to which the trial record revealed the shackling issue should be raised. Here, appellate counsel, reviewing the record from a trial lasting days, was limited to a solitary reference to shackling in the trial record—a transcript of a pretrial hearing[1] discussing the possibility of shackling Johnson during trial. The transcript read:

> THE COURT: The other matter is concerning Mr. Johnson and courthouse security. And it is the court's understanding that there was some, apparently, discussion yesterday about arrangements made for Mr. Johnson to be seated before the jury's brought in and to remain seated until they are out of the courtroom.

[1] The trial judge, the prosecutor, Johnson, and his counsel were present at this hearing.

> And I guess some additional efforts to try to make as inconspicuous as possible the fact that he's wearing shackles. And there have been some discussions this morning with counsel. I've suggested that perhaps it would be sensible to tell the jury up-front that Mr. Johnson is wearing shackles, and perhaps explain to them the reason for that in such a manner that they will not be left to debate about it or to wonder about it. My suggestion was that I would simply tell the jurors this morning that they may notice that Mr. Johnson is wearing shackles, and that that's done because we do have security policies for the courtroom and the courthouse, and that because we have three doors to the courtroom, that it would require a number of deputies to be present. That our trial is expected to take seven or eight days during the winter when we like to have the deputies out on the street and patrolling the county. And that in order to alleviate that need, to have those deputies tied up for a week, that Mr. Johnson has agreed to the shackles. That he has no plans to go anywhere and has agreed to wear those so that we can eliminate the need to keep all of those deputies here.
>
> Something along those lines. And that it might take care of any speculation on the part of the jurors.
>
> Mr. Miler, have you had an opportunity to discuss that with your client?
>
> MR. MILER: We have, Your Honor. And I know that the court was just giving a rough description of how you would advise the jury, but we would ask that in addition to what the court just indicated, that [the jurors] be advised that there are no conclusions to be drawn from the fact that he has shackles on. Otherwise, we have discussed this matter with Mr. Johnson, and we are agreeable to the court's proposal.
>
> THE COURT: Okay. Mr. Johnson, is that acceptable with you?
>
> THE DEFENDANT: Very much so, Your Honor.
>
> THE COURT: All right.
>
> THE DEFENDANT: Thank you.
>
> THE COURT: I assume it is acceptable with the State?
>
> MR. HAMMERAND: Yes, Your Honor.

From this transcript, the only things appellate counsel could have noted were the issue was discussed with counsel present, counsel said they discussed the issue with Johnson, an agreement regarding shackling had apparently been reached, and Johnson consented to being shackled. Appellate counsel had no way of knowing (1) whether an objection had been lodged and addressed

previously; (2) what, if any, specific findings the trial court made regarding shackling outside of this hearing; (3) whether Johnson was actually shackled during the trial; (4) what, if anything, was told to the jury; or (5) what the defense strategy was. There was no further trial record regarding shackling after this brief transcript. Absent this information in the trial record, Johnson's appellate counsel lacked the necessary information to argue a due process violation on direct appeal.[2]

Even if appellate counsel had raised a shackling issue on direct appeal, further development of the record was necessary to determine—at a minimum—whether an objection had been made and what considerations led to Johnson being shackled.[3] Absent this development of the trial record, on appellate review, the issue would have been preserved for further development of the record for a possible postconviction action.

Because Johnson's appellate counsel lacked the necessary information to pursue the shackling issue on direct appeal, we conclude he did not fail to perform an essential duty.

B. Prejudice

Because we conclude Johnson's ineffective-assistance-of-appellate counsel claim fails on the essential duty prong, we decline to address the

[2] This is particularly true if the claim was to be raised as an ineffective-assistance-of-counsel claim. *See State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006) ("Only in rare cases will the trial record alone be sufficient to resolve the claim on direct appeal.").

[3] While shackling a defendant during trial is considered inherently prejudicial, "shackling a defendant may be justified despite the fact that some prejudice will occur." *State v. Wilson,* 406 N.W.2d 442, 449 (Iowa 1987). "In certain instances, the defendant's right to the physical indicia of innocence before the jury must bow to the competing rights of participants in the courtroom and society at large to a safe and orderly trial." *Id.*

prejudice prong. *Ledezma*, 626 N.W.2d at 142 ("However, both elements do not always need to be addressed.").

V. Structural Error

Johnson's final claim is that his trial counsel's failure to object to his shackling amounted to a structural error because he was effectively denied counsel.

> [S]tructural 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.

Lado v. State, 804 N.W.2d 248, 252 (Iowa 2011). Counsel was neither actually nor constructively denied at any point in these proceedings. Johnson had counsel present throughout the pretrial hearings and the trial, and both counsel and Johnson acknowledged that they discussed the shackling in the pretrial transcript. Accordingly, Johnson's structural-error claim is denied.

VI. Conclusion

As we conclude the district court properly denied Johnson's ineffective–assistance-of-counsel claims against both his trial and appellate counsel and because we deny Johnson's structural-error claim, we affirm the district court's denial of Johnson's application for postconviction relief.

AFFIRMED.

IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
15-0776	Johnson v. State

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