No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MARK BITZAN, PETITIONER

VS.

PATTI WACHTENDORF, AND IOWA STATE PENITENTIARY,

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE EIGITH CIRCUIT

APPENDIX OF UNEDRLYING OPINIONS,

ORDERS AND EVIDENCE

Mark Bitzan 6290077
Iowa State Penitentiary
P.O. Box 316
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APPENDIX OF EVIDENCE

UNDERLYING *FEDERAL COURT* PROCEEDINGS

EXHIBIT

A

(Aug. 2, 2021)

Eighth Circuit Court of Appeals

Order denying permission to submit an Overlength Petition

for Rehearing and denying the Petition as overlength

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-3003

Mark Bitzan

Appellant

v.

Patti Wachtendorf and Iowa State Penitentiary

Appellees

Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids
(1:18-cv-00031-LRR)

ORDER

The motion to file an overlength petition for rehearing is denied. The petition for rehearing is denied as overlength.

August 02, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX OF EVIDENCE

UNDERLYING *FEDERAL COURT* PROCEEDINGS

EXHIBIT

B

(June 1, 2021)

Eighth Circuit Court of Appeals

Order granting permission to submit Overlength Petition for

Rehearing and time extension to July 7, 2021

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-3003

Mark Bitzan

Appellant

v.

Patti Wachtendorf and Iowa State Penitentiary

Appellees

Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids
(1:18-cv-00031-LRR)

ORDER

The motion of appellant for an extension of time until July 7, 2021, to file a petition for rehearing is granted. No further extensions will be granted.

Electronically-filed petitions for rehearing must be received in the clerk's office on or before the due date.

The three-day mailing grace under Fed.R.App.P. 26(c) does not apply to petitions for rehearing.

Appellant's motion to file an overlength petition for rehearing is also granted.

June 01, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX OF EVIDENCE

UNDERLYING *FEDERAL COURT* PROCEEDINGS

EXHIBIT

C

(Aug. 16, 2021)

Eighth Circuit Court of Appeals

Mandate releasing jurisdiction over the case

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-3003

Mark Bitzan

Appellant

v.

Patti Wachtendorf and Iowa State Penitentiary

Appellees

Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids
(1:18-cv-00031-LRR)

MANDATE

In accordance with the judgment of 03/26/2021, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matter.

August 16, 2021

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX OF EVIDENCE

UNDERLYING *FEDERAL COURT* PROCEEDINGS

EXHIBIT

D

(May 6, 2021)

Eighth Circuit Court of Appeals

Order granting an extension of time to June 7, 2021

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-3003

Mark Bitzan

Appellant

v.

Patti Wachtendorf and Iowa State Penitentiary

Appellees

Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids
(1:18-cv-00031-LRR)

ORDER

The motion of appellant for an extension of time to file a petition for rehearing is granted. Petition due June 7, 2021.

Electronically-filed petitions for rehearing must be received in the clerk's office on or before the due date.

The three-day mailing grace under Fed.R.App.P. 26(c) does not apply to petitions for rehearing.

May 06, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX OF EVIDENCE

UNDERLYING *FEDERAL COURT* PROCEEDINGS

EXHIBIT

E

(April 7, 2021)

Eighth Circuit Court of Appeals

Order granting appointed habeas counsel Jennifer Frese

leave to Withdraw and extension of time to May 7, 2021

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-3003

Mark Bitzan

Appellant

v.

Patti Wachtendorf and Iowa State Penitentiary

Appellees

Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids
(1:18-cv-00031-LRR)

ORDER

The motion to withdraw as counsel is granted. Ms. Jennifer Frese is granted leave to withdraw from this case. The appellant may have until May 7, 2021 to file a pro se petition for rehearing.

April 07, 2021

Order Entered Under Rule 27A(a):
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX OF EVIDENCE

UNDERLYING *FEDERAL COURT* PROCEEDINGS

EXHIBIT

F

(March 26, 2021)

Eighth Circuit Court of Appeals

Judgment denying application for certificate of appealability

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-3003

Mark Bitzan

Petitioner - Appellant

v.

Patti Wachtendorf; Iowa State Penitentiary

Respondents - Appellees

Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids
(1:18-cv-00031-LRR)

JUDGMENT

Before GRUENDER, WOLLMAN, and GRASZ, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed. The motion for stay is also denied.

March 26, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

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APPENDIX OF EVIDENCE

UNDERLYING *FEDERAL COURT* PROCEEDINGS

EXHIBIT

G

(Oct. 29, 2020)

Eighth Circuit Court of Appeals

Order denying Bitzan's request for new counsel, an extension of time, and to request to submit a pro se application or supplemental application for certificate of appealability

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-3003

Mark Bitzan

Appellant

v.

Patti Wachtendorf and Iowa State Penitentiary

Appellees

Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids
(1:18-cv-00031-LRR)

ORDER

Appellant's request for appointment of new counsel is denied.

Appellant's request for leave to proceed pro se, for an extension of time and leave to file his own application or supplemental application for certificate of appealability, are also denied.

October 29, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX OF EVIDENCE

UNDERLYING *FEDERAL COURT* PROCEEDINGS

EXHIBIT

H

(Oct. 9, 2021)

Eighth Circuit Court of Appeals

Order granting time extension for habeas counsel Jennifer Frese to file an application for certificate of appealability

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-3003

Mark Bitzan

Appellant

v.

Patti Wachtendorf and Iowa State Penitentiary

Appellees

Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids
(1:18-cv-00031-LRR)

ORDER

The motion for extension of time to file an application for certificate of appealability is granted up to, and including, October 30, 2020.

October 09, 2020

Order Entered Under Rule 27A(a):
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX OF EVIDENCE

UNDERLYING *FEDERAL COURT* PROCEEDINGS

EXHIBIT

I

(Oct. 9, 2020)

Eighth Circuit Court of Appeals

Order granting appointment of Jennifer Frese as counsel

under the Criminal Justice Act

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-3003

Mark Bitzan

Appellant

v.

Patti Wachtendorf and Iowa State Penitentiary

Appellees

Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids
(1:18-cv-00031-LRR)

ORDER

The motion for appointment of counsel is granted, nunc pro tunc. Jennifer Frese is appointed to represent Mark Bitzan under the Criminal Justice Act. Information regarding the CJA appointment and vouchering process in eVoucher will be emailed to counsel shortly.

October 09, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX OF EVIDENCE

UNDERLYING *FEDERAL COURT* PROCEEDINGS

EXHIBIT

J

(Aug. 27, 2020)

U.S. District Court for the Northern District of Iowa

Order denying habeas relief

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

MARK BITZAN,

Petitioner,

vs.

PATTI WACHTENDORF and IOWA STATE PENITENTIARY,

Respondents.

No. 18-CV-0031-LRR

ORDER

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I. INTRODUCTION

The matter before the court is Petitioner Mark Bitzan's pro se "Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus" ("Petition") (docket no. 1).

II. FACTUAL AND PROCEDURAL HISTORY

A. Trial and Conviction

On June 19, 2011, a trial information was filed in the Iowa District Court for Monona County alleging kidnapping in the first degree (Count 1) in violation of Iowa Code Sections 710.1(3) and 710.2 and sexual abuse in the second degree (Count 2) in violation of Iowa Code Sections 709.3(1) and 901A.2.[1] *See* Trial Information (docket no. 11-6) at 8. On July 21, 2011, an amended information was filed, which, among other things, detailed the predicate offense for Count 2 as a 2006 conviction for third degree sexual assault in the Seventh Judicial District of Wyoming, case no. 16720-C. *See* Amended Trial Information (docket no. 11-6) at 13. A jury trial was held commencing on January 10, 2012 and ending on January 17, 2012. *See* Trial Transcript Vol. I (docket no. 11-1) at 1. Petitioner elected not to testify on his own behalf at trial, and he confirmed during a colloquy with the trial judge that he fully understood the decision. *See* Trial Transcript Vol. IV (docket no. 11-4) at 41-42. On January 17, 2012, the jury returned a verdict of guilty on Count 1, kidnapping in the first degree. *See* Verdict (docket no. 11-6) at 272. The jury answered a special interrogatory, finding that a dangerous weapon was displayed during the first-degree kidnapping offense. *See id.* The jury also found that Petitioner was convicted of a prior offense under Iowa Code Section 902.14 as alleged in Count 2 of the Amended Trial Information.[2] *See id.* at 275; Judgment and

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[1] The amended trial information, which was filed on July 21, 2011, listed Iowa Code Section 902.14 for Count 2, rather than 901A.2. *See* Amended Trial Information (docket no. 11-6) at 13.

[2] The Iowa District Court conducted a separate enhancement phase of the jury trial to reach a separate verdict on Count 2. *See* Trial Transcript Vol. V.

Sentence (docket no. 11-6) at 320. On March 16, 2012, Petitioner was sentenced to life in prison. *See* Judgment and Sentence at 321.

B. Direct Appeal

On direct appeal, the Iowa Court of Appeals thoroughly summarized the trial evidence as follows:

> During the evening of December 17, 2010, Bitzan was inside the women's handicap stall at an interstate restroom when nineteen-year-old Natasha stopped at the rest area and used the restroom. As she stood at the sink and washed her hands, Bitzan exited the stall, walked up behind her, placed one hand over her mouth, placed the other hand around her torso, and kissed the top of her head. After asking her if she was "going to be quiet," Bitzan forced Natasha away from the sink area and into the handicap stall at the back of the restroom. Bitzan reached back and latched the stall door as he pushed her up against the wall. Bitzan stood in front of her, between Natasha and the stall door, and began asking questions in a calm voice, for example, "Where are you going?" "Are you alone?" "Do you have people waiting for you or are people expecting you?"
>
> When Natasha would not tell Bitzan her name and slapped his hands away from the zipper on her hoodie, Bitzan responded by changing his body language, reaching into his pocket, and pulling out a collapsible pocketknife. Natasha then gave a name, and Bitzan put the knife away and asked more questions. When Bitzan reached for her pants and she slapped his hand away, Bitzan displayed "frustration or anger" and stated, "This will just be easier if you cooperate." Natasha asked, "Are you going to hurt me?" Bitzan replied, "Not if you cooperate." Bitzan then asked personal questions, "Are you on birth control?" and "Is this a bad time of the month?" When Natasha hesitated in her response to his questions or to his demands, Bitzan gestured toward the knife in his pocket. At some point, Natasha asked herself, "What can I do to live?"
>
> Bitzan proceeded to remove Natasha's boots, pants, and underwear. Bitzan began touching Natasha's genitals as she begged him to stop. Bitzan ordered Natasha to the floor, and he confirmed that she was not visible from outside the handicap stall. Natasha testified, "so I'm lying in that corner, and I remember him remarking ... 'good, you are out of sight,' because he

(docket no. 11-5) at 31-36. The second phase occurred with the original jury but was conducted after the verdict was announced on Count 1. *Id.* at 28.

> kind of glanced off to the side to ... check under the stalls to see if I would be visible." Bitzan pulled down his pants, raped Natasha, and ejaculated inside her. Bitzan wiped himself off and ordered Natasha to remain in the stall until he left. Natasha waited for a few minutes after she heard the bathroom door close, dressed, and drove away.
>
> Natasha, who was in ROTC at college, called her commanding officer for advice. The officer advised Natasha to go directly to a hospital, and she stayed on the phone while Natasha drove to the hospital. Natasha called her mother, and her parents came to the hospital. The hospital was not equipped to perform a sexual assault exam, so the family went to a nearby hospital where Natasha provided samples for a sexual assault kit. The samples were analyzed by the Iowa DCI laboratory. The DNA in the samples matched Bitzan's profile. Bitzan's DNA was in the data bank as a result of a previous sexual abuse conviction in Wyoming.

State v. Bitzan, 837 N.W.2d 679 (Table), 2013 WL 3273813, at *1 (Iowa Ct. App. June 26, 2013).

On direct appeal, Petitioner's primary argument was that the evidence at trial was insufficient to support a finding of kidnapping or use of a dangerous weapon. *See* Appellant's Brief (docket no. 11-7) at 29-54. The Iowa Court of Appeals affirmed Petitioner's conviction for first-degree kidnapping. *See Bitzan*, 2013 WL 3273813, at *5. In reaching its decision, the Iowa Court of Appeals reviewed Iowa precedent on kidnapping and concluded that there was "substantial evidence from which a rational jury could find the period of confinement or the distance of removal exceeded what is normally incident to the commission of a sexual abuse." *Id.* at *3-*4. The Iowa Court of Appeals specifically noted that the victim was moved from the open area of the restroom to a stall, the door was latched, and she was further secluded beside a toilet, thus the risk of detection or interruption was significantly reduced. *Id.* at *4. Petitioner also argued that counsel was ineffective for failing to challenge a sentence enhancement or an action during the enhancement portion of the trial. The Iowa Court of Appeals bypassed the arguments because it concluded that no enhancement was applied to Petitioner's sentence. Petitioner sought further review but was denied. Procedendo issued on September 23, 2013.

C. Postconviction

Petitioner initiated postconviction proceedings on August 15, 2014. Petitioner subsequently retained counsel, who filed multiple amended petitions. *See* docket no. 11-14 at 52-66 (Amended Application for Postconviction Relief), 68-83 (Second Amended Application for Postconviction Relief). Ultimately, Petitioner argued that: (1) trial counsel was ineffective for failing to do a pretrial investigation; (2) trial counsel was ineffective regarding Petitioner's right to testify; (3) trial counsel was ineffective for failing to challenge certain jurors; (4) trial counsel was ineffective for failing to protect confrontation rights; (5) trial counsel was ineffective for failing to file a motion in limine regarding testimony on a possible sexual assault spree; (6) trial counsel was ineffective for failing to object to the in-court identification by the victim; (7) the state committed a *Brady* violation; (8) trial counsel was ineffective for failing to call an expert on victim credibility; (9) trial counsel was ineffective for failing to raise prosecutorial misconduct; (10) trial counsel was ineffective for failing to challenge Nurse Wear's vouching testimony; and (11) trial counsel was ineffective for failing to call a medical expert regarding vaginal tears. *See* Second Amended Postconviction Petition at 68-83.

On August 17 and 18, 2016, the Iowa District Court for Monona County conducted a two-day evidentiary hearing on Bitzan's postconviction relief petition. Postconviction Transcript Vol. I and II (docket nos. 24-1 and 24-2). Bitzan's original trial counsel, Dean Stowers, and Nick Sarcone, both testified at the postconviction hearing. Petitioner also testified on his own behalf for the first time. Counsel testified at the hearing that the theory of the case had been that the sexual encounter was consensual in the rest stop bathroom.

By contrast, Petitioner testified, at the postconviction hearing, that during their representation of him counsel refused to listen to his version of the events. *See* Postconviction Transcript Vol. II (docket no. 24-2) at 11. Petitioner proceeded to testify that he first met the victim at the Sonic restaurant in Sioux Falls, South Dakota, where the two agreed to drive in a caravan. *Id.* at 10-16. About 40 minutes into the drive, the

victim pulled off at a rest stop and invited Petitioner into her vehicle where flirting quickly escalated to consensual intercourse in the back seat. *Id.* at 17-21. Petitioner testified that his travel companion and best friend, Louis Hamilton, was in his vehicle right next to the victim's and certainly would have seen the sexual encounter. *Id.* at 24.

Petitioner further testified that, at trial Mr. Stowers:

> pushed [him] to testify. If we went to court and I testified to what he was telling me, like a story that I had met her and we had sex on the floor in the bathroom, and he gave me some random little details that were close to what her story was in the deposition that he had sent, and he told me that it just needed to be close. It needed to be close to what hers was, and he kept cutting me off when I would try to tell him my information that I was never in Iowa.

See Id. at 35-36. Petitioner also stated that he kept trying to tell Mr. Stowers "[i]f anywhere, it would have been north in South Dakota," but "[h]e basically ignored me. He didn't really acknowledge that I said anything." *Id.* at 38. When confronted on cross-examination about Mr. Stowers' notes from attorney client meetings that corroborated the theory of consensual sex at a rest stop, Petitioner stated that such notes would be incorrect and "not what [he] said to them." *Id.* at 55-56. Additionally, when confronted with a postconviction filing wherein Petitioner personally stated that he took a route through Iowa, he said it was probably a typo. *Id.* at 66-67.

Petitioner testified that he had ten to fifteen minutes at trial with his attorneys to discuss whether he would testify. *Id.* at 41. He claimed counsel never prepared him to testify or rehearsed what his testimony would be, and that in the short meeting during trial his counsel suggested he should not testify because he would not make a good witness. *Id.* at 42-43. Petitioner said he felt "horrified" about the way Mr. Stowers was describing the option to testify, and he felt uncomfortable because Mr. Stowers "wanted [him] to testify to something different than the truth, something different than what actually happened." *Id.* at 43. On cross-examination, Petitioner admitted that he said

nothing about problems with his choice to testify or counsel until his allocution at sentencing. *Id.* at 64.

Both Mr. Stowers and Mr. Sarcone testified at the postconviction hearing that Petitioner never told them he met the victim at the Sonic in Sioux Falls, South Dakota. *See id.* 87, 92, 115, 210-12. Mr. Stowers testified that much of the preparation for trial and investigation of the case, as well as the trial strategy itself, was based upon Petitioner telling them that the sexual encounter was in Iowa and that it was consensual. *See* Postconviction Transcript Vol. I (docket no. 24-1) at 207.

The postconviction court took the matter under advisement and issued a written decision denying the petition for postconviction relief on all accounts. Petitioner appealed the outcome of his postconviction proceedings and his appeal was denied. Petitioner also applied for further review with the Iowa Supreme Court, but his application only concerned a subset of the issues raised at the postconviction hearing. Specifically, he argued that the district court erred by determining that there was no prejudice from the vouching testimony; the court of appeals erred by failing to consider prejudice of the cumulative errors by trial counsel; and, the court of appeals erred by determining that there was a breach of duty during jury selection but no prejudice. Ultimately, the Iowa Supreme Court denied further review.

D. Federal Habeas Petition

Petitioner initiated these proceedings by filing a pro se habeas petition on March 26, 2018. *See generally* Petition. Respondent answered the Petition and filed the state court documents in February of 2019. *See* docket nos. 10 and 11. A briefing schedule was set, and numerous discovery motions were addressed. Subsequently, the court appointed counsel to assist Petitioner and a new briefing schedule was established. *See* docket no. 40. On March 3, 2020, counsel filed the Petitioner's Brief (docket no. 44). Petitioner attempted to supplement counsel's brief, but his filing was stricken. *See* docket nos. 46, 49. On April 29, 2020, Respondent timely filed the Respondent's Brief (docket no. 53). On May 15, 2020, counsel for Petitioner filed the Reply Brief (docket no. 56).

The case is fully submitted and ready for decision.

III. STANDARDS OF REVIEW

Even if a claim is exhausted, under Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") this court can only issue habeas corpus relief if the petitioner can show that the Iowa court's decision "was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Woodford v. Visciotti,* 537 U.S. 19, 24-25 (2002) (per curiam). A decision is "contrary to" Supreme Court precedent if: (1) "the state court arrives at a conclusion opposite that reached by [the Supreme Court] on a question of law"; or (2) "the state court confronts a set of facts that are materially indistinguishable from a [decision of the Supreme Court] and [nevertheless] arrives at a [different result]." *Williams v. Taylor,* 529 U.S. 362, 405-06 (2000). A decision is an "unreasonable application" of Supreme Court precedent if: (1) "the state court identifies the correct governing legal rule from [the Supreme Court's] cases but unreasonably applies it to the facts of the particular state prisoner's case"; or (2) "the state court either unreasonably extends a legal principle from [the Supreme Court's] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* at 407. A state court decision is not unreasonable simply because this court believes the state court erroneously or incorrectly applied Supreme Court precedent. *Id.* at 411. The error or incorrect application must also be patently unreasonable for this court to issue habeas relief. *Id.*

State court interpretations of the facts are presumed correct on federal habeas review. 28 U.S.C. § 2254(e)(1). The petitioner bears the burden to show by clear and convincing evidence that the state court decision was an unreasonable interpretation of the facts. *Id.*; *Middleton v. Roper,* 455 F.3d 838, 845 (8th Cir. 2006). As is the case with an unreasonable application of Supreme Court precedent, erroneous fact-finding by a state court is not enough to warrant habeas relief. *Weaver v. Bowersox,* 241 F.3d 1024,

1030 (8th Cir. 2001). The petitioner must show that the state court's error was an *unreasonable* interpretation of the facts, not just a mistake. *Id.* Additionally, a state court decision on a matter of state law cannot be reviewed by a federal habeas court. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

Under Section 2254(e), the court need only hold an evidentiary hearing in limited circumstances. 28 U.S.C. § 2254(e)(2)(A)-(B). An evidentiary hearing is warranted if a claim relies on: (1) a new rule of constitutional law that is retroactive on collateral review and was previously unavailable; or (2) a new factual predicate that could not have been discovered earlier via due diligence. *Id.* Additionally, a hearing may be warranted if the facts presented show by clear and convincing evidence that no reasonable factfinder would have found the petitioner guilty absent a constitutional error. *Id.*

IV. DISCUSSION

a. Insufficient evidence

Petitioner argued that the evidence was not sufficient to support the "confinement or removal" element of kidnapping under Iowa law because the use of a bathroom stall versus the main area of the bathroom was not significantly different and the sexual act could have been detected in either location. *See* Petitioner's Brief at 7-8. Respondent counters that the federal habeas standard of review is doubly deferential because this court should only consider whether the Iowa Court of Appeals acted reasonably, rather than whether the court correctly interpreted Iowa law. *See* Respondent's Brief at 12-14. Using that narrow approach, Respondent argues that rational jurors could have concluded that a kidnapping occurred and the Iowa Court of Appeals was reasonable to credit the jury's finding. *Id.* at 14-19. In reply, Petitioner argues that the facts were not sufficient under Iowa precedent to find that there was significant confinement or removal of the victim. Petitioner's Reply (docket no. 56) at 4-7.

A sufficiency of the evidence claim is a claim of factual error. Therefore, the applicable standard that applies is 28 U.S.C. § 2254(d)(2): whether the Iowa Courts' decision "was based on an unreasonable determination of the facts in light of the evidence

presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). The state court's findings of fact are presumed to be correct. *See Beck v. Bowersox*, 257 F.3d 900, 901 (8th Cir. 2001) (*citing* 28 U.S.C. § 2254(e)(1)). The burden is on the petitioner to rebut the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). "All conflicting inferences that arise from the historical facts must be resolved in favor of the prosecution." *Nance v. Norris*, 392 F.3d 284, 290 (8th Cir. 2004). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

Under Iowa law "a person commits kidnapping when the person either confines a person or removes a person from one place to another . . . [with the intent to subject] the person to a sexual abuse." Iowa Code section 710.2. "Kidnapping is kidnapping in the first degree when the person kidnapped, as a consequence of the kidnapping, suffers serious injury or is intentionally subjected to torture or sexual abuse." Iowa Code § 710.3. In *State v. Rich,* 305 N.W.2d 739 (1981), the Iowa Supreme Court thoroughly examined the meaning of the "confine or remove" element of kidnapping in conjunction with a sexual assault. *Id.* at 745. The Court concluded that although there is no minimum period of confinement or distance of removal, the action must at least be such that it substantially increases the risk of harm to the victim, significantly lessens the risk of detection, or significantly facilitates escape after the offense. *Id.* In *Rich*, the victim was taken from the main area of a shopping mall to a restroom. The Court emphasized that the restroom was sought out for seclusion, and the victim's hands were bound behind her back, an act of restraint which was not necessary to commit sexual abuse. *Id.* at 745-46. Thus, the Court concluded that actions were taken above and beyond those incidental to accomplishing a sexual abuse.

The Iowa Supreme Court recently reexamined its conceptualization of kidnapping in *Sauser v. State*, 928 N.W.2d 816 (2019). In *Sauser*, the Iowa Supreme Court found

that there was insufficient evidence of kidnapping where a wife pointed a gun at her husband and subsequently shot him because it found there was nothing about pointing the gun that made the crime substantially more heinous than the shooting in and of itself. The Court stressed that precedential cases where the evidence was sufficient for kidnapping included "a series of acts of confinement that made the underlying crime more abominable." *Id.* at 820. "The idea is that the kidnapping must make the defendant's overall actions substantially more dangerous." *Id.* at 819-20.

On direct appeal, the Iowa Court of Appeals found that the evidence presented at trial was sufficient to satisfy the elements of first-degree kidnapping. *See Bitzan*, 2013 WL 3273813, at *4. That legal determination was exclusively under Iowa law as an interpretation of Iowa's kidnapping statute, so the legal determination is not subject to review by this federal habeas court. *See, e.g., Estelle*, 502 U.S. at 67-68 ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). Therefore, the only issue for this court is one of fact—whether the Iowa Court of Appeals made an unreasonable determination based on the facts in the record. The burden lies with Petitioner to demonstrate that the Iowa Court of Appeals made an unreasonable determination based on the facts. As the Iowa Court of Appeals noted, the victim testified that Petitioner forcibly removed her from the main area of a restroom to the privacy of a locked stall and secluded her from view on the floor next to the toilet. Either of these actions made the detection and interruption of the assault less likely. The Iowa Court of Appeals did not make an unreasonable determination based on the facts available, and to date, Petitioner has set forth nothing new to change that holding.

Although Petitioner testified at the postconviction hearing that the sexual encounter took place in the victim's vehicle and with consent, that version of events is too late, and it is rebutted by multiple witnesses. This court reviewed the entirety of the trial transcript and the postconviction transcript—more than 1,500 pages of material. The victim's testimony at trial and at the postconviction hearing appears consistent. Additionally, at

the postconviction hearing both of Petitioner's trial attorneys testified that they had never heard of a version of events where the Petitioner and victim met at a Sonic restaurant in South Dakota and proceeded to a rest stop to have consensual sex in her vehicle. They testified that Petitioner consistently told them that he had consensual sex with the victim at a rest stop.

Considering this evidence, Petitioner has presented this court with nothing other than his own self-serving testimony to rebut the presumption that the state court factual findings were correct. The argument that he never previously alleged this version of events because his trial attorneys ignored and intimidated him is implausible. Some potential evidence has become unavailable over time—such as specific cell tower records and potential surveillance camera footage from the Sonic restaurant that is no longer available. But, a key potential source of evidence frequently discussed, but never presented, Louis Hamilton, was available to Petitioner. Indeed, Petitioner alleged that his best friend, Louis Hamilton, was an eyewitness to his interactions with the victim. But that evidence was never presented, and the mere suggestion that Hamilton may possess favorable testimony is not enough to satisfy Petitioner's burden because there is clear evidence, that the Iowa Courts considered, to sustain the sufficiency of the evidence finding. Nothing presented in this Petition suggests that the state courts were unreasonable in interpreting the facts. Accordingly, the Petition must be denied on this ground.

b. Vouching

Petitioner argues that registered nurse Laureen Wear (a defense witness) provided improper vouching testimony to which counsel failed to object, and that testimony caused prejudice by giving the jury an expert opinion on the issue of consent. *See* Petitioner's Brief at 8-11. Respondent contends that trial counsel's actions, even though improper under Iowa law, did not cause prejudice due to other overwhelming evidence available. *See* Respondent's Brief at 20-29. In reply, Petitioner points to *Maurer v. Minn. Dep't of*

Corr., 32 F.3d 1286 (8th Cir. 1994), a case in which the Eighth Circuit found a vouching error to be prejudicial. *See* Petitioner's Reply at 8-11.

Nurse Wear was a defense witness at trial. On cross examination she testified:

> A: She presented because she had been sexually assaulted.
>
> Q: I believe it's your testimony that nothing she did made you doubt that, correct?
>
> A: That is correct.
>
> Q: Nothing about her demeanor?
>
> A: Nothing about her demeanor.
>
> Q: Nothing about what she told you?
>
> A: Nothing about what she told me.

Trial Transcript Vol. IV at 30. On re-cross she testified, "[P]ersonally, I felt as if she was not—she was being honest." *Id.* at 30-31.

The prohibition on vouching testimony is rooted in Iowa law, and this Court will not examine a determination of state law, so to the extent that the Iowa courts found improper vouching—that determination stands. However, this Court will apply the ineffective assistance of counsel framework to the situation to conclude that no prejudice occurred.

Strickland v. Washington, 466 U.S. 668, 687 (1984) requires an individual to establish that his counsel's performance was deficient and that the deficiency caused him prejudice. "[T]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Wiggins v. Smith,* 539 U.S. 510, 521 (2003) (*quoting Strickland,* 466 U.S. at 687-88). To show prejudice, an individual must establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at

694. The *Strickland* standard is even narrower when a federal court reviews a state court action in the habeas context. The combined standard from Section 2254 and *Strickland* "is not whether counsel's actions were reasonable," but instead "whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Harrington v. Richter*, 562 U.S. 86, 101 (2011).

The parties and the state postconviction court agreed that the testimony of Nurse Wear about the victim's credibility was impermissible but the Respondent insists there was no *Strickland* prejudice. *See Bitzan v. State,* 912 N.W.2d 855 (table) (Iowa Ct. App. 2018). This court agrees that there was no prejudice because there was substantial evidence to support the verdict in this case, including other reliable and valid indicators about the victim's credibility. For example, the trained nurse who ultimately examined the victim testified that many types of behavior are consistent with sexual abuse, *see* Trial Transcript Vol. III (docket no. 11-3) at 27, and the victim's commandant (the first person she called after the abuse) testified about her demeanor, *see id.* at 19-20, 22. The victim's own testimony both at trial and at the state court postconviction hearing were also consistent and jurors had the ability at trial to weigh her demeanor and credibility. Accordingly, the record does not support a finding of prejudice based on the brief "vouching" testimony.

c. Ineffective assistance of counsel via pretrial investigation

Petitioner argues that counsel's pretrial investigation was ineffective in a number of ways, including failure to retain certain lay and expert witnesses or conduct a physical investigation. *See* Petitioner's Brief at 11-13. Respondent opposed the failure to investigate claims as unexhausted at the state level, and without prejudicial effect on the outcome of Petitioner's trial. *See* Respondent's Brief at 29-34. Petitioner does not address this issue in his Reply.

To obtain federal habeas relief, a state prisoner must fully exhaust the claims before the state courts. 28 U.S.C. § 2254(b)(1)(A)-(B). *See also Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (holding that under the AEDPA, a petitioner must exhaust available

state remedies). "In other words, a state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition." *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). The exhaustion doctrine "is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts." *Id.* at 845. In Iowa, a prisoner must seek review through the established appellate review process, which includes an application for further review in the Iowa Supreme Court. *See Welch v. Lund*, 616 F.3d 756, 758-59 (8th Cir. 2010) (internal citation omitted) (holding that an Iowa prisoner failed to exhaust his claims in the State court when the prisoner's appeal of the state district court's decision to the Iowa Supreme Court was "deflected to the Iowa Court of Appeals" and the prisoner failed to file for further review in the Iowa Supreme Court).

Respondent argues that many of Petitioner's claims were not fully exhausted at the state level, including this claim. The state court records show that on appeal from the postconviction ruling in the Iowa district court, Petitioner only raised three issues in his application for further review—the improper admission of Nurse Wear's vouching testimony, the cumulative impact of trial counsels' errors and the failure to challenge juror 21 for cause. *See* Application for Further Review (docket no. 11-20). By failing to include any other issues in the application for further review, Petitioner essentially abandoned the issues and failed to complete state exhaustion. *See Welch*, 616 F.3d at 758-59. While this court could decline review of all issues other than the three brought forth for further review to the Iowa Supreme Court, out of an abundance of caution, this court will review all of the claims presented in the Petition.[3]

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Hinton v. Alabama*, 571 U.S.

[3] The exhaustion issue will be flagged in this Order wherever Respondent raised it, but this analysis of exhaustion will apply throughout the Order.

263, 274 (2014) (citing *Strickland*, 466 U.S. at 690-91). If an attorney makes an unreasonable or flawed strategic decision based on a misunderstanding or lack of legal knowledge, then his strategic or investigatory decision constitutes deficient performance. *Hinton*, 571 U.S. at 274-75. Stated differently, "[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Id.* at 274. In *Hinton*, the Supreme Court found that defense counsel's performance was deficient when he failed to hire a qualified expert because he incorrectly believed he could not seek adequate reimbursement to retain the expert. In *Hinton*, the Supreme Court stressed that counsel's deficiency was about his lack of familiarity with the legal reimbursement avenues for retained experts and had nothing to do with the actual credentials or qualifications of an expert. *Id.* at 274-75. The Eighth Circuit recently echoed *Hinton*, finding in *Mayfield v. United States,* 955 F.3d 707 (8th Cir. 2020), that if counsel gives advice that is wrong, based on a simple misunderstanding of the law, then counsel's performance was deficient. *Id.* at 711 (counsel was deficient in advising defendant to take a plea based on a mistaken belief that a federal sentencing enhancement applied, when the enhancement was plainly inapplicable).

Counsel was not deficient in the pretrial investigation of this case, nor was there prejudice as the result of any shortcomings in the investigation. At the postconviction hearing Mr. Stowers testified about the investigatory steps taken and the strategic decisions made. For example, he testified that he did not ultimately seek to call Hamilton as a witness because Petitioner told him Hamilton was asleep the whole time and knew nothing, and Hamilton told the police that they never traveled through Iowa, when Petitioner insisted that they did. *See* Postconviction Transcript Vol. I at 190-193. "[I] just didn't think he had anything to add whatsoever and probably would have not been helpful at all. He probably would have hurt the case. So that's why he wasn't called, and that's why he wasn't really pursued hotly as somebody to follow up with." *Id.* at 193. Mr. Stowers repeatedly testified that he built his trial strategy around the

information he had from Petitioner—that the sexual encounter was consensual and occurred in Iowa.

At the postconviction hearing Petitioner called an investigator to testify about evidence that could have been recovered, such as cell tower data or video surveillance footage. But the investigator's testimony about what could have been done is speculation in the face of consistent and persuasive testimony by the victim, Mr. Stowers, Dan Dawson (DCI Agent) and others. Mr. Stowers testified that Petitioner told him there was consensual sex at an Iowa rest stop—under this version of events the investigatory decisions were sound. There was no reason to pull cell tower records to pinpoint the location, or to secure camera footage from a Sonic restaurant where Petitioner never previously alleged he had gone. There was also no reason to talk to a witness who was allegedly asleep and unaware of the evening's events. Trial counsel did not make strategic decisions based on erroneous interpretations of the law. Counsel made strategic decisions based on the version of events his client relayed to him. The decisions were not unreasonable in light of the available evidence. Accordingly, the court concludes that there was no investigatory error sufficient to rise to the level of ineffective assistance of counsel.

d. **Brady *violation***

Petitioner alleges that the police or the state did not disclose the DVD recording of Louis Hamilton's interview. *See* Petitioner's Brief at 14. Respondent argues that this issue was not exhausted, and the evidence was not exculpatory, nor did the state hide it from Petitioner. See Respondent's Brief at 34-37. Petitioner does not address this issue in his Reply.

A *Brady* claim has three essential components: (1) the excluded evidence was favorable to the accused; (2) the evidence was willfully or inadvertently suppressed; and (3) prejudice ensued. *Banks v. Dretke*, 540 U.S.668, 691 (2004) (citing *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). "[T]he materiality standard for *Brady* claims is met when 'the favorable evidence could reasonably be taken to put the whole case in such

a different light as to undermine confidence in the verdict." *Banks,* 540 U.S. at 699 (*citing Kyles v. Whitley*, 514 U.S. 419, 435 (1995)).

Petitioner's claim fails to meet the materiality standard because it is not plausible that testimony from Hamilton, who was asleep for the majority of the pertinent time period, would put the case in a different light. Additionally, defense counsel knew of the existence of this witness, and knew he had been interviewed, so the Hamilton interview cannot be said to be truly suppressed. *See* Postconviction Transcript Vol. II at 226-227 (Stowers testified that he got the law enforcement report from the Hamilton interview and determined that Hamilton could not provide useful information). The facts presented do not meet the standards of a *Brady* claim, so this court will not grant relief on this theory.

e. Failure to strike jurors

Petitioner argues that his counsel was ineffective because jurors who knew the Monona County Attorney and local law enforcement were not stricken from the jury. *See* Petitioner's Brief at 14. Respondent counters that Iowa courts reasonably concluded that only one juror could have been challenged for cause under state law, and the presence of that juror did not prejudice Petitioner. *See* Respondent's Brief at 36-39. Petitioner does not address this issue in his Reply.

Counsel cannot be ineffective for failing to raise an issue at trial that would have failed under state law. *See Rainer v. Kelley*, 865 F.3d 1035, 1045 (8th Cir. 2017) (*citing Dodge v. Robinson*, 625 F.3d 1014, 1019 (8th Cir. 2010). In *Rainer*, the Eighth Circuit concluded that trial counsel was not ineffective for failing to renew a pretrial objection to the exclusion of evidence because the evidence was properly excluded under Arkansas evidentiary rules. *Id.*

The Iowa Court of Appeals considered the jury selection issues and noted that under Iowa Rule of Criminal Procedure 2.18(5)(e) a potential juror can be challenged for cause if there is an attorney-client relationship at play. *See Bitzan v. State*, 912 N.W.2d 855 (Table), 2018 WL 348092, at *1, *5 (Iowa Ct. App. 2018). Juror 21 testified that

the Monona County Attorney was representing him in restaurant litigation, but that he could remain fair and impartial. *See* Trial Transcript Vol. I at 15. At jury selection, the presiding judge stated on the record that the Monona County Attorney played no role in the prosecution of the case. *Id.* Based on this testimony, the Court of Appeals noted that defense counsel should have moved to strike the juror for cause. However, the Court of Appeals concluded that there was no prejudice because counsel and the Petitioner's handwritten notes indicated that they wanted the juror, and the juror stated he could be impartial. *Bitzan*, 2018 WL 348092, at *6.

Here, the juror selection issues were strategic and also fell within the scope of Iowa law. The Iowa Court of Appeals specifically referenced Iowa Rule of Criminal Procedure 2.18(5)(e) and stated that a challenge under the rule would have been the correct course of action for juror 21. The Iowa courts determination about the scope of Rule 2.18(5)(e), is not a determination that this Court will review because it was the state court's interpretation of its own laws and rules. *Estelle*, 502 U.S. at 67-68. However, this Court can still review the jury selection issue under the ineffective assistance of counsel rubric. Petitioner cannot establish prejudice because the record clearly demonstrates that juror 21 stated under oath that he could be fair and impartial, and defense counsel did not object to the selection of this juror. *See* Trial Transcript Vol. I at 15. Even if the juror had a personal relationship with the county attorney, the county attorney was not involved in Petitioner's trial, so the risk of prejudice was entirely speculative.

f. Ineffective assistance regarding Bitzan's right to testify

Petitioner alleges that counsel were ineffective because they failed to prepare him to testify, improperly advised him regarding testifying and encouraged him to commit perjury. *See* Petitioner's Brief at 14-15. Respondent argues that Petitioner did not exhaust this claim, and even if he did, the trial and postconviction records show that he made an adequate and informed decision about his testimony, the outcome of which was

not prejudicial. *See* Respondent's Brief at 39-42. Petitioner does not address this issue in his Reply.

A defendant has a constitutional right to testify, and only the defendant may waive that right. *See Rock v. Arkansas*, 483 U.S. 44 (1987); *United States v. Bernloehr,* 833 F.2d 749, 751 (8th Cir.1987). A defendant's waiver of his right to testify, like his waiver of other constitutional rights, must be made voluntarily and knowingly. *Id.* (*citing Boykin v. Alabama*, 395 U.S. 238, 242–43 (1969); *Johnson v. Zerbst*, 304 U.S. 458, 464–65 (1938)). Although the defendant has the ultimate decision whether to waive his right to testify, he must act affirmatively to assert that right. *Id.* If, during trial, a defendant sits idly and does not express his desire to testify, a knowing and voluntary waiver is deemed to have occurred. *Frey v. Schuetzle*, 151 F.3d 893, 898 (8th Cir.1998); *United States v. Blum*, 65 F.3d 1436, 1444 (8th Cir.1995).

Trial counsel's strategic decisions, however, about who to call to testify are virtually unchallengeable. *See e.g. United States v. Orr*, 636 F.3d 944, 955 (8th Cir. 2011). For example, the *Orr* Court concluded that counsel made appropriate strategic decisions by advising his client (the defendant) not to testify to shield him from cross examination. *Id.* In *Orr*, the defendant's testimony likely would have been an attempt to cause confusion about his place of residence or role in drug-dealing, despite abundant evidence against him. *Id.* Additionally, in *Frey* the Eighth Circuit concluded that counsel can advise a defendant not to testify if he reasonably believes based on his professional evaluation of a case that the defendant's testimony would not be beneficial. *Frey*, 151 F.3d at 899.

Petitioner cannot reasonably allege that he received ineffective assistance of counsel regarding his right to testify, because at trial, Petitioner stated under oath that he understood the final decision was his own, and that he did not wish to testify. *See* Trial Transcript Vol. IV at 41-42. At the postconviction hearing, counsel testified that they had prepared Petitioner to testify, but that they had some concerns about his testimony being consistent with initial information he had told them about the case. Postconviction

Transcript Vol. I at 204-210. Mr. Stowers testified, "[I]n anticipation of him testifying the following day, we were going over him one more time his testimony and kind of going through a mock Q and A with him and asking him to describe what happened, what happened next, this kind of thing. And I'll never forget it, we're in there and he changed his story." *Id.* at 205. "And we said, well, wait a minute, that's not what you told us earlier. And I'm sitting there with Nick. And he says, well—then he said—he says, what do you want me to say? Which threw up a whole bunch of flags. . . ." *Id.* at 206. "And then we said, well, look, Mark, this can't be—we're not telling you what to say. It's got to be what you're saying has really happened. . . . It can't be a story that we're feeding you. We're not doing that." *Id.* at 208. To the extent that this interaction caused counsel to worry about the credibility of their client, they acted within reasonable bounds by admonishing Petitioner about the importance of telling the truth on the stand. And, even if, they advised him not to testify based on related credibility or believability concerns, they did not go beyond the bounds of reasonable counsel in so doing. *See, e.g., Frey*, 151 F.3d at 899 (counsel can advise a defendant not to testify if he believes the testimony would not be beneficial).

Based on a review of the Petitioner's statements about testifying at trial, as well as the postconviction testimony of all parties, nothing supports the allegation that counsel was ineffective regarding Petitioner's right to testify. Counsel admonished Petitioner about the need to testify truthfully, but Petitioner was not told that he would be unable to testify. To establish ineffective assistance, Petitioner would have to show that his counsel was deficient regarding his right to testify and that prejudice resulted. *Strickland*, 466 U.S. at 687. Petitioner has not established either prong of *Strickland*. Although counsel may have discouraged him from testifying if there was a concern about his truthfulness, this does not amount to interference with Petitioner's ability to making a knowing and intelligent decision about testifying. Even if counsel improperly influenced Petitioner's decision, which this Court does not believe, he has not established prejudice. The record reveals an individual who changed his story over time and wants a new trial to present

an entirely new series of events. In light of consistent testimony by other participants, this Court finds that Petitioner was not prevented from testifying or telling his story because of ineffective assistance of counsel. Therefore, this court denies relief on this claim.

g. Confrontation regarding DCI lab report

Petitioner argues, in his pro se Amended Petition (docket no. 4-1), that his trial was flawed because the lab report matching his DNA to the DNA located on the victim was admitted at trial without affording him the chance to confront multiple witnesses on the issue of his identification. *See* Pro Se Amended Petition at 36-38. Petitioner's counsel elected not to elaborate on this claim. Respondent contends that this issue was not exhausted, and trial counsel had no reason to press the issue because the defense was that the sexual encounter was consensual. *See* Respondent's Brief at 42-43.

The state postconviction review of this claim characterized it as a claim of ineffective assistance of counsel. There was no ineffectiveness because counsel adopted a strategy of claiming consensual sex based on the information provided by Petitioner, and if the theory was that the sex was consensual, then there would be no reason to challenge the authenticity of the lab report. Additionally, even if the report was challenged, the state had adequate witnesses to authenticate the lab report and they would have been presented at trial and thus available for confrontation. Therefore, counsel was not ineffective for the lack of cross examination, nor was there prejudice.

h. Ineffective assistance for failing to object to Dawson's testimony

Petitioner argues in his pro se Amended Petition that his counsel was ineffective for failing to object to DCI Agent Dawson's testimony about a possible serial rapist on the local interstate.[4] *See* Amended Petition at 38-39. Respondent counters that Petitioner

[4] Petitioner's appointed counsel did not elaborate on this issue in her brief, instead deferring to the argument presented by Petitioner in his original filing. *See* Petitioner's Brief at 15.

did not exhaust this claim, and there was no prejudice from this discrete line of testimony taken in light of the whole trial. *See* Respondent's Brief at 44-46.

Although trial counsel could have possibly objected to this testimony, the net impact of a few lines of testimony in the week-long trial was minor, resulting in no prejudice. The state merely asked Agent Dawson why he conducted an additional interview with the victim, to which he responded that he wanted to gain any possible additional information she had about her assailant because there had been another possible rape along I-29 during the same timeframe. *See* Trial Transcript Vol. III at 51. The possibility of multiple rapes by one assailant was never discussed further. This testimony covered less than two pages of more than an 800-page record of testimony. Petitioner cannot demonstrate that such a discrete mention of a serial rape spree was prejudicial to him. Thus, the court must deny relief on this ground.

i. Prosecutorial misconduct during closing argument

Petitioner alleges in his pro se Amended Petition that the prosecution committed misconduct in at least 16 ways, and that the misconduct was most damaging during closing arguments.[5] *See* Amended Petition at 40-44. Respondent argues that the claim was not exhausted and there was no prejudice from remarks made during closing. *See* Respondent's Brief at 46-47.

"[A] prosecutor's improper comments will be held to violate the Constitution only if they 'so infect the trial with unfairness as to make the resulting conviction a denial of due process.'" *Parker v. Matthews,* 567 U.S. 37, 45 (2012) (*quoting Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (internal citation omitted)). In *Darden*, the Supreme Court stated that a prosecutor's remarks can be undesirable or even universally condemned without fatally infecting a conviction. 477 U.S. at 182. For example, if a prosecutor does not manipulate or misstate the evidence, or mock the defendant for

[5] Petitioner's appointed counsel did not elaborate on this issue in her brief, instead deferring to the argument presented by Petitioner in his original filing. *See* Petitioner's Brief at 15.

exercising the right to remain silent, but rather makes commentary that is simply responsive to the defense, then there is no fundamental unfairness. *Id.* at 181-83.

A full review of the closing arguments does not reveal pervasive prosecutorial misconduct. The trial transcript of closing arguments shows that the prosecutor talked about two subjects that were contested by counsel before or during trial, but the issues were not objected to during the prosecutor's closing argument. First, she reminded the jurors that Nurse Laureen Wear testified that she personally believed the victim's claim of sexual assault. Trial Transcript Vol. V (docket no. 11-5) at 11. Second, during her rebuttal closing she mentioned the victim's vaginal tear—an issue that was addressed before trial outside the presence of the jury. *Id.* at 22. These two statements may have cast the Petitioner in a bad light, but they did not misstate the evidence. The prosecutor's closing was largely focused on the legal elements of the offenses, and the burden of proof. In addition to the two statements, she also made an analogy to child sex abuse cases where there is often no other witness than the victim. The Iowa Courts considered that statement on postconviction review and concluded that it did not constitute misconduct. This court agrees with the postconviction assessment that the analogy was not misconduct, and additionally concludes that no other statements during the closing argument constituted significant prosecutorial misconduct. Therefore, regardless of exhaustion Petitioner has not demonstrated misconduct that warrants habeas relief.

j. Cumulative error

Petitioner argues that taken together, all of the errors his counsel made at trial amount to a showing of prejudice. *See* Amended Petition at 52-65. Petitioner's appointed counsel acknowledged that the Eighth Circuit does not recognize such a theory of cumulative harm. *See* Petitioner's Brief at 15-16 n. 1. Respondent agrees that the cumulative effect of attorney errors does not provide grounds for habeas relief in the Eighth Circuit. *See* Respondent's Brief at 47-48.

"Neither cumulative effect of trial errors nor cumulative effect of attorney errors are grounds for relief." *Wainwright v. Lockhart,* 80 F.3d 1226, 1233 (8th Cir. 1996).

Cumulative error review is not recognized by the Eighth Circuit, and this court has expressly declined to blaze a trail on this legal theory. *See, e.g., Johnson v. United States*, 860 F.Supp.2d 663, 749-776 (N.D. Iowa 2012) (thorough discussion of the history and precedent on cumulative error review and cumulative prejudice review). Therefore, as Petitioner's counsel and Respondent acknowledged, the Petition must be denied on this claim because this theory is not supported by controlling precedent.

V. CERTIFICATE OF APPEALABILTY

"In a habeas corpus proceeding ... before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held." 28 U.S.C. § 2253(a). "Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals. . . ." *Id.* § 2253(c)(1). A district court possesses the authority to issue certificates of appealability under 28 U.S.C. § 2253(c) and Federal Rule of Criminal Procedure 22(b). *See Tiedeman v. Benson*, 122 F.3d 518, 522 (8th Cir. 1997). Under 28 U.S.C. § 2253(c)(2), a certificate of appealability may only issue if a petitioner "has made a substantial showing of the denial of a constitutional right." *See Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003); *Garrett v. United States*, 211 F.3d 1075, 1076–77 (8th Cir. 2000); *Carter v. Hopkins*, 151 F.3d 872, 873–74 (8th Cir. 1998); *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997); *Tiedeman*, 122 F.3d at 522. To make such a showing, the issues must be debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings. *Cox*, 133 F.3d at 569 (*citing Flieger v. Delo,* 16 F.3d 878, 882–83 (1994)); *see also Miller-El*, 537 U.S. at 335–36 (reiterating standard).

Courts reject constitutional claims either on the merits or on procedural grounds. "'[W]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy [28 U.S.C.] § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" *Miller-El*, 537 U.S. at 338 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). When a federal habeas petition is dismissed

on procedural grounds without reaching the underlying constitutional claim, "the [petitioner must show], at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

Having thoroughly reviewed the record in this case, the court finds that the Petitioner failed to make the requisite "substantial showing" with respect to the claims that he raised in his application for a writ of habeas corpus. *See* 28 U.S.C. § 2253(c)(2); Fed. R. App. P. 22(b). Because there is no debatable question as to the resolution of this case, an appeal is not warranted. Accordingly, the court shall not issue a certificate of appealability pursuant to 28 U.S.C. § 2253.

If the Petitioner desires further review of his claims, he may request issuance of the certificate of appealability by a circuit judge of the Eighth Circuit Court of Appeals in accordance with *Tiedeman*, 122 F.3d at 520–22.

VI. CONCLUSION

In light of the foregoing, it is hereby **ORDERED**:

(1) The Petitioner's Application for a writ of habeas corpus under 28 U.S.C. § 2254 (docket no. 1) is **DENIED**.

(2) A certificate of appealability shall **NOT ISSUE**.

IT IS SO ORDERED.

DATED this 27th day of August, 2020.

LINDA R. READE, JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA

APPENDIX OF EVIDENCE

UNDERLYING *FEDERAL COURT* PROCEEDINGS

EXHIBIT

K

(Nov. 14, 2019)

U.S. District Court for the Northern District of Iowa

Order granting appointment of Jennifer Frese as habeas counsel under *18 U.S.C. §3006(a)(2)(b); 28 U.S.C. §2254(h)*

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

MARK BITZAN,

Petitioner,

vs.

PATTI WACHTENDORF and IOWA STATE PENITENTIARY,

Respondents.

No. 18-CV-0031-LRR-KEM

ORDER

This matter is before the court on Petitioner Mark Bitzan's pro se motion for a copy of applicable rules (Doc. 27), and pro se motion for discovery, for access to computer system, and to extend the briefing deadlines (Doc. 35). Petitioner also filed supplements in support of his motions (Docs. 29, 36). Respondents Patti Wachtendorf and Iowa State Penitentiary filed a resistance to the discovery motion (Doc. 37) and submitted documents for in camera review (Doc. 38). Petitioner submitted a reply (Doc. 39) to the resistance.

Petitioner previously requested the appointment of counsel (Doc. 2), and Respondents now propose the court might appoint counsel. Except in capital cases, "'there is neither a constitutional nor statutory right to counsel in habeas proceedings; instead, it is committed to the discretion of the trial court.' *McCall v. Benson*, 114 F.3d 754, 756 (8th Cir. 1997)." *Morris v. Dormire*, 217 F.3d 556, 558 (8th Cir. 2000).

> District courts may appoint indigent habeas petitioners counsel in the interests of justice. 18 U.S.C. § 3006A(a)(2)(b); *see* 28 U.S.C. § 2254(h). In exercising its discretion to appoint counsel, however, the district court "should first determine whether ... [the] petitioner has presented a nonfrivolous claim," *Abdullah v. Norris*, 18 F.3d 571, 573 (8th Cir. 1994), and then "should consider the legal complexity of the case, the factual complexity of the case, and the petitioner's ability to investigate and present

his claims, along with any other relevant factors," *see Hoggard*, 29 F.3d at 471.

Martin v. Fayram, 849 F.3d 691, 699 (8th Cir. 2017). Based on the ongoing issues with Defendant having access to materials and the various discovery-related issues that have arisen in the case, the court finds the interest of justice weighs in favor of appointing of counsel.

IT IS ORDERED the clerk's office shall appoint Petitioner counsel. Petitioner's motions (Docs. 27, 35) are **denied as moot** in light of the appointment of counsel. The parties shall file a joint status report by **December 18, 2019**, to address new briefing deadlines, other deadlines that may need to be scheduled, and any other issues the parties wish the court to address. The court will reset briefing deadlines after submission of the joint status report.

IT IS ORDERED this 14th day of November, 2019.

Kelly K.E. Mahoney
Chief United States Magistrate Judge
Northern District of Iowa

APPENDIX OF EVIDENCE

UNDERLYING *FEDERAL COURT* PROCEEDINGS

EXHIBIT

L

(Dec. 19, 2018)

U.S. District Court for the Northern District of Iowa

Order granting leave to proceed *in forma pauperis* under *28 U.S.C. §1915(a)(1) & (2); 28 U.S.C. §2254 Rule 3(a)(2)*

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

MARK BITZAN, Petitioner, vs. PATTI WACHTENDORF and IOWA STATE PENITENTIARY, Respondents.	No. C18-0031-LRR **ORDER**

Presently before the court is a petition (docket no. 1) filed by Mark Bitzan pursuant to 28 U.S.C. § 2254. In his petition, Bitzan raises a variety alleged constitutional violations that occurred during his Iowa state court criminal case. Also before the court is Bitzan's motion to appoint counsel (docket no. 2) and motion to proceed in forma pauperis (docket no. 6). Finally, Bitzan also filed a pro se motion to amend (docket no. 4).

I. MOTION TO PROCEED IN FORMA PAUPERIS

In order for a court to authorize the commencement of an action without the prepayment of the filing fee, a person must submit an affidavit that includes a statement of all the assets the person possesses. *See* 28 U.S.C. § 1915(a)(1). In addition, a prisoner must submit a certified copy of the trust fund account statement (or institutional equivalent) for the 6-month period immediately preceding the filing of the complaint, obtained from the appropriate official of each prison at which the prisoner was or is confined. *See* 28 U.S.C. § 1915(a)(2); *see also* Rules Governing § 2254 Cases, Rule 3(a)(2) (making the affidavit requirement of 28 U.S.C. § 1915 applicable to prisoners

proceeding in § 2254 cases).[1] Petitioner has complied with those requirements and based on the petitioner's filings his motion to proceed in forma pauperis (docket no. 6) is **granted**. Petitioner's case will be allowed to proceed without the payment of additional fees.[2]

II. § 2254 INITIAL REVIEW STANDARD

Rule 4 of the Rules Governing Section 2254 Cases requires the court to conduct an initial review of an application for a writ of habeas corpus and summarily dismiss it, order a response or "take such action as the judge deems appropriate." *See* Rule 4, Rules Governing Section 2254 Cases. The court may summarily dismiss an application for a writ of habeas corpus without ordering a response if it plainly appears from the face of such application and its exhibits that the petitioner is not entitled to relief. *See id.*; 28 U.S.C. § 2243; *Small v. Endicott*, 998 F.2d 411, 414 (7th Cir. 1993).

Three primary issues often result in summary dismissal in 28 U.S.C. § 2254 cases. The first reason that often leads to summary dismissal is that the petition obviously fails on its merits. The second reason that often leads to summary dismissal is that the petitioner failed to exhaust the available remedies in the state court system. *See Grass v. Reitz*, 643 F.3d 579, 584 (8th Cir. 2011). The final reason that often leads to summary dismissal of applications for habeas corpus relief is the strict one-year statute of limitation provided in 28 U.S.C. § 2244(d)(1).

The calculation regarding the statute of limitations is often complicated. "By the terms of [28 U.S.C. §] 2244(d)(1), the one-year limitation period [. . .] begins to run on

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[1] However, the remaining portions of the Prison Litigation Reform Act are not applicable to habeas proceedings. *See Malave v. Hedrick*, 271 F.3d 1139, 1140 (8th Cir. 2001), citing *Anderson v. Singletary*, 111 F.3d 801, 805 (11th Cir. 1997); *see also Martin v. Bissonette*, 118 F.3d 871, 874 (1st Cir. 1997) and *Walker v. O'Brien*, 216 F.3d 626, 637 (7th Cir. 2000).

[2] The court notes that petitioner already paid the required $5.00 filing fee. Accordingly, the grant of in forma pauperis will only apply to subsequent charges or fees which may occur in the case.

one of several possible dates, including the date on which the state court judgment against the petitioner became final." *Ford v. Bowersox*, 178 F.3d 522, 523 (8th Cir. 1999). *See* 28 U.S.C. § 2244(d)(1)(A) (specifying that the 1-year period of limitation runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review"); *Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012) (explaining 28 U.S.C. § 2244(d)(1)(A)); *Riddle v. Kemna*, 523 F.3d 850, 855 (8th Cir. 2008) (stating that the 90 days is not applicable and the one-year statute of limitation under 28 U.S.C. § 2254 runs from the date procedendo issued if the petitioner's direct appeal does not contain a claim that is reviewable by the Supreme Court); *Snow v. Ault*, 238 F.3d 1033, 1035 (8th Cir. 2001) (stating that the running of the statute of limitation for purposes of 28 U.S.C. § 2244(d)(1)(A) is triggered by: (1) the conclusion of all direct criminal appeals in the state system, followed by either the completion or denial of certiorari proceedings; or (2) the conclusion of all direct criminal appeals in the state system followed by the expiration of the 90 days allowed for filing a petition for a writ of certiorari in the United States Supreme Court) (citing *Smith v. Bowersox*, 159 F.3d 345, 348 (8th Cir. 1998)).

Due to the one-year statute of limitation under 28 U.S.C. § 2244, the petitioner's application for a writ of habeas corpus is only timely if the period was "tolled" for all but a period of less than one year between when the grace-period started, and the date that the petitioner filed the instant action. *See Peterson v. Gammon*, 200 F.3d 1202, 1204 (8th Cir. 2000). Post-conviction relief actions filed before or during the limitation period for habeas corpus actions are "pending" and the limitation period is tolled during: (1) the time "a properly filed" post-conviction relief action is before the district court; (2) the time for filing of a notice of appeal even if the petitioner does not appeal; and (3) the time for the appeal itself. *See Williams v. Bruton*, 299 F.3d 981, 983 (8th Cir. 2002) (discussing application of 28 U.S.C. § 2244(d)(2)); *see also Lawrence v. Florida*, 549 U.S. 327, 332 (2007) ("[28 U.S.C.] § 2244(d)(2) does not toll the [one-year limitation]

period during the pendency of a petition for certiorari."); *Evans v. Chavis,* 546 U.S. 189, 191 (2006) (holding that an application is tolled during the interval "between (1) a lower court's adverse determination, and (2) the prisoner's filing of notice of appeal, *provided that* the filing of the notice of appeal is timely under state law"); *Snow*, 238 F.3d at 1035-36 (concluding that 28 U.S.C. § 2244(d)(2) does not toll the limitation period for the 90 days during which a petitioner could seek certiorari from a state court's denial of post-conviction relief).

III. INITIAL REVIEW ANALYSIS

In January 2012, a Monona County, Iowa, jury convicted Bitzan of kidnapping and he was sentenced to life in prison. *State v. Bitzan,* 2013 WL 3273813 (Iowa Ct. App. 2013) (unpublished). Bitzan filed a timely appeal, which was denied both by the Iowa Court of Appeals and on an application for further review by the Iowa Supreme Court. *Id.* Procedendo issued on September 23, 2013. *State v. Bitzan*, 03671 FECR 015085 (Monona County 2013). Bitzan filed a timely post-conviction relief action on August 11, 2014, which was denied by the district court, the Iowa Court of Appeals and the Iowa Supreme Court on an application for further review. *Bitzan v. State*, 2018 WL 348092 (Iowa Ct. App. 2018) (unpublished); *Bitzan v. State*, 03671 PCCV 028783 (Monona County 2018). Procedendo issued on February 27, 2018. *Id.* Bitzan mailed the present motion on March 23, 2018. (docket no. 1).

Based on the forgoing, approximately 346 days of the one-year limitation period elapsed prior to Bitzan mailing the petition. (As more than ten months passed between procedendo on direct appeal and filing the post-conviction action, and three weeks passed between procedendo on the post-conviction case and mailing the present petition.) Accordingly, on the court's initial determination, it appears Bitzan's petition is timely

filed.[3] Moreover, a review of the record shows that Bitzan exhausted at least a portion of these issues before the state court. Finally, Bitzan's claims, including claims of ineffective assistance of counsel, are not plainly frivolous. Accordingly, the court will allow Bitzan's petition to proceed.

The clerk's office is directed to send by certified mail a copy of the application for a writ of habeas corpus to the respondent and the Iowa Attorney General in accordance with Rule 4, Rules Governing Section 2254 Cases. The respondent is directed to file an answer to the application for a writ of habeas corpus in accordance with Rule 5, Rules Governing Section 2254 Cases, by no later than February 18, 2019. Petitioner will then have twenty-one days to file a reply. Once the respondent has filed an answer, and petitioner has either filed a reply or the time to do so has run, the court will enter a standard briefing schedule.

IV. MOTION TO APPOINT COUNSEL

As noted above, Bitzan requested the appointment of counsel (docket no. 2 at 1-3). Except in capital cases, "'there is neither a constitutional nor statutory right to counsel in habeas proceedings; instead, it is committed to the discretion of the trial court.' *McCall v. Benson*, 114 F.3d 754, 756 (8th Cir. 1997)." *Morris v. Dormire*, 217 F.3d 556, 558 (8th Cir. 2000).

> District courts may appoint indigent habeas petitioners counsel in the interests of justice. 18 U.S.C. § 3006A(a)(2)(b); *see* 28 U.S.C. § 2254(h). In exercising its discretion to appoint counsel, however, the district court "should first determine whether ... [the] petitioner has presented a nonfrivolous claim," *Abdullah v. Norris*, 18 F.3d 571, 573 (8th Cir. 1994), and then "should consider the legal complexity of the case, the factual complexity of the case, and the petitioner's ability to investigate and present his claims, along with any other relevant factors," *see Hoggard*, 29 F.3d at 471.

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[3] Because it seems Bitzan's claim is allowed even under the strictest calculation, the court has not considered whether Bitzan's case contained claims reviewable by the Supreme Court, which could entitle him to an additional ninety days.

Martin v. Fayram, 849 F.3d 691, 699 (8th Cir. 2017).

The court is well acquainted with the standards related to both ineffective assistance of counsel and the other issues raised in Bitzan's motion. Additionally, the state court records will be provided by the respondent. Accordingly, the appointment of counsel is not warranted and Bitzan's request (docket no. 2) is **denied**.

V. MOTION TO AMEND

In his motion to amend (docket no. 4), Bitzan requests that the court consider his supplemental petition attached to that motion. The motion to amend (docket no. 4) is **granted**. The respondent is directed to respond to issues both in the petition (docket no. 1) and amended petition (docket no. 4-1).[4]

VI. CONCLUSION

IT IS THEREFORE ORDERED:

(1) Petitioner's motion to proceed in forma pauperis (docket no. 6) is **granted**.

(2) Petitioner's motion to appoint counsel (docket no. 2) is **denied**.

(3) Petitioner's motion to amend (docket no. 4) is **granted**.

(3) The clerk's office is directed to send by certified mail a copy of the petition for a writ of habeas corpus (docket no. 1), the amended petition (docket no. 4-1) along with a copy of this order, to the respondent c/o the Iowa Attorney General in accordance with Rule 4, Rules Governing Section 2254 Cases.

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[4] From the court's review it appears that Bitzan's amended petition simply expounds upon issues raised in the original petition. If the respondent wishes to argue that the amended petition raises issues that are procedurally barred, they are free to do so in their answer or pre-answer dispositive motion.

(4) The respondent is directed to file an answer to the petition for a writ of habeas corpus in accordance with Rule 5, Rules Governing Section 2254 Cases, by no later than February 18, 2019.

DATED this 19th day of December, 2018.

LINDA R. READE, JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA

APPENDIX OF EVIDENCE

UNDERLYING *STATE COURT* PROCEEDINGS

PRETRIAL & DIRECT APPEAL

EXHIBIT

M

(Jan. 6, 2012)

Iowa District Court for Monona County

Pre-Trial – combined application for appointment of counsel

and application to proceed *in forma pauperis*

Rule 1.1901 — Form 8: *Application for Appointment of Counsel and Financial Statement.*

IN THE IOWA DISTRICT COURT FOR Monona COUNTY

Plaintiff. State of Iowa v. Defendant. Mark Bitzan	No. FECR015065 APPLICATION FOR APPOINTMENT OF COUNSEL AND FINANCIAL STATEMENT (General)

I request that the court appoint counsel to represent me at public expense. I realize that I may be required to repay in whole or in part any public funds expended for this purpose. The following financial statement is submitted in support of my application:

Current mailing address: 1901 Bonnie Brae, Casper, WY. 82601
Age: 23 Telephone number(s): N/A
Marital status: Single X Married ____ Divorced ____ Widow(er) ____
Name of husband/wife: N/A Live with husband/wife Yes ____ No ____
If no, length of physical separation from husband/wife: N/A
Number and ages of dependents: None

How long a resident of this county: 1 Years
Occupation: Welder
Present employer: None
Address: N/A
Former employer: Paramount Energy Systems
Address: 2259 Revenue Ave Casper, WY 82609
Weekly take-home (net) earnings: $ No Paramount 1200 Weekly gross earnings $ No Paramount 1600
Total gross income for past 12 months: $ 0.00
Bank with: None Address:
Balance personal bank account: $ 0.00
Balance account in name of husband/wife: $ 0.00
Balance joint account with husband/wife: $ 0.00
Balance joint account with any other person(s): $ 0.00
What is your average monthly living expense (clothing, food, housing, transportation, other)? $ 1260
Does any person pay all or any portion of these expenses: Yes X No ____ If yes, who pays these costs and how much do they contribute? Dad Pays it all Right Now
Motor vehicles: Give make, year, present value, amount owing thereon, if any, and whether registered or titled in your name, name of husband/wife or jointly with another: N/A

List all sources of income, in your name, name of husband/wife or jointly shared with another, including salary (net wages), pensions, bonds, stocks, securities, private business, farming, insurance, retirement benefits, social security benefits, lawsuits or settlements or others: None

ADC or welfare relief, if any, in your name, name of husband/wife or jointly shared with another: No

List all sources of public assistance, if any, including ADC, unemployment compensation, heating assistance, food stamps: No

Real estate owned in your name, name of husband/wife or jointly shared with another (describe): No

Other assets in your name, name of husband/wife or jointly shared with another (stereo, TV, furniture, trust funds, notes, bonds, stocks savings certificates, life insurance, other):
No

Value: $

Are you a beneficiary or heir in an estate of a person deceased? I Don't Know
List all debts or unpaid bills, including money owed for such things as: Housing, food, clothing, transportation (car, gas), utility costs, medical and dental services and other items, be specific: About $1000 medical about $1500 utility costs. $65000 for the Attorney and plane/ambulance to my Dad. $50,000 to pay back to my dad Mark Bitzan
Does anyone owe you money or have any property belonging to you? My Attorney has my laptop and 4 hard drives
Give details in full:

Do you have a judgment against anyone: Yes _____ No X If yes, give name, date, court and amount:

Have you or anyone else employed or offered to employ an attorney for Mark Bitzan in this matter? Yes X No _____ If so, how much has the attorney been paid by you or for you?
$ 55000 - 60000
Who can verify this information: Paul Bitzan
Telephone number: 307-217-5396 Address: 1901 Bonnie Bree, Casper, WY 82601

I certify under penalty of perjury and pursuant to the laws of the State of Iowa that the foregoing statements are true and correct to the best of my knowledge, and are made in support of my request that the court appoint legal counsel for me because I am financially unable to employ counsel.

Mark Bitzan
(Signature of applicant)

The State of Iowa:

_____ does not object to the appointment of counsel,
_____ objects to the appointment of counsel and requests a hearing on the application.

Dated: _____, 20____.
(Assistant _____ County Attorney)

[Report February 21, 1985, effective July 1, 1985; November 9, 2001, effective February 15, 2002]

APPENDIX OF EVIDENCE

UNDERLYING *STATE COURT* PROCEEDINGS

PRETRIAL & DIRECT APPEAL

EXHIBIT

N

(Jan. 6, 2012)

Iowa District Court for Monona County

Order granting Bitzan's request to proceed *in forma pauperis* under *Iowa Code §815* and allowing witnesses to be subpoenaed at State's expense

IN THE IOWA DISTRICT COURT FOR MONONA COUNTY

STATE OF IOWA, Plaintiff, vs. MARK ALLAN BITZAN, Defendant.	CRIMINAL NO. FECR015085 ORDER RE: APPLICATION FOR AUTHORIZATION TO OBTAIN WITNESSES AT STATE EXPENSE

The above file is presented to the Court in regard to an Application for Authorization to Obtain Witnesses at State Expense filed by Defendant. Pursuant to Iowa Rule of Criminal Procedure 2.20(4), the Court finds that said Application should be and is hereby tentatively granted, in that the Court believes Defendant can establish indigency. Counsel for Defendant may secure "necessary" witnesses to testify at trial on behalf of Defendant at the State's expense. The Court otherwise reserves determination of reasonable compensation and direct payment under Rule 2.20(4) and pursuant to Iowa Code Chapter 815, and notes that any such costs may later be assessed against Defendant in the event of a conviction and judgment.

IT IS SO ORDERED:

Dated this 6th day of January, 2012.

STEVEN J. ANDREASEN, Judge of the
Third Judicial District of Iowa.

APPENDIX OF EVIDENCE

UNDERLYING *STATE COURT* PROCEEDINGS

PRETRIAL & DIRECT APPEAL

EXHIBIT

O

(March 16, 2012)

Iowa District Court for Monona County

Order on post-trial motions that finds Bitzan indigent under

Iowa Code §815

IN THE IOWA DISTRICT COURT FOR MONONA COUNTY

STATE OF IOWA, Plaintiff, vs. MARK ALLAN BITZAN, Defendant.	CRIMINAL NO. FECR015085 ORDER RE: POSTTRIAL MOTIONS

On the 16th day of March, 2012, the above file came before the Court at the time and place set for hearing on posttrial motions. Defendant appeared personally and with counsel, Dean Stowers and Nick Sarcone. The State of Iowa appeared by Assistant Attorney General Susan Krisko and Assistant Monona County Attorney Christyne Martens. The proceeding was stenographically reported. At the conclusion of the hearing, the Court stated its Findings, Conclusions, and Orders regarding the pending posttrial motions. As stated more fully by the Court on the record, it was and is ordered as follows:

1. Defendant's Motion for Transcripts at State's Expense is conditionally granted. The Court finds Defendant to be indigent. In the event a Notice of Appeal is filed by Defendant, he shall be entitled to obtain a transcript of these proceedings for purpose of said appeal at state's expense, specifically including reimbursement of any such expense, all in accordance with Iowa Code Chapter 815.

2. Defendant's Motion for Judgment of Acquittal is denied.

3. Defendant's Motion for New Trial is denied.

4. The arguments made by Defendant in his sentencing memorandum are denied or overruled.

5. Defendant's Motion to Strike Count 2 of the Trial Information filed prior to trial is granted in part and denied in part. The enhancement allegation under Count 2 as amended in regard to the Sexual Abuse in the Second Degree charge was properly submitted to the jury at trial. The charge of Sexual Abuse in the Second Degree under Count 2 otherwise is an included offense of the charge of Kidnapping in the First Degree and, thus, said charge merges into the conviction for Kidnapping in the First Degree. Defendant was therefore sentenced only under Count 1.

IT IS SO ORDERED:

Dated this 16th day of March, 2012..

STEVEN J. ANDREASEN, Judge of the
Third Judicial District of Iowa.

3/16 TB
MCA
D. STOWERS

APPENDIX OF EVIDENCE

UNDERLYING *STATE COURT* PROCEEDINGS

PRETRIAL & DIRECT APPEAL

EXHIBIT

P

(March 16, 2012)

Iowa District Court for Monona County

Order appointing the appellate public defender's office to represent Bitzan on Direct Appeal

IN THE IOWA DISTRICT COURT FOR MONONA COUNTY

STATE OF IOWA, Plaintiff, vs. MARK ALLAN BITZAN, Defendant.	CRIMINAL NO. FECR015085 ORDER APPOINTING APPELLATE COUNSEL

ON the 16th day of March, 2012, the above file came before the Court at the time and date set for pronouncement of judgment. A stenographic record was made of the proceedings. At the conclusion of the proceeding, trial counsel for Defendant orally moved to withdraw. Defendant also indicated his intent to appeal his conviction and sentence and request court-appointed counsel. Defendant has also now filed a notice of appeal. The Court previously found Defendant to be indigent in regard to a Motion for Transcripts at State's Expense. The court therefore further and specifically finds that:

1. Defendant is an indigent person without funds with which to pay for the transcript expenses and printing expenses required to perfect an appeal to the Supreme Court of Iowa; and cannot afford to hire an attorney to represent him on this appeal.

2. Trial counsel should be allowed to withdraw and the State Appellate Defender should be appointed to represent Defendant on appeal.

3. Trial transcript and the sentencing transcript and the transcript of any other proceedings in this case, if ordered by the appellate defender, shall be made available to the appellate defender, all at the expense of the public.

IT IS THEREFORE ORDERED that trial counsel Dean Stowers and Nick Sarcone are withdrawn as counsel of record and the State Appellate Defender's office, First Floor Lucas Building, Des Moines, IA 50319, is appointed to represent Defendant in his appeal.

IT IS FURTHER ORDERED the court reporter be and is hereby authorized and directed to prepare a transcript of the proceedings in this cause if such a transcript is

ordered by the State Appellate Defender's office and make it available to the Appellate Defender, all at the expense of the public.

Copies to Assistant Attorney General, Monona County Attorney, Attorneys Stowers and Sarcone, court reporter, Defendant, and the State Appellate Defender.

IT IS SO ORDERED:

Dated this 16th day of March, 2012.

STEVEN J. ANDREASEN, Judge of the
Third Judicial District of Iowa.

3/16 TB
MCA
D. STOWERS

APPENDIX OF EVIDENCE

UNDERLYING *STATE COURT* PROCEEDINGS

PRETRIAL & DIRECT APPEAL

EXHIBIT

Q

(March 16, 2012)

Iowa District Court for Monona County

Judgment & Sentence

IN THE IOWA DISTRICT COURT FOR MONONA COUNTY

STATE OF IOWA, Plaintiff, vs. MARK ALLAN BITZAN, Defendant.	CRIMINAL NO. FECR015085 JUDGMENT and SENTENCE

ON the 16th day of March, 2012, the above matter came before the Court for pronouncement of judgment. The State appeared by Assistant Attorney General Susan Krisko and Assistant Monona County Attorney Christyne Martens. Defendant appeared personally and with counsel, Dean Stowers and Nick Sarcone. A stenographic record was made of the proceedings.

On the 17th day of January, 2012, the jury returned a verdict finding Defendant guilty of the crime(s) of: KIDNAPPING IN THE FIRST DEGREE in violation of Iowa Code Section(s) 710.2 as alleged in Count 1 of the Trial Information. The jury also returned a verdict finding Defendant was convicted of a prior offense under Section 902.14 as alleged in Count 2 of the Trial Information as amended. For reasons stated more fully on the record, Count 2 is merged into Count 1 and Defendant is sentenced under Count 1 only.

Pre-Sentence Investigation:

☒ A Presentence Investigation Report pursuant to Iowa Code Section 901.2 – 901.4 is on file and was distributed to the parties, although such presentence investigation is not required under Section 901.2 for this class A felony.

Pre-Sentencing Rights / Procedures:

☒ Fifteen days (15) has elapsed since Defendant was found guilty by verdict or plea; Defendant has not filed a motion in arrest of judgment and the time to do so has expired. Defendant's Motions for Judgment of Acquittal and New Trial are otherwise denied

The parties were given an opportunity to present evidence/argument regarding sentence and Defendant was given an opportunity for allocution. The Court finds no legal reason why sentence could not be pronounced.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

1. It is the judgment of the Court that Defendant stands convicted and is guilty of the crime of:

KIDNAPPING IN THE FIRST DEGREE, a class A felony in violation of Iowa Code Section(s) 710.2 as alleged in Count 1 of the Trial Information.

2. The Court has reviewed all pertinent information herein and has considered all of the sentencing options available under applicable law. Defendant is sentenced under Iowa Code Section 902.1 as follows:

Jail / Incarceration:

☒ Defendant shall be confined in the custody of the Director of the Iowa Department of Corrections for the rest of Defendant's life. Defendant shall not be released on parole unless the Governor commutes Defendant's sentence to term of years.

The Iowa Medical and Classification Center at Oakdale, Iowa, is designated as the reception center to which Defendant is to be delivered by the sheriff. After issuance of the mittimus, Defendant shall be in the temporary custody of the sheriff of this county until Defendant is transferred to the custody of the Director of the Iowa Department of Corrections. The county shall pay the cost of temporarily confining the defendant and transporting the Defendant to the state institution. While transporting the Defendant to the state institution, the defendant shall be accompanied by a person of the same sex.

3. The reasons supporting this judgment of incarceration include:

☒ Protection of the community from further offenses by Defendant and others will be adequately provided by a period of incarceration.
☒ Nature of the offense committed.
☒ Other factors: Iowa Code Section 902.1.

4. **Mittimus** shall issue forthwith.

5. **Restitution:** Defendant shall make restitution as follows:

☒ To the victim: To be determined in accordance with Iowa Code Chapter 910.
☒ For the court costs as taxed by the clerk.
☒ If Defendant was represented by court-appointed counsel, for the fees of Defendant's court-appointed attorney and/or for the expense of the public defender pursuant to Iowa Code Section 815.9.

☒ For any administrative fees of the county sheriff pursuant to Iowa Code Sections 910.2 and 356.7.

☒ The Department of Corrections shall submit a plan of restitution to the Court for approval within 90 days of this Judgment.

6. **No Contact Order**. Pursuant to Iowa Code § 664A.5, a no contact order

☒ is applicable. Defendant shall have no contact with Natasha Rau for five (5) years. The Court will issue a separate order to further implement this paragraph.

7. **DNA Profiling**. Defendant shall submit a physical specimen for DNA profiling, pursuant to Iowa Code §§ 81.2 and 901.5(8A)(a).

8. **Credit for Time Served:** Pursuant to Iowa Code Section 903A.5, Defendant shall be given credit upon any sentence of confinement imposed under this judgment for such days, if any, as the defendant has been, or is in the future, confined to the county jail or other correctional or mental institution because of failure to furnish bail in this case. The county sheriff and the clerk shall certify to the appropriate authority the number of days so served in accordance with 903A.5.

9. **Appeal Bond:**

☒ No appeal bond is available or the presumption of ineligibility has not been rebutted under Section 811.1 of the Iowa Code.

10. Defendant was advised of his right to appeal pursuant to the Iowa Rules of Criminal Procedure, as well as his right to counsel for the appeal.

Copies to Defendant, counsel of record, the county sheriff, and the Department of Corrections.

Steven J. Andreasen,
Judge, Third Judicial District

APPENDIX OF EVIDENCE

UNDERLYING *STATE COURT* PROCEEDINGS

PRETRIAL & DIRECT APPEAL

EXHIBIT

R

(June 26, 2013)

Iowa Court of Appeals

Ruling concerning Direct Appeal issues denying relief and affirming the conviction

IN THE COURT OF APPEALS OF IOWA

No. 3-344 / 12-0551
Filed June 26, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARK ALLAN BITZAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Monona County, Steven J. Andreasen, Judge.

Defendant appeals his conviction for first-degree kidnapping. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Rachel C. Regenold, Assistant Appellate Defender, for appellant.

Mark Bitzan, Fort Madison, pro se.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson and Susan Krisko, Assistant Attorneys General, and Michael P. Jensen, County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Potterfield and Tabor, JJ.

EISENHAUER, C.J.

Mark Bitzan appeals his conviction for first-degree kidnapping, challenging the sufficiency of the evidence supporting his conviction. Bitzan's pro se brief raises additional challenges to the jury instructions and to trial counsel's performance. We affirm.

I. Background Facts and Proceedings.

During the evening of December 17, 2010, Bitzan was inside the women's handicap stall at an interstate restroom when nineteen-year-old Natasha stopped at the rest area and used the restroom. As she stood at the sink and washed her hands, Bitzan exited the stall, walked up behind her, placed one hand over her mouth, placed the other hand around her torso, and kissed the top of her head. After asking her if she was "going to be quiet," Bitzan forced Natasha away from the sink area and into the handicap stall at the back of the restroom. Bitzan reached back and latched the stall door as he pushed her up against the wall. Bitzan stood in front of her, between Natasha and the stall door, and began asking questions in a calm voice, for example, "Where are you going?" "Are you alone?" "Do you have people waiting for you or are people expecting you?"

When Natasha would not tell Bitzan her name and slapped his hands away from the zipper on her hoodie, Bitzan responded by changing his body language, reaching into his pocket, and pulling out a collapsible pocket knife. Natasha then gave a name, and Bitzan put the knife away and asked more questions. When Bitzan reached for her pants and she slapped his hand away, Bitzan displayed "frustration or anger" and stated, "This will just be easier if you cooperate." Natasha asked, "Are you going to hurt me?" Bitzan replied, "Not if

you cooperate." Bitzan then asked personal questions, "Are you on birth control?" and "Is this a bad time of the month?" When Natasha hesitated in her response to his questions or to his demands, Bitzan gestured toward the knife in his pocket. At some point, Natasha asked herself, "What can I do to live?"

Bitzan proceeded to remove Natasha's boots, pants, and underwear. Bitzan began touching Natasha's genitals as she begged him to stop. Bitzan ordered Natasha to the floor, and he confirmed that she was not visible from outside the handicap stall. Natasha testified, "so I'm lying in that corner, and I remember him remarking . . . 'good, you are out of sight,' because he kind of glanced off to the side to . . . check under the stalls to see if I would be visible." Bitzan pulled down his pants, raped Natasha, and ejaculated inside her. Bitzan wiped himself off and ordered Natasha to remain in the stall until he left. Natasha waited for a few minutes after she heard the bathroom door close, dressed, and drove away.

Natasha, who was in ROTC at college, called her commanding officer for advice. The officer advised Natasha to go directly to a hospital, and she stayed on the phone while Natasha drove to the hospital. Natasha called her mother, and her parents came to the hospital. The hospital was not equipped to perform a sexual assault exam, so the family went to a nearby hospital where Natasha provided samples for a sexual assault kit. The samples were analyzed by the Iowa DCI laboratory. The DNA in the samples matched Bitzan's profile. Bitzan's DNA was in the data bank as a result of a previous sexual abuse conviction in Wyoming.

On June 9, 2011, Bitzan was charged on two counts, first-degree kidnapping and second-degree sexual abuse. On July 21, 2011, the State filed a motion to amend the trial information to add a lifetime enhancement for second or subsequent sexual offenses. *See* Iowa Code § 902.14 (2009). The court allowed the amendment. Bitzan filed a motion to strike the sexual abuse count. The State requested a special interrogatory regarding sexual abuse if the court submitted the second-degree sexual abuse charge as a lesser-included offense of kidnapping. The court reserved ruling on the motion to strike and revised the preliminary instructions to state Bitzan was charged with kidnapping in the first degree and lesser-included offenses.

At the January 2012 trial, the second-degree sexual abuse charge was not submitted as a separate count but as a lesser-included offense, and the jury was given a special interrogatory:

> If you find [Bitzan] guilty of the charge of kidnapping in the first degree, you shall answer the following question: Did the State prove beyond a reasonable doubt that during the commission of the sexual abuse of [Natasha, Bitzan] displayed a dangerous weapon in a threatening manner . . . ?

The jury found Bitzan guilty of first-degree kidnapping and answered "yes" to the interrogatory. In a separate trial, the State presented evidence of Bitzan's Wyoming conviction for sexual abuse, and the jury found Bitzan had previously been convicted of a sexual offense.

Bitzan filed a motion for new trial, and at the hearing, he argued the evidence of "confinement and/or movement" was not sufficient to support first-degree kidnapping. The court disagreed, ruling:

> Among other factors, the court believes the movement of [Natasha] from the sink to the stall, the use of a knife during the incident, the location of the stall, closing of the door, and the location of [Natasha] tucked between the toilet and the wall did make the risk of detection significantly reduced and also increased the risk of harm to [Natasha].

Counsel addressed the court regarding sentencing and enhancement. The State argued Bitzan "needs to also be sentenced . . . under the enhancement." The court recognized the State is asking "essentially for two Class A sentences," and ruled:

> The court would note that during trial, it formally reserved ruling on the motion to strike Count II, but then proceeded at the request of defendant with jury instructions submitting only the kidnapping charge with the Count II sexual abuse as an included offense.
>
> . . . .
>
> Section 902.14 creates an enhancement of the sentence on the underlying charge. It is not a separate crime . . . .
>
> . . . .
>
> . . . [T]he court [concludes] the amended Count II and the lesser-included offense of sexual abuse does merge into the kidnapping conviction, and even though [enhancement under section] 902.14 may still apply, it only creates one sentence.
>
> In this particular case, it just happens to be that the enhanced sentence . . . is the exact same sentence as the underlying crime.

The court entered judgment finding Bitzan guilty of the crime of first-degree kidnapping "as alleged in Count I of the trial information" and sentenced Bitzan to life in prison without parole.

Bitzan appeals and requests we reverse his kidnapping conviction and remand for a finding of guilt on third-degree sexual abuse. Bitzan, pro se, requests we remand for judgment and sentence for false imprisonment and "[i]n addition, reverse his conviction (and sentence per se) for [second-degree sexual abuse] and grant him a new trial 'limited' to [third-degree sexual abuse.]"

II. Standards of Review.

We review claims of insufficient evidence for the correction of errors at law. *State v. Davis*, 584 N.W.2d 913, 915 (Iowa Ct. App. 1998). If there is substantial evidence to support the verdict, we will uphold a finding of guilt. *State v. Hagedorn*, 679 N.W.2d 666, 668 (Iowa 2004). Evidence is substantial if a rational trier of fact could find Bitzan guilty beyond a reasonable doubt. *Id.* at 669.

We also review challenges to jury instructions for correction of errors at law." *State v. Marin*, 788 N.W.2d 833, 836 (Iowa 2010). To the extent Bitzan alleges his trial counsel was ineffective, our review is de novo. *State v. Ondayog*, 722 N.W.2d 778, 783 (Iowa 2006). "To prove a claim of ineffective assistance of counsel, [Bitzan] must show by a preponderance of the evidence that his trial counsel failed to perform an essential duty and prejudice resulted." *Id.* at 784.

III. Sufficient Evidence of Confinement or Removal.

Relevant to this case, kidnapping requires proof Bitzan *either* confined Natasha or removed Natasha from one place to another knowing[1] he did not have the consent of Natasha to confine or remove her and with the intent to subject Natasha to sexual abuse. *See* Iowa Code § 710(1). First-degree kidnapping occurs if Natasha, as a consequence of the kidnapping, is intentionally subjected to sexual abuse. *See id.* § 710(2).

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[1] Assuming error is preserved, we find no merit to the pro se argument the court erred in instructing the jury because the elements of kidnapping do "not require knowledge." *See* Iowa Code § 710.1 (stating "knowing that the person who confines or removes the other person has neither the authority nor the consent of the [victim] to do so").

Bitzan challenges the evidence supporting the confinement or removal element. He argues the confinement or removal of Natasha was *incidental* to the sexual abuse and, therefore, insufficient to support his kidnapping conviction.[2]

In *State v. Rich*, the court recognized every sexual abuse case involves some degree of confinement or removal of the victim. 305 N.W.2d 739, 745 (Iowa 1981). The court ruled although "no minimum period of confinement or distance of removal is required for conviction of kidnapping, the confinement or removal must definitely exceed that normally incidental to the commission of sexual abuse." *Id.* The "incidental rule" is designed to justify the more severe penalties of kidnapping. *State v. McGrew*, 515 N.W.2d 36, 39 (Iowa 1994). "Such confinement or removal may exist because it [1] substantially increases the risk of harm to the victim, [2] significantly lessens the risk of detection, or [3] significantly facilitates escape following the consummation" of the sexual abuse. *Rich*, 305 N.W.2d at 745; *see State v. Hardin*, 359 N.W.2d 185, 190 (Iowa 1984) (dragging the victim out of car and into residence reduced "risk of detection" and made "risk of harm to the victim more likely"). If the defendant merely "seizes" the victim, this does not rise to the level of kidnapping. *State v. Mead*, 318 N.W.2d 440, 445 (Iowa 1982) (refusing to extend kidnapping "to nearly any case involving a seizure by a defendant of another person during" a crime).

We conclude there is substantial evidence from which a rational jury could find the period of confinement or the distance of removal exceeded what is normally incidental to the commission of the sexual abuse. Bitzan forced

[2] We assume error was preserved.

Natasha out of the sink area and into the back stall, latching the door behind them, and thus secluding Natasha from the general public while reducing the risk of detection. Forcing Natasha into the largest stall also allowed Bitzan to lay Natasha down on the floor between the toilet and the wall, further secluding her from the view of anyone walking into the restroom and freeing him to rape her without detection and interruption. Both the removal and the confinement of Natasha lessened the likelihood of anyone either intervening or calling the police. Bitzan points out the confinement of Natasha lasted only about ten minutes, but no minimum time is required. *See Rich*, 305 N.W.2d at 745. When viewed in the light most favorable to upholding the verdict, sufficient evidence of independent removal and confinement was presented. *See Davis*, 584 N.W.2d at 916 (stating one factor of confinement "is whether the victim believed her captor possessed a weapon and whether the victim felt her life in danger").

IV. Sufficient Evidence of Dangerous Weapon.

Sexual abuse in the second degree includes: "During the commission of sexual abuse the person displays in a threatening manner a dangerous weapon." Iowa Code § 709.3(1). Bitzan argues there is insufficient evidence the pocket knife he possessed is a "dangerous weapon." The State argues the only proof required for the sexual abuse element of first-degree kidnapping is that Natasha was "intentionally subjected to . . . sexual abuse." *See id.* § 710.2. Therefore, "even assuming, arguendo, the knife Bitzan displayed was not a 'dangerous weapon,' the State nevertheless presented sufficient evidence of sexual abuse to

support the first-degree kidnapping conviction." We agree with the State and conclude there is no reason to address the merits of this claim.[3]

V. Failure to Instruct on Second-Degree Kidnapping.

Iowa Code section 710.3 provides: "Kidnapping where the purpose is to hold the victim for ransom or where the kidnapper is armed with a dangerous weapon is kidnapping in the second degree." Bitzan argues the trial court erred in failing to instruct on second-degree kidnapping as a lesser-included offense of first-degree kidnapping.[4] Alternatively, Bitzan claims trial counsel was ineffective for failing to request the second-degree kidnapping instruction.

We disagree. The State charged first-degree kidnapping under the "intentionally subjected [Natasha] to a sexual abuse" alternative. *See* Iowa Code § 710.1(3) (listing the first-degree kidnapping alternatives—suffering serious injury, intentionally subjected to torture, and intentionally subjected to sexual abuse). As discussed above, the "dangerous weapon" element is not necessarily included in first-degree kidnapping—sexual abuse alternative. *See Ondayog*, 722 N.W.2d at 783 (applying "the impossibility test"). Accordingly, second-degree kidnapping is not a lesser-included offense, and the trial court did not err. Also, defense counsel was not ineffective because counsel has no duty to pursue a meritless issue. *See State v. Griffin*, 691 N.W.2d 734, 737 (Iowa 2005).

---

[3] Assuming error was preserved, we likewise need not address the pro se claims challenging the court's jury instructions on "dangerous weapon."

[4] The lesser-included offenses submitted to the jury were second-degree sexual abuse, third-degree sexual abuse, third-degree kidnapping, false imprisonment, aggravated assault, assault with intent to commit sexual abuse, and assault.

VI. Ineffective Assistance of Counsel.

Bitzan first argues trial counsel was ineffective in failing to object to the State's pretrial motion to amend the trial information to add the sentencing enhancement. Bitzan contends this amendment prejudiced him and charged a "wholly new and different offense" by raising "the offense from a class 'B' felony to a class 'A' felony." Second, Bitzan asserts trial counsel was ineffective in failing to challenge the State's motion, during the enhancement trial, to correct the date of his Wyoming conviction to conform to the proof.

At sentencing, the court merged the kidnapping and the sexual abuse into one conviction for first-degree kidnapping and entered judgment and sentence *only* on the conviction for first-degree kidnapping, a class "A" felony. *See* Iowa Code § 710.2. The court did not apply an enhancement. We have upheld the first-degree kidnapping conviction that, as a class "A" felony, mandates life imprisonment. *See* Iowa Code § 902.1 (stating sentence for class "A" felonies). Accordingly, we need not address these arguments.

VII. Conclusion.

Any arguments raised and not specifically addressed are deemed to be without merit. We affirm Bitzan's conviction for first-degree kidnapping.

AFFIRMED.

APPENDIX OF EVIDENCE

UNDERLYING *STATE COURT* PROCEEDINGS

PRETRIAL & DIRECT APPEAL

EXHIBIT

S

(Sept. 17, 2013)

Iowa Supreme Court

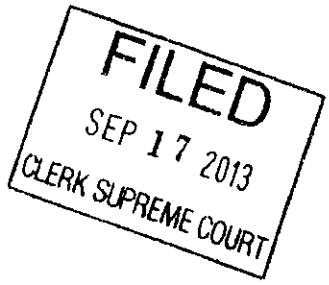
Order denying Bitzan's request for Further Review of Direct Appeal issues

IN THE SUPREME COURT OF IOWA

No. 12–0551

Monona County No. FECR015085

O R D E R



STATE OF IOWA,
Plaintiff-Appellee-Resister,

vs.

MARK ALLAN BITZAN,
Defendant-Appellant-Applicant.

After consideration by this court, en banc, further review of the above-captioned case is denied.

Dated this 17th day of September, 2013.

THE SUPREME COURT OF IOWA

By Mark S. Cady
Mark S. Cady, Chief Justice

Copies to:

Rachel Regenold
Assistant State Appellate Defender
Fourth Floor, Lucas Building
L O C A L

Elisabeth Reynoldson
Assistant Attorney General
Criminal Appeals Division
Second Floor, Hoover Building
L O C A L

APPENDIX OF EVIDENCE

UNDERLYING *STATE COURT* PROCEEDINGS

PRETRIAL & DIRECT APPEAL

EXHIBIT

T

(Sept. 23, 2013)

Iowa Court of Appeals

Procedendo finalizing the denial of all Direct Appeal issues

and affirming the conviction

IN THE COURT OF APPEALS OF IOWA

No. 12-0551

Monona County No. FECR015085

PROCEDENDO

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARK ALLAN BITZAN,
Defendant-Appellant.

To the Iowa District Court for the County of Monona:

Whereas, there was an appeal from the district court in the above-captioned case to the supreme court, and the supreme court transferred the case to the court of appeals. The appeal is now concluded.

Therefore, you are hereby directed to proceed in the manner required by law and consistent with the opinion of the court.

In witness whereof, I have hereunto set my hand and affixed the seal of the court of appeals.

Dated this 23rd day of September, 2013.

Donna M. Humpal, Clerk

Copies to:

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APPENDIX OF EVIDENCE

UNDERLYING *STATE COURT* PROCEEDINGS

POSTCONVICTION RELIEF **(PCR)**

EXHIBIT

U

(Oct. 20, 2016)

Iowa District Court for Monona County

Ruling denying Postconviction Relief issues from the

Application and Brief's

IN THE IOWA DISTRICT COURT FOR MONONA COUNTY

MARK ALLAN BITZAN, **Applicant,** **v.** **STATE OF IOWA,** **Respondent.**	**NO. PCCV028783** **POST CONVICTION RELIEF RULING**

Applicant, Mark Allan Bitzan, filed an amended post-conviction relief application on October 5, 2015. Applicant filed a Brief in Support of Application on September 6, 2016. State of Iowa filed a Resistance Brief to the Application on September 6, 2016. The Court held a hearing on August 18 and 19, 2016. The hearing consisted of the Court receiving oral arguments and testimony from the parties and witnesses. At the conclusion of the hearing, the Court took the matter under submission for later ruling. After reviewing the court file, considering the parties' arguments, and reviewing the applicable law, the Court enters the following ruling.

BACKGROUND FACTS AND PROCEEDINGS

During the evening of December 17, 2010, 19-year-old Natasha Rau ("Natasha") stopped at a rest area in Iowa to use the restroom. As she stood at the sink washing her hands, a man exited a stall, walked up behind her, and placed one of his hands over her mouth and the other around her torso. Natasha was forced away from the sink area and into the handicap stall at the back of the bathroom. After the man posed a series of questions, a change in body language, and the showing of a collapsible pocket knife, Natasha cooperated in fear for her life.

The man proceeded to remove Natasha's boots, pants, and underwear. After checking under the stalls to ensure Natasha wasn't visible to outside parties, he proceeded to rape her and ejaculate inside her. Upon finishing, the man instructed Natasha to remain in the stall until he left. After waiting a few moments for the bathroom door to close, Natasha dressed and drove away. Immediately, Natasha drove to a hospital in Omaha, Nebraska, where she provided samples for a sexual assault kit. The samples were analyzed by the Iowa DCI laboratory. The DNA from the samples provided from Natasha's kit matched a sample already in the data bank from a previous conviction in Wyoming belonging to a Mark Allan Bitzan ("Bitzan").

In June of 2011, Bitzan, represented by defense counsel Dean Stowers and Nick Sarcone, was charged by the State of Iowa on two counts: First Degree Kidnapping and Second Degree Sexual Abuse pursuant to Iowa Code § 710.2 and § 709.3. Prior to trial, Bitzan filed a motion to strike the sexual abuse count. The State requested the use of a special interrogatory regarding sexual abuse if the court submitted the Second Degree Sexual Abuse charge as a lesser included offense of Kidnapping. The Court reserved ruling on the motion and revised the preliminary instructions charging Bitzan with Kidnapping in the First Degree and lesser included offenses.

In January 2012, a jury trial commenced. The Second Degree Sexual Abuse charge was not submitted as a separate count, but rather as a lesser included offense, and the jury was given a special interrogatory:

> If you find [Bitzan] guilty of the charge of Kidnapping in the First Degree, you shall answer the following question: Did the State prove beyond a reasonable doubt that during the commission of the sexual abuse of [Natasha, Bitzan] displayed a dangerous weapon in a threatening manner...

The jury found Bitzan guilty of First Degree Kidnapping and responded "yes" to the interrogatory. At a separate trial, the jury also found Bitzan had previously been convicted of a sexual offense, after evidence was presented concerning his Wyoming conviction for sexual abuse. Judgment was entered against Bitzan finding him guilty of First Degree Kidnapping and he was sentenced to life in prison without parole.

On appeal, Bitzan and Counsel Mark C. Smith and Rachel C. Regenold challenged his conviction for First Degree Kidnapping on lack of evidence to support a conviction. Bitzan requested the appellate court reverse his conviction and remand for a finding of guilty on Third Degree Sexual Abuse. The Court found sufficient evidence to support a finding of confinement or removal and use of a dangerous weapon. Bitzan's conviction was affirmed.

Bitzan, along with Counsel Regenold, sought further review from the Iowa Supreme Court, again arguing insufficient evidence. In September 2013, the Iowa Supreme Court denied further review.

In August 2014, Bitzan filed his first application for post-conviction relief. In it he requested the Court, supported by ten individual bases, vacate his conviction and release him

without retrial or, in the alternative, grant him a new trial. Bitzan's application was denied in total, unless he provided sufficient reason for not asserting his claims on direct appeal.

In October 2015, Bitzan filed an Amended Application for Relief requesting the amended application be granted, and his conviction and sentence be vacated, overturned and dismissed or a new trial be granted. Bitzan, in his Amended Application and Supporting Brief, supplies twelve grounds for which relief should be granted, primarily surrounding claims of ineffective assistance of counsel and prosecutorial misconduct.

STANDARD OF REVIEW

This post-conviction relief proceeding is civil in nature and is governed by Chapter 822 of the Iowa Code. As such, the applicant bears the burden of proof and must show his claims by a preponderance of the evidence. *State v. Hischke*, 639 N.W.2d 6, 8 (Iowa 2002).

"If the court finds in favor of the applicant, it shall enter an appropriate order with respect to the conviction or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper." IOWA CODE § 822.7 (2015). "The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." *Id.*

APPLICABLE LAW

a. Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance of counsel, the applicant must demonstrate both ineffective assistance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 206480 L.Ed.2d 674, 693 (U.S. 1984). The applicant must establish by a preponderance of the evidence that counsel's performance was under the normal range of competency for an attorney. *Snethen v. State*, 308 N.W.2d 11, 14 (Iowa 1981). A successful claim requires the petitioner to show: (1) counsel failed to perform an essential duty, and (2) as a result, the petitioner was prejudiced from this action or inaction. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687. "In proving the first prong of this test, [Applicant] must overcome the strong presumption counsel's actions were reasonable under the circumstances and fell within the normal range of professional

competency." *State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987).

> To satisfy the first prong of the *Strickland* test, [Applicant] must show that 'counsel's representation fell below an objective standard of reasonableness.' *Strickland*, 466 U.S. at 688. In evaluating the objective reasonableness of trial counsel's conduct, we examine 'whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.'

State v. Madsen, 813 N.W.2d 714, 724 (Iowa 2012)(quoting *Strickland*, 466 U.S. at 690). Review of counsel's decisions will be highly deferential—there is a strong presumption in favor of competency. Furthermore, not every attorney is alike; there are different ways to provide competent representation under similar circumstances. *Strickland*, 466 U.S. at 689.

In order to demonstrate prejudice, the second prong of the *Strickland* test, Applicant "must prove there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Hildebrant*, 405 N.W.2d at, 841 (quoting *Taylor v. State*, 352 N.W.2d 683 (Iowa 1984)). "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.'" *State v. Clay*, 824 N.W.2d 488, 495 (Iowa 2012) (quoting *State v. Palmer*, 791 N.W.2d 840). The court will not find such a breach by second-guessing counsel or making hindsight evaluations. Id (citing *State v. Maxwell*, 743 N.W.2d 185 (Iowa 2008)). In examining counsel's performance, more is required than a showing that trial strategy did not work for the case. *Heaton*, 420 N.W.2d at 430.

The court will consider the totality of the evidence, determining if the prejudicial effect was "pervasive or isolated and trivial." *Clay*, 824 N.W.2d at 496 (quoting *State v. Graves*, 668 N.W.2d 860, 882–83 (Iowa 2003)). It is not enough for counsel's performance to have merely impaired the defense of petitioner. *Id.* (citing *Ledezma*, 626 N.W.2d at 143). Because the petitioner must establish both prongs by a preponderance of the evidence, "if the claim lacks the necessary prejudice, [the court] can decide the case on the prejudice prong of the test without deciding whether the attorney performed deficiently." *Maxwell*, 743 N.W.2d at 196 (citing

Ledezma, 626 N.W.2d at 142). However, under Iowa law, the court will "look to the cumulative effect of counsel's errors to determine whether the defendant satisfied the prejudice prong of the *Strickland* test." *McCoy*, 692 N.W.2d at 25 (citing *Schrier v. State*, 347 N.W.2d 657, 668 (Iowa 1984)).

1. Reasonable Investigation by Counsel

Counsel is required to conduct a reasonable investigation or make reasonable decisions that make a particular investigation unnecessary. *Ledezma v. State*, 626 N.W.2d 134, 144 (Iowa 2001); citing *Strickland v. Washington*, 104 S. Ct. 2052, 2066 (S.Ct. 1984). The duty to investigate is not unlimited, and counsel is not required to interview every potential witness. *Ledezma*, 626 N.W.2d at 144. The decision to investigate a particular matter must be judged in relation to the underlying circumstances. Id.; citing *Strickland*, 104 S. Ct. at 2066. If counsel has reason to believe that the investigation would be fruitless or unwarranted or if facts are already known to counsel through another source, there is no need to investigate a particular matter. *Ledezma*, 626 N.W.2d at 144; citing *Mulligan v. Kemp*, 771 F.2d 1436, 1441-42 (11th Cir. 1985). Counsel's duty to investigate and prepare a defense is not limitless; it does not require the pursuit of each possible witness to delve into every line of inquiry. *Heaton v. State*, 420 N.W.2d 429, 430 (Iowa 1988); see *Schrier v. State,* 347 N.W.2d 657, 662 (Iowa 1984).

2. Defendant's right to testify

An accused's privilege to testify is now recognized as a constitutional right, and as such may be waived if done so "voluntarily, knowingly, and intelligently." *Ledezma*, 626 N.W.2d at 146; citing *Foster v. Delo*, 11 F.3d 1451, 1457 (8th Cir. 1994). "The decision whether or not to testify belongs to the defendant, and the role of counsel is to provide advice [counsel has a duty to advise the defendant about the consequences of testifying] to enable a defendant to make [an informed] decision." Id. See *Taylor v. State*, 352 N.W.2d 683, 687-88 (Iowa 1984). "Generally, the advice provided by counsel is a matter of trial strategy and will not support a claim of ineffective assistance [of counsel] absent exceptional circumstances. "*Ledezma*, 626 N.W.2d at 147. However, when counsel misinforms a defendant concerning the consequences of testifying, ineffective assistance of counsel may occur. Id. *See Foster*, 11 F.3d at 1457.

Numerous reasons can support the advice by counsel to a defendant not to testify. Ledezma, 626 N.W.2d at 147. See, e.g., *People v. Reed*, 373 N.E.2d 538, 543-44 (Ill. App. First Dis. 1978) (belief that prosecution failed to establish guilt beyond a reasonable doubt and that

defendant would not make a good witness based on simulated examination and a prior false statement made by the defendant). *Taylor v. State*, 352 N.W.2d 683, 687-88 (Iowa 1984)(defense counsel advised petitioner that there was no other choice but to take the stand, while cautioning him on the discrepancies in the prior statements made by the petitioner. Petitioner waivered during trial between testifying and not testifying, and ultimately decided not to testify).

b. Prosecutorial Misconduct

"To prevail on a claim of prosecutorial misconduct, an [Applicant] must establish that misconduct occurred, and that he was so prejudiced by the misconduct that he was deprived a fair trial." *State v. Piper*, 663 N.W.2d 894, 913 (Iowa 2003) *See State v. Bowers*, 654 N.W.2d 349, 355 (Iowa 2002); *State v. Greene*, 592 N.W.2d 24, 30-31 (Iowa 1999). It is the prejudice resulting from the misconduct, not the misconduct itself, that entitles a defendant to a new trial. *Piper*, 663 N.W.2d at 913 citing *Greene*, 592 N.W.2d at 31. Evidence of a prosecutor's bad faith is not necessary, as a trial can be unfair to a defendant even when the prosecutor has acted in good faith. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003) citing *State v. Leuty*, 73 N.W.2d 64, 69 (Iowa 1955). In determining prejudice, the Iowa Courts have looked to several factors "within the context of the entire trial [,]" including:

> (1) severity and pervasiveness of the misconduct, *State v. Webb*, 244 N.W.2d 332, 333 (Iowa 1976); (2) significance of the misconduct to the central issues in the case, *Piper*, 663 N.W.2d at 903; (3) the strength of the State's evidence, *Greene*, 592 N.W.2d at 32; (4) the use of cautionary instructions or other curative measures, *State v. Anderson*, 448 N.W.2d 32, 33 (Iowa 1989); and (5) the extent to which the defense invited the misconduct, *State v. Swartz*, 601 N.W.2d 348, 353 (Iowa 1999).

Graves, 668 N.W.2d at 869.

The court turns now to the specific claims alleged by Mr. Bitzan.

ANALYSIS

a. Ground one.

Bitzan contends that trial counsel (Stowers and Sarcone) failed to conduct a reasonable investigation into his case during preparation for trial by failing to interview numerous key witnesses and calling them to testify on behalf of Bitzan's defense.

Bitzan argues that Stowers breached his duty to investigate by not interviewing numerous family members and, particularly, Louis Hamilton who was with Bitzan during the time of this incident. Further, Bitzan believes Stowers should have hired an investigator to investigate the

timeline more closely and called numerous witnesses (outside of Louis Hamilton), including Officer Vaemlhoef and Fergus Falls, Minnesota, family members of Bitzan who could have corroborated his version of the facts to the jury and aided in his defense. Bitzan also believes Stowers failed to spend sufficient time with him in preparing for trial, presenting his defense to the jury, and at communicating with Bitzan's family, primarily his mother and father, as requested. This case presents a classic example where Bitzan is the client of Stowers, despite the fact he was retained by his parents. Bitzan's parents are not the client, and there is no attorney-client confidentiality of any information Stowers would share with them. Any information shared would be subject to being brought out in open court or deposition without grounds for objecting to the admission of this testimony. Accordingly, to their frustration, Stowers did not share their trial strategy or share what was told to him by his client. Stowers testified how it is better to know all facts before asking your client for their version of what happened. It is clear Bitzan's parents wanted to know a story early on. The jailhouse recordings between them and their son could have been used against him if he elected to testify. The court finds some of these conversations that were recorded would have been damaging if he had elected to testify. Stowers has no affirmative obligation to inform the defendant's parents of their trial strategy or of the defendant's story, despite the fact they were paying for his services.

The State believes that Bitzan's claims lack credibility, truthfulness, and entirely centered around a fictional set of facts never relayed to counsel and that Bitzan's claims of failure to communicate with his mother and father is contrary to the emails and communications in exhibits expressing their gratitude and thanks for Stowers and his team's assistance in this matter. The State provides that Stowers did consider Louis Hamilton as a witness and obtained a summary of his statements to police in Wyoming, but it was determined he would not be helpful to the defense. Further, that the storyline Bitzan is arguing in his application was never discussed with Stowers or Sarcone before or during trial and the need for additional investigation supporting this storyline is difficult to complete without the attorney knowing of it prior to trial.

The Court finds counsel's investigation into this case was not unreasonable given the circumstances. First, it is important to note the while counsel is required to make a reasonable investigation, that duty is not limitless. Specifically, it does not require counsel to interview or call every witness available. *Ledezma*, 626 N.W.2d at 144. Stowers did consider the testimony Hamilton would have provided prior to trial and made a reasonable decision under the

circumstances that it would be difficult for a jury to find him to be credible. He offered nothing to substantiate the idea that the intercourse had between Rau and Bitzan was consensual. Given the transcript Stowers had and the information relayed to him by Bitzan during trial (that Hamilton was asleep during most of the road trip), Stowers made a judgment call that any further investigation into Hamilton would be unnecessary. Post-conviction counsel retained a private investigator that drove to Mr. Hamilton's residence and was unsuccessful in getting any statement from him. Efforts to elicit any statement or testimony different from that available to Stowers were unsuccessful. Mr. Hamilton intentionally avoided speaking with the private investigator. The same can be concluded concerning the numerous family members of Bitzan from Fergus Falls. Stowers had reasoned they could offer nothing of evidentiary value in support of Bitzan's consensual sex defense.

Additionally, while Stowers and Sarcone did not complete much investigation at the rest stop near the Vermillion, South Dakota, exit where Bitzan asserts the consensual act occurred, they did assert the territorial issues in Bitzan's defense in numerous ways prior to and during the trial. Stowers did file a motion for a change of venue prior to trial, as well as information raising doubt as to the timetable Rau provided regarding her accident in Sioux Falls. It is plausible the timeline with Sioux Falls as the starting point could have occurred as testified to by the victim. If the starting point is from the rest area to the hospital the timeline is very plausible. Either way this evidence was developed and was known by the jury prior to their verdict.

The Court finds that trial counsel completed a reasonable investigation and inquiry into Bitzan's defense and concluded reasonably in relation to the circumstances on how to present his case to the jury. As such, the Court finds the Applicant's relief based on ground one must fail.

b. *Ground two.*

Bitzan asserts that he was not advised by Stowers of the consequences of not testifying at trial, specifically that Stowers was ineffective in failing to properly prepare, nor calling, Bitzan to testify at trial and not advising him that all of the crime elements have been established and, without testifying, Bitzan has no opportunity to "assert a defense and present [his] side of the story." The State urges that Stowers did communicate with Bitzan on the issue and reiterated during trial, when communicating with the District Judge, that he wished not to take the stand. The Court concludes that Bitzan was not improperly advised regarding his right to testify at trial, and thus was not unknowingly prejudiced by not taking the stand.

It is an accused's constitutionally protected privilege whether or not to testify. *Ledezma*, 626 N.W.2d at 146. The decision to take the stand during trial or not was entirely left up to Bitzan under the advisement of counsel. There has been no indication suggesting misinformation, coercion, or anything otherwise provided by either counsel to Bitzan regarding his right to testify on behalf of himself.

The Court finds no support in concluding Bitzan did not "voluntarily, knowingly, and intelligently," waive his right to testify. *Ledezma*, 626 N.W.2d at 146. As such, the Court finds the Applicant's relief based on ground two must fail.

c. *Ground three.*

Bitzan contends that Stowers was providing ineffective assistance of counsel by failing to remove specific jurors, either for cause or through preemptory strikes, from the jury during voir dire. Specifically, juror numbers 27, 21, 32, 18, 7, and 29 made statements during the voir dire process that Bitzan argues should have required Stowers to strike them from the jury pool.

The Court finds it helpful to note the questioned juror responses concerning this ground for relief. Jurors number 27, 21, 18, and 29 all answered affirmatively in response to questions concerning either previous representation personally or for a close friend or family by an attorney in the county attorney's office. Juror 27 disclosed that his granddaughter was "raped." Juror 18 stated that his wife had been abused by her father from the age of 9-17. Finally, Juror 7 remarked, "he should defend himself if he did not commit the crime."

The second prong of the *Strickland* test to support an ineffective assistance of counsel claim requires that an Applicant show "petitioner was prejudiced from [counsel's] action or inaction." *Maxwell*, 743 N.W.2d a t 195 (citing *Strickland*, 466 U.S. at 687). This prong requires a showing of a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. *Hildebrant*, 405 N.W.2d at 841. While Bitzan believes these responses by jurors indicated their inability to remain neutral, he has not shown any indication on how their presence, or lack of, on the jury would create the probability of a different outcome at trial. Juror bias may be actual or implied. *State v. Webster*, 865 N.W.2d 223, 236 (Iowa 2015). Actual bias occurs when the evidence shows that a juror, in fact, is unable to lay aside prejudices and judge a case fairly on the merits. Implied bias arises when the relationship of a prospective juror to a case is so troublesome that the law presumes a juror would not be impartial. Implied bias has been found to arise, for instance, when a juror is employed by a party or is closely

related to a party or witness. Id. Without other evidence of bias, the business relationship the juror had with the State's witness five years prior is not enough to disqualify the juror. *Webster* at 238 – 39 (the mere fact a juror has knowledge of parties or witnesses does not indicate actual bias or require juror disqualification). For purposes of determining juror prejudice, the relevant question is not what a juror has been exposed to, but whether the juror holds such a fixed opinion of the merits of the case that he or she cannot judge impartially the guilt or innocence of the defendant. *State v. Galvin*, 360 N.W.2d 817, 819 (Iowa 1985). See also *State v. Virden*, unpublished libel Court of Appeals decision filed September 28, 2016.

Therefore, the Court finds that Bitzan has not established a reasonable probability of a different outcome based on the jury selected for trial. As such, the Court finds the Applicant cannot meet the second prong of the *Strickland* test. Therefore, his ineffective assistance of counsel claim must fail.

d. Ground four.

Bitzan asserts that counsel was ineffective at both the trial and appellate level in failing to object to hearsay during the State's presentation of the case to certain exhibits prepared by DCI containing "multiple hearsay statements."

An ineffective assistance of counsel claim requires an Applicant to satisfy the *Strickland* test. Prong one requires a showing counsel failed to perform an essential duty. *Strickland*, 466 U.S. at 687. This requires a showing that counsel's representation fell below a standard of reasonableness. Id. It cannot be concluded that under the same circumstances different attorneys would provide representation the same, but that is not required for effective assistance.

At trial the State introduced a report (Exhibit 12) concerning a DNA match from samples taken from Rau and Bitzan. This report was corroborated with testimony from a DCI agent. It has been concluded that Bitzan's primary defense was consent. Counsel and Bitzan had agreed that they were not going to challenge the DNA found. Further, it would do no good to challenge the DNA if the act was consensual and there would be no reason to argue a DNA match between Rau and Bitzan. If anything, it supports Bitzan's story line. Simply because arguably another attorney would have required more foundation before allowing the exhibit to be admitted, does not mean Stowers was unreasonable in not doing so.

Therefore, the Court finds that Bitzan has not established counsel's actions were unreasonable under the circumstances, meaning he has not established prong one of the

Strickland test and, therefore, ground four must fail.

e. Ground five.

Bitzan asserts that Stowers was ineffective in allowing prejudicial testimony to be heard, specifically during the State's case when DCI Agent Dawson testified concerning another report of a possible sexual assault in Harrison County. Further, that the State's attorney committed prosecutorial misconduct in allowing the agent to testify regarding highly prejudicial testimony in the presence of the jury.

The Court finds it helpful to note the transcript dialogue of concern by Bitzan. The State's witness was DCI Agent Dan Dawson. The pertinent part of testimony reads:

> Q: Let's go back to the investigation that you did. Was there another interview of Natasha Rau done on December 30th of 2010?
>
> A: Yes, there was.
>
> Q: Why?
>
> A: To put in context, approximately a few weeks prior to this incident being reported to us, we had another reported incident in Harrison County of a possible sexual assault. Being Natasha Rau was unable to identify the person in this incident. It wasn't a friend, former boyfriend, anything like that. We had no description. I, one, wanted to have her reinterview to see if there were any additional details that she could gain which would maybe help us identify that person with the possibility that we were having a sexual offender assaulting females on Interstate 29. . . .

Trial transcript, Pg. 681, Lines 12-25 and Pg. 682, Lines 1-3. While Bitzan has alleged prosecutorial misconduct for allowing this statement to be heard by the jury, the Court does not believe he has provided any support for that belief beyond mere speculation. It cannot be said that the State's questioning of DCI Agent invited such an answer nor that the answer was as prejudicial as to the defendant to warrant a new trial based on a theory of misconduct by the prosecutor.

Turning attention to the ineffective assistance of counsel claim for failure to object to the testimony by defense counsel, the Court again looks to the two-prong *Strickland* test. Giving Mr. Bitzan the benefit and agreeing with the notion that the statement by DCI Agent Dawson was prejudicial to his defense, the Court still does not believe it has risen to the

level requiring him to a new trial. Instead, rather, the Court finds the testimony to be isolated and trivial when considering the totality of the circumstances. In fact, it can even be said that by not objecting to the statement, Stowers was allowing the jury to take it for what it was, nothing more than an answer to a question on why he decided to do a second interview of Rau. By not drawing attention to the statement, he was allowing the jury to believe that matter in no way was related to the one being tried.

The Court finds that Bitzan has not shown the prejudicial effect this statement had on his trial to support a claim for prosecutorial misconduct or ineffective assistance of counsel. Therefore, ground five must fail.

f. Ground six.

Mr. Bitzan has withdrawn ground six. For this reason, Applicant's relief based on ground six must fail.

g. Ground seven.

Bitzan asserts that the State of Iowa has violated his due process rights by failing to disclose favorable evidence, in particular a DVD containing the interview of a Casper, Wyoming, sheriff and Louis Hamilton.

The Court finds it important to note that Stowers had a copy of the transcript summary of the interview completed by the Wyoming Police Department of Hamilton. As was discussed already, Stowers was aware of the testimony and storyline Hamilton had provided, and he ruled reasonably that nothing of value could come from his testimony. Further, the evidence derived from the interview can't, even in the best light, be seen as favorable to the defense's case. Hamilton states repeatedly in the interview that he is unaware of the route the two took on their road trip, nor of any specific stops made along the way. He waivers on the story during most of the interview and provides no real concrete alibi for Bitzan as he alleges.

Therefore, based on the lack of favorable evidence for the Applicant in the DVD, we cannot conclude any due process rights were violated and ground seven must fail.

h. Ground eight.

Bitzan contends that Stowers rendered ineffective counsel assistance in not calling an expert to testify concerning the credibility of victim testimony and statements.

Relying again on the two-prong *Strickland* test, Bitzan is required to show how the outcome of trial would be different had counsel used expert testimony to discredit the witness's

truthfulness and credibility. Arguably, if such expert existed and could provide testimony favorable to Bitzan, it is not unreasonable for counsel to reasonably decide not to use it. Trial transcript shows Stowers questioning the credibility of the witness's factual depiction and timeline. Under his belief, he was drawing the jury's attention to her credibility, and it cannot be concluded that the judgment call made to not call an expert witness to testify to such was prejudicial to the defendant requiring he be given a new trial.

The Court finds that Bitzan has provided no support, outside of speculation, of the possibility that expert testimony concerning victim truthfulness could have affected the outcome of his trial. Therefore, the Applicant has failed to satisfy the second prong of the *Strickland* test, and ground eight must fail.

i. Ground nine.

Bitzan has alleged prosecutorial misconduct and ineffective assistance of counsel, citing to two instances of conduct: First, not releasing the DVD containing the interview of Hamilton; and, second, the prosecutor's statements in the State's closing argument.

At length above the Court discussed the DVD interview of Hamilton. For those reasons, the Court finds no valid claim for Mr. Bitzan on this topic. With regard to the prosecutor's statements during closing arguments, the Court must note specifically what Mr. Bitzan is referring to. In closing the State commented: "We have cases like this every day. We have kids that are sexually abused by their parents. They come into court say this happened."

Concerning a prosecutor's closing statements, our courts have consistently noted the latitude given when analyzing evidence presented at trial. *State v. Phillips*, 226 N.W.2d 16, 19 (Iowa 1975). A prosecutor may argue reasonable conclusions and inferences that can be drawn from the evidence, but they may not express personal opinions or beliefs. Id. The Court does not believe Ms. Krisko's above statements can be seen as her own personal opinions or beliefs by a reasonable juror. Rather, these statements are more of an inference or reasonable relation that could be drawn from the case, not personal beliefs of the prosecutor.

In *State v. Graves*, the prosecutor's closing argument consisted of a variety of statements arguably prejudicial to a defendant. The one the Supreme Court seemed to stress as being the most troublesome was the constant referral made in the rebuttal argument by the State concerning the defendant's lying. *State v. Graves*, 668 N.W.2d 860, 874 (Iowa 2003). While a prosecutor is given some leeway during closing, a prosecutor stills owes a duty to the defendant

and the public as well. Id. at 869. The Court concluded calling the defendant a liar, stating he was a liar, or making similar comments is improper conduct. Id. at 875. More importantly, however, concerning Mr. Bitzan's argument, the Court in *Graves* went on to reiterate that a prosecutor is still free to "craft an argument that includes reasonable inferences based on the evidence . . ." *Graves*, 668 N.W.2d at 869 citing *State v. Davids*, 275 Kan. 107, 710-711 (Kan. 2003).

Here, Ms. Krisko was not referring to Bitzan in any way when making those statements. She was simply drawing reasonable inferences from the nature of the case. She was crafting an argument to close the case to the jury. The Court sees no prejudicial effect or misconduct in her choosing to do so in this manner.

Based on the Applicant's inability to prove how the referenced statements during closing arguments were improper or personal beliefs and opinions of the prosecutor, ground nine must fail.

j. Ground ten.

Bitzan asserts that Stowers rendered ineffective assistance in not objecting to a line of questioning on cross-examination regarding the truthfulness and credibility of the victim's testimony and demeanor.

Before beginning our analysis of Mr. Bitzan's claim, the Court would first note that Mr. Sarcone did make objections during Nurse Wear's testimony concerning her statements, some which were overruled and others which were sustained. Further, he addressed the topic of her being unable to determine whether Mr. Rau was, in fact, telling the truth at the hospital to discredit her previous testimony to the jury. Looking to the *Strickland* test, this court believes Mr. Bitzan's claim fails the second prong.

Our courts have consistently taken the view that expert testimony is "not admissible merely to bolster a [witness's] credibility." *State v. Dudley*, 856 N.W.2d 668, 678-77 (Iowa 2014). Testimony conveying that a witness is credible is not a fact issue that is subject to expert opinion, as an expert cannot "accurately opine when a witness is telling the truth." This is a jury's function. Id. In *State v. Jaquez*, the following colloquy occurred between counsel and forensic interviewer Kay:

> Q: . . . What was your impression of [M.M.] when you spoke to her? Basically, how did she appear emotionally?

A: She was quiet and very polite.

Q: Okay.

A: She was not extremely emotionally expressive or upset. She was just very polite.

Q: In your experience in those prior interviews that you conducted, is that unusual that a child not be overly emotional in that type of a situation?

A: Oh, no, not at all. Her demeanor was completely consistent with a child who has been traumatized, particularly multiple times.

State v. Jaquez, 856 N.W.2d 663, 664 (Iowa 2014). Based on the above exchange, the Court concluded that Kay indirectly vouched for M.M., victim's, credibility, thereby commenting on the defendant's guilt or innocence. Id. at 665.

In the present case, Nurse Wear did not conclude that Ms. Rau's demeanor or emotion was consistent with that of a victim of sexual assault. She only noted that at the time of examination, she had no reason to doubt Ms. Rau was telling the truth. Conversely, if Nurse Wear had stated Ms. Rau's demeanor indicated she had been assaulted or Ms. Rau had been sexually assaulted, based on her statements made during examination, this court would conclude differently. However, this court cannot believe that as a result of Nurse Wear's statements concerning Ms. Rau telling her the truth, the jury concluded Mr. Bitzan had sexually assaulted her. Due to this, the Court cannot conclude Mr. Bitzan has been prejudiced by counsel's allowing certain statements to come in both over and without objection.

The Applicant has failed to establish a successful ineffective assistance of counsel claim, requiring ground ten to fail.

k. Ground eleven.

Bitzan asserts that counsel was ineffective in not consulting an expert to rebut the evidence offered by the State concerning the vaginal tear of the alleged victim. Specifically, Mr. Bitzan urges that a medical expert would have been able to contradict Ms. Rau's testimony that the defendant was jamming his fingers inside her forcibly because there were no signs of forcible sex acts and that the vaginal tear was inconsistent with forcible sex. While we can agree that an expert may have aided in Bitzan's consensual encounter defense, it cannot be said that this alone affected the outcome of his trial. The Court would also note that a nurse testified concerning Rau's vaginal tear and during both direct and cross-examination she concluded that reasonably it

could not be said that this tear came from either a consensual or nonconsensual encounter.

The Applicant has failed to establish either prong of the *Strickland* test, requiring ground eleven to fail.

l. Ground twelve

Finally, Bitzan contends that his counsel was ineffective in not challenging Natasha's testimony and presenting to the jury that the sex was consensual and her timeline of events was inaccurate.

Mr. Bitzan is heavily focused on counsel's failure to draw attention to the timetable testified to by Ms. Rau as being inaccurate. This court cannot agree with Mr. Bitzan that counsel did not draw attention to the inaccuracies of Ms. Rau's timetable of events and convey the defense's argument that the encounter was consensual. Additionally, Mr. Bitzan has provided additional evidence to discredit Ms. Rau's timetable, none of which can be pointed to as "newly discovered." Essentially, Mr. Bitzan is asserting the jury concluded wrong. In review, this court is not playing the role of the jury. The Court concludes this argument is outside the scope of review for an application for post-conviction relief.

Mr. Bitzan has failed to establish by a preponderance of evidence how counsel was ineffective and he was prejudiced as a result, warranting him to a new trial based on this reason. For this reason, ground twelve must fail.

SUMMARY

Based on the foregoing discussion, the Court finds that Applicant was effectively represented by counsel and no prosecutorial misconduct took place. Accordingly, the Court finds that Applicant has not sustained his burden of proof in this proceeding, and the Application for Post-Conviction Relief should be denied.

ORDER

IT IS THEREFORE ORDERED as follows:

1) All of the above.
2) The Applicant's Amended Application for Post-Conviction Relief is DENIED.
3) Court costs are taxed to the Applicant.

SO ORDERED.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
PCCV028783	MARK BITZAN VS STATE OF IOWA

So Ordered

Duane E. Hoffmeyer

Duane E. Hoffmeyer, Chief Judge,
Third Judicial District of Iowa

Electronically signed on 2016-10-20 08:43:23 page 17 of 17

APPENDIX OF EVIDENCE

UNDERLYING *STATE COURT* PROCEEDINGS

POSTCONVICTION RELIEF (PCR)

EXHIBIT

V

(Jan. 10, 2018)

Iowa Court of Appeals

Ruling denying the Appeal, affirming denial of

Postconviction Relief, and affirming the conviction

IN THE COURT OF APPEALS OF IOWA

No. 16-1943
Filed January 10, 2018

MARK ALLAN BITZAN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Monona County, Duane E. Hoffmeyer, Judge.

Mark Bitzan appeals the denial of his application for postconviction relief.

AFFIRMED.

James P. McGuire of McGuire Law, P.L.C., Mason City, for appellant.

Thomas J. Miller, Attorney General, and Louis S. Sloven, Assistant Attorney General, for appellee State.

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

VAITHESWARAN, Presiding Judge.

A college student on her way home for winter break stopped at a rest area in Monona County, Iowa. A man in the women's restroom accosted her, forcibly moved her to the handicapped stall, threatened her with a pocket knife, and raped her.

A jury found Mark Bitzan guilty of first-degree kidnapping.[1] This court affirmed his judgment and sentence of life in prison. *See State v. Bitzan*, No. 12-0551, 2013 WL 3273813, at *5 (Iowa Ct. App. June 26, 2013). Bitzan filed an application for postconviction relief (PCR) alleging his trial attorneys provided ineffective assistance. The district court denied the application following an evidentiary hearing. Bitzan appealed.

I. Ineffective Assistance of Counsel

Bitzan contends his trial attorneys were ineffective in failing to (A) object to a nurse's testimony vouching for the credibility of the student; (B) investigate the case and interview witnesses; (C) advise him of the consequences of his decision not to testify and prepare him to testify; (D) object to or investigate DNA evidence; (E) consult an expert about false allegations of rape; (F) object to alleged prosecutorial misconduct; (G) consult an expert about a vaginal tear sustained by the student; (H) impeach the student and explicate his defense of consensual sex; (I) challenge particular jurors for cause or exercise peremptory strikes; and (J) object to testimony about another assault. To prevail, he must show (1) counsel

[1] The State also charged Bitzan with second-degree sexual abuse. The jury was instructed to consider this charge only if the State failed to prove the elements of first-degree kidnapping. See State v. Mitchell, 450 N.W.2d 828, 831 (Iowa 1990) (holding second-degree sexual abuse is a lesser-included offense of first-degree kidnapping).

breached an essential duty and (2) prejudice resulted. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

A. Vouching Testimony

The following evidence is relevant to the vouching claim. After the student was raped, she drove to a hospital, where she was examined by an emergency room nurse with twenty-five years of experience. The defense called the registered nurse as a witness to controvert the student's account of having to stop at the rest area to address stomach issues. On cross-examination, the prosecutor asked the nurse whether the student's demeanor was "consistent with" what she had seen in other women who said they were sexually assaulted. Defense counsel objected on relevancy grounds and on the ground the question was outside the scope of direct examination. The district court overruled the objection and the prosecutor proceeded with the following exchange:

> Q. Was there anything about the way she appeared that gave you cause to doubt what she was telling you? A. No.
>
> . . . .
>
> Q. Did she present in your hospital asking to be treated for a stomach ailment or because she had been sexually assaulted? A. She presented because she had been sexually assaulted.
>
> Q. I believe it's your testimony that nothing she did made you doubt that, correct? A. That is correct.
>
> Q. Nothing about her demeanor? A. Nothing about her demeanor.
>
> Q. Nothing about what she told you? A. Nothing about what she told me.
>
> Q. Nothing about how she reacted to any of the questions you asked? A. Nothing about how she reacted to the questions.
>
> Q. Nothing about— A. Nothing.
>
> Q. —anything to do with her made you doubt what she had to tell you? A. I did not doubt her at all, no.

Bitzan's attorney failed to object to this line of questioning. On redirect examination, he asked the nurse, "Your role wasn't to decide whether or not what

she said was the truth, correct?" The nurse responded, "This is true." The attorney then asked, "So that's not something that you were in a position to determine at the time?" The nurse answered, "Personally, I felt as if she was not—she was being honest."

Bitzan contends the nurse impermissibly vouched for the student's credibility and "counsel breached an essential duty by failing to object to the long series of improper questions." On our de novo review, we agree.

The nurse categorically stated nothing made her doubt the student's narrative and she believed the student was "being honest." She directly opined on the credibility of the college student, in contravention of decades old precedent. *See State v. Myers*, 382 N.W.2d 91, 95 (Iowa 1986) ("[E]xpert opinions on the truthfulness of a witness should generally be excluded because weighing the truthfulness of a witness is a matter reserved exclusively to the fact finder.").

Our courts have reaffirmed this precedent. *See State v. Brown*, 856 N.W.2d 685, 689 (Iowa 2014) (concluding sentence in physician's report "indirectly convey[ed] to the jury that [the child was] telling the truth about the alleged abuse because the authorities should conduct a further investigation into the matter"); *State v. Dudley*, 856 N.W.2d 668, 676-77 (Iowa 2014) (holding an expert's testimony is "not admissible merely to bolster a [witness's] credibility"); *State v. Jaquez*, 856 N.W.2d 663, 665 (Iowa 2014) (concluding the expert witness indirectly vouched for a child victim's credibility in stating the victim's "demeanor was completely consistent with a child who has been traumatized, particularly multiple times"); *In re C.W.*, No. 16-1677, 2017 WL 5185433, at *5 (Iowa Ct. App. Nov. 8, 2017) ("Counsel's questioning to elicit the vouching testimony was a breach of duty

to represent [the juvenile] effectively."); *Simpson v. State*, No. 15-1529, 2017 WL 1735615, at *7 (Iowa Ct. App. May 3, 2017) (concluding trial attorney breached a duty to object to coaching testimony); *State v. Tjernagel*, No. 15-1519, 2017 WL 108291, at *8 (Iowa Ct. App. Jan. 11, 2017) (concluding trial counsel breached an essential duty in failing to object to expert testimony "indirectly vouching for [a child's] credibility and truthfulness"); *State v. Pitsenbarger*, No. 14-0060, 2015 WL 1815989, at *9 (Iowa Ct. App. Apr. 22, 2015) (finding no reasonable strategy for failing to object to improper vouching testimony). In most if not all these opinions, the statements found to have been impermissible were far more indirect than the nurse's statements in this case.

The State only addresses *Brown*. In its view, the opinion is inapposite because it discussed expert credibility opinions, whereas the nurse testified as a lay witness. To the contrary, the nurse testified in her capacity as a trauma professional. Her role was no different than the forensic interviewer and therapist in *Dudley* or the physicians who examined the children in *Brown* and *Jaquez*. *See Brown*, 856 N.W.2d at 689; *Dudley*, 856 N.W.2d at 677-78; *Jaquez*, 856 N.W.2d at 664; *see also Myers*, 382 N.W.2d at 98 (finding school principal's vouching testimony impermissible); *State v. Gillison*, No. 15-2045, 2017 WL 2181176, at *3 (Iowa Ct. App. May 17, 2017) (concluding forensic interviewer and other witnesses offered "direct testimony about their belief in the credibility of the witness's allegations" and defendant's attorney "breached a duty in failing to object").

Notably, the State filed a pretrial motion in limine seeking to exclude precisely this type of vouching testimony. The district court granted the motion. The vouching testimony elicited from the nurse contravened the ruling. *See*

Tjernagel, 2017 WL 108291, at *7 (noting State filed a pretrial motion in limine seeking to bar "[a]ny witnesses testifying about the credibility of other witnesses"). We conclude Bitzan's attorneys breached an essential duty in failing to object to the prosecutor's questions and the nurse's responses, including the response to the defense question.

This brings us to the *Strickland* prejudice requirement. To satisfy this prong of the test, an applicant must show "a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." *Strickland*, 466 U.S. at 694. This standard is not met when the evidence of guilt is overwhelming. *See State v. Ambrose*, 861 N.W.2d 550, 559 (Iowa 2015) (concluding "there was no reasonable probability the result of the trial would have been different" where "[t]he evidence of guilt was overwhelming"). In cases involving a witness who vouches for the credibility of another witness, we also have asked whether the case turned on witness credibility. *Tjernagel*, 2017 WL 108291, at *8 (finding prejudice where "the State's case . . . rested entirely on the credibility of the witnesses"); *Pitsenbarger*, 2015 WL 1815989, at *10 (concluding "the result may have been different if proper objections had been made to exclude the improper testimony" because "the State's case . . . rested entirely on the credibility of the witnesses"). And we have considered the presence or absence of physical evidence, the pervasiveness of the vouching testimony, and its emphasis in the presentation. *See Tjernagel*, 2017 WL 108291, at *7.

Our de novo review of the trial record reveals the following facts. The college student described stopping at the rest area, going to the women's restroom, seeing a pair of shoes in the handicapped stall, and having "this instant

reaction something is wrong here." Despite this trepidation, her upset stomach left her no choice but to relieve herself. She stepped into the toilet two stalls down. Soon, she heard the other person leave the handicapped stall, go towards the door, and return to the handicapped stall. She proceeded to the sink area and began washing her hands. As she did so, she glanced up at the mirror and noticed a man standing behind her.

The man wrapped his right hand around her torso and the other hand over her mouth, kissed her on the head, asked if she was going to be quiet, and, after she finished washing her hands, forced her into the handicapped stall. He closed and locked the stall door and held her against the wall. The student was "shaking uncontrollably" in "terror." She testified, "I don't know how many people in their life actually feel genuine terror, but you can't describe that sort of feeling." In a low, "creepy" voice, the man attempted to determine whether someone was waiting for her and whether she was on birth control. He pulled out a "collapsible knife" and said, "If you are quiet, I won't hurt you."

The man proceeded to hurt her. He removed her snow boots and pants, unzipped and lowered his pants, touched her labia and clitoris, forced her to lie on the floor of the stall, and inserted his penis into her vagina. He ejaculated, zipped up his pants, told her to wait in the restroom, and left.

The student left soon after. She obtained the number of her college ROTC commandant and phoned her.

The commandant testified to her conversation with the student. In her words, the student told her "she was raped." On determining the man ejaculated, the commandant advised the student not to wash herself and to get to a hospital.

A sexual assault nurse examiner at a second hospital to which the student was transferred asked her what happened. The nurse examiner recounted the student's response, as follows:

> She stopped off at a rest stop . . . approximately 50 miles, roughly, north of Council Bluffs . . . . She went into the women's restroom to use the restroom and looked underneath the stalls and saw feet underneath one of the stalls. She proceeded to use the restroom. [S]he came out and was washing her hands. She said that a man had come out of one of the stalls, came up behind her, and put his hand over her mouth and kissed the top of her head. She told me that he said not to fight her, to cooperate with . . . him. He then forced her into . . . the handicapped stall in the restroom. She told me that he pushed her up against the wall, that he kept asking her if she was going to cooperate with him. He took a pocketknife out of his pocket numerous times and showed it to her, and you know, told her that she needed to cooperate with him . . . . She just told me that . . . he had taken her pants and her boots off, that he had laid her on the floor of the stall in the restroom and that he had raped her.

The nurse examiner completed a sexual assault kit that included two swabs from the student's genital area. The department of criminal investigation tested these samples and identified an unknown male DNA profile. This profile was compared to known profiles. According to a DCI criminalist, "[I]f somebody's DNA profile matches or is identical to the profile that we obtained from the evidence," the agency issues a statistic "that says less than one in 100 billion" in the general population have that profile. Within these parameters, the criminalist opined, "The profile that was obtained from the vaginal swab and the pubic hair swab [of the student] matched the known profile of Mark Bitzan."

A DCI special agent informally spoke to the student at the hospital. According to the agent, "She stated that she had to use the restroom" and "she decided to pull over knowing that she was still 57 miles away from Council Bluffs." She provided the agent with a description of her assailant. During a formal

interview several hours later, the student provided a consistent description of the attacker.

Bitzan exercised his constitutional right not to testify. His defense of consensual sex was advanced through cross-examination of the State's witnesses and through several defense witnesses, including Bitzan's parents, a student who was asked about the consequences of providing false testimony, and the emergency room nurse whose vouching testimony is being challenged.

Even without the vouching testimony, the evidence supporting the jury's finding of guilt was overwhelming. First, the student did not waver from her narrative, even in the face of vigorous cross-examination by the defense. For example, when one of the attorneys asked, "Bottom line is that you were in this rest area, and you met this person, and for whatever reason, you allowed this to happen, is that true?" she responded, "No. I did not meet this person. This person grabbed and attacked me." Second, the DNA evidence corroborated the student's testimony. Finally, the testimony of the student's commandant, the sexual assault nurse examiner, and the DCI special agent lent credence to the student's testimony.

We recognize the prosecutor honed in on the impermissible vouching testimony in her closing argument. But given the wealth of permissible evidence corroborating the student's testimony, we are persuaded the prosecutor's comments did not generate a reasonable probability of a different outcome.

B. Remaining Ineffective Assistance Claims

Having found the evidence of guilt overwhelming, we could conclude Bitzan's remaining ineffective assistance claims fail on the *Strickland* prejudice

prong. But because Bitzan also asserts the combined effect of these errors denied him a fair trial, we will separately address those claims. *See State v. Clay*, 824 N.W.2d 488, 500, 501-02 (Iowa 2012) (stating, "Under Iowa law, we should look to the cumulative effect of counsel's errors to determine whether the defendant satisfied the prejudice prong of the *Strickland* test," and stating, "If the defendant raises one or more claims of ineffective assistance of counsel, and the court analyzes the prejudice prong of *Strickland* without considering trial counsel's failure to perform an essential duty, the court can only dismiss the postconviction claim if the alleged errors, cumulatively, do not amount to *Strickland* prejudice").

On our de novo review, we are persuaded Bitzan's trial attorneys breached no essential duty in (B) investigating the case and interviewing witnesses; (C) advising him of the consequences of his decision not to testify and preparing him to testify; (D) failing to object to or investigate the DNA profile evidence; (E) failing to consult an expert about false allegations of rape; (F) failing to object to claimed prosecutorial misconduct; (G) failing to consult an expert to opine on the cause of the vaginal tear sustained by the student; and (H) impeaching the student and explicating the defense of consensual sex. Bitzan's primary attorney thoroughly explained his trial strategy with respect to most of these contentions. The strategy as explained was reasonable or, where it was not explained, was apparent from the trial record.

We are less sanguine about defense counsels' failure to challenge certain jurors for cause or exercise a peremptory strike. Although Bitzan challenges defense counsels' conduct with respect to several members of the jury panel, our

concern is with juror #21.[2] The juror stated he had an existing attorney-client relationship with the part-time Monona County Attorney who, in his civil practice, was "taking care of restaurant matters" for him.

Iowa Rule of Criminal Procedure 2.18(5)(e) allows a challenge for cause to a potential juror "[s]tanding in the relation of . . . attorney and client." Although the Monona County Attorney was not the primary prosecutor of Bitzan's case, he was listed on the State's filings and was the head of the office employing one of the prosecutors who handled the case. Under these circumstances, defense counsel should have moved to have the juror stricken for cause. *See, e.g.*, *Futrell v. Commonwealth*, 471 S.W.3d 258, 274 (Ky. 2015) (stating potential juror's "close relationship with the prosecutor trying the case is presumptively disqualifying" and "any suggestion of an on-going relationship with the prosecutor, such as the potential juror's intent to make use of his professional services again, is disqualifying" and concluding district court's failure to remove a juror for cause after he acknowledged actual bias based on the attorney-client relationship was an abuse of discretion, as was the court's failure to remove a juror whose son was represented by the prosecutor); *cf. State v. Shimko*, No. 05-1758, 2006 WL 3018467, at *2 (Iowa Ct. App. Oct. 25, 2006) (noting attorney-client relationship ended a year earlier). Their failure to make the motion constituted a breach of an essential duty.

[2] On our review of the reported voir dire of the remaining challenged jurors and the notes of Bitzan and his attorneys, we are persuaded counsel did not breach an essential duty in failing to challenge those jurors for cause or exercise peremptory challenges.

That said, Bitzan did not establish *Strickland* prejudice. Both he and his attorneys had notes reflecting their knowledge of the juror's relationship with the county attorney and indicating a preference to have the potential juror remain on the jury. In addition, the juror stated the relationship he had with the prosecutor would not give him pause or impact his ability to listen to a case the county attorney's office was prosecuting. *See Shimko*, 2006 WL 3018467, at *2 (noting juror "affirmed that he could set aside his personal biases and opinions and render a verdict only on the information presented as evidence and testimony. He further opined that his past business dealings with the prosecutor would not interfere with his ability to impartially judge the evidence presented at trial").

We are left with the claimed failure of Bitzan's attorneys to object to testimony about another assault. Specifically, the DCI special agent who interviewed the student testified, "[A]pproximately a few weeks prior to this incident being reported to us, we had another reported incident in Harrison County of a possible sexual assault." According to Bitzan, the State deliberately elicited the agent's response "knowing his answer would be devastating testimony that would be highly prejudicial."

"Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Iowa R. Evid. 5.404(b)(1). However, it may be admissible for other purposes. Iowa R. Evid. 5.404(b)(2).

At the postconviction hearing, one of Bitzan's attorneys was asked about this testimony. He had no specific recollection of it and agreed the record would speak for itself. On our de novo review, we note the DCI agent did not tie the prior

incident to Bitzan and proceeded to answer questions about the DNA of a "known local sex offender" other than Bitzan. Read in context, the challenged testimony may have been a reference to the local sex offender. We conclude counsel did not breach an essential duty in failing to object to the testimony. But if counsel had an obligation to object, the claim fails on the *Strickland* prejudice prong, given the overwhelming evidence supporting the finding of guilt.

Having found the remaining ineffective assistance claims unpersuasive, we find the claim of cumulative error unavailing.

II. Prosecutorial Misconduct

Bitzan contends "the district court erred in failing to find prosecutorial misconduct." The PCR court did not rule on any independent prosecutorial misconduct claims. Accordingly, we have nothing to review. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

We affirm the denial of Bitzan's postconviction relief application.

AFFIRMED.

State of Iowa Courts

Case Number	Case Title
16-1943	Bitzan v. State

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APPENDIX OF EVIDENCE

UNDERLYING *STATE COURT* PROCEEDINGS

POSTCONVICTION RELIEF **(PCR)**

EXHIBIT

W

(Feb. 27, 2018)

Iowa Supreme Court

Order denying Bitzan's request for Further Review of all

Postconviction Relief issues

IN THE SUPREME COURT OF IOWA

No. 16–1943

Monona County No. PCCV028783

ORDER

MARK ALLAN BITZAN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

After consideration by this court, en banc, further review of the above-captioned case is denied.

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IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
16-1943	Bitzan v. State

So Ordered

Mark S. Cady

Mark S. Cady, Chief Justice

Electronically signed on 2018-02-27 10:05:55

APPENDIX OF EVIDENCE

UNDERLYING *STATE COURT* PROCEEDINGS

POSTCONVICTION RELIEF (PCR)

EXHIBIT

X

(Feb. 27, 2018)

Iowa Court of Appeals

Procedendo finalizing the denial of all Postconviction Relief issues and affirming the conviction

IN THE COURT OF APPEALS OF IOWA

No. 16–1943

Monona County No. PCCV028783

PROCEDENDO

MARK ALLAN BITZAN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

To the Iowa District Court for the County of Monona:

Whereas, there was an appeal from the district court in the above-captioned case to the supreme court, and the supreme court transferred the case to the court of appeals. The appeal is now concluded.

Therefore, you are hereby directed to proceed in the manner required by law and consistent with the opinion of the court.

In witness whereof, I have hereunto set my hand and affixed the seal of the court of appeals.

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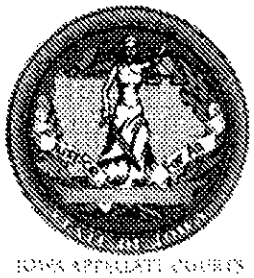

IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
16-1943	Bitzan v. State

So Ordered

Donna M. Humpal, Clerk

Electronically signed on 2018-02-27 13:11:07

APPENDIX OF EVIDENCE

UNDERLYING *FEDERAL COURT* PROCEEDINGS

EXHIBIT

Y

(July 7, 2021)

Eighth Circuit Court of Appeals

Overlength Petition for Rehearing with Suggestion for

Rehearing En Banc

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Mark Bitzan, Defendant-Appellant, v. Patti Wachtendorf, and ISP, Respondent-Appellees.	Case No. 20-3003 PRO SE PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC.

APPEAL FROM THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA - CEDAR RAPIDS

PRO SE PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

Mark Bitzan 6290077
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PETITIONER MARK BITZAN *PRO SE*

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United States Constitution

Fifth Amendment ..... Passim

Sixth Amendment ..... Passim

Fourteenth Amendment ..... Passim

CERTIFICATE OF INTERESTED PARTIES

Pro Se litigant Mark Bitzan certifies that the following persons have an interest in the outcome of this case:

1. Mark Bitzan, Defendant-Appellant;
2. Patti Wachtendorf, Warden, Iowa State Penitentiary;
3. Chris Trip, Acting Warden, Iowa State Penitentiary;
4. Benjamin Milton Parrott, Iowa Dept. of Justice, Des Moines, Iowa;
5. Jennifer Jo Frese, Kaplan & Frese, Marshalltown, Iowa (former appointed post-conviction counsel; terminated);
6. Honorable Kelly K.E. Mahoney, U.S. Magistrate Judge, Cedar Rapids, Iowa;
7. Honorable Linda R. Reade, U.S. District Court Judge, Cedar Rapids, Iowa.

This Certificate is made so the Judges of this Court may evaluate possible disqualification or recusal.

RULE 35(b)(1) STATEMENT

In my opinion, the questions presented in this Petition satisfy the criteria of *Federal Rule of Appellate Procedure 35(b)(1)(A)* and *35(b)(1)(B).* The March 26, 2021 Panel decision is mostly silent on the reasons why they denied the Application for Certificate of Appealability. However, the reference that they "[r]eviewed the original file of the district court...", as the basis for denial, reveals the essential reasoning which directly conflicts with Supreme Court precedent *Martinez v. Ryan,*

132 S.Ct. 1309 (2012); Trevino v. Thaler, 133 S.Ct. 1911(2013), and the 8th Circuit's recent decision in *Harris v. Wallace, 984 F.3d 641 (8th Cir. 2021).*

While this is a path seldom traveled, Bitzan believes the issues presented require the full Circuit's attention. Consideration by the full Court is necessary to secure and maintain uniformity of both the Supreme Court's established precedent and the 8th Circuit Court of Appeals' recent decisions concerning ineffective assistance of postconviction counsel as a reason for defaulted ineffective assistance of trial counsel claims. The questions are also of exceptional importance in the criminal law context as the *Sixth* and *Fourteenth Amendments* are at issue.

The Panel decision creates an implied rule that will likely undermine *Sixth* and *Fourteenth Amendment* protections and essentially allow a State prisoner who was denied effective assistance of trial counsel during State proceedings, to be foreclosed from bringing these potentially meritorious claims for postconviction relief on Federal Habeas Corpus review pursuant to *28 U.S.C. §2254,* et seq., where his appointed postconviction counsel in both State and Federal proceedings defaulted his claims due to no fault of his own.

COURSE OF PROCEEDINGS AND DISPOSITION

I. Trial & Conviction

The record shows a Trial Information was filed June 19, 2011 in Iowa District Court for Monona County alleging First Degree Kidnapping (Count 1) in violation

of *Iowa Code §710.1(3)* and *§710.2*, and Second Degree Sexual Abuse (Count 2) in violation of *Iowa Code §709.3(1)* and *§901A.2*.[1] *(Trial Information, [ECF No. 11-6 at 8])*[2] An Amended Trial Information was filed July 21, 2011, which among other things, detailed the predicate offense for Count 2 as a 2006 conviction for Third Degree Sexual Assault in the Seventh Judicial District of Wyoming, Case No. 16720-C. *(Amended Trial Information, [ECF No. 11-6 at 13])* A jury trial was held commencing Jan. 10, 2012, and ending Jan. 17, 2012. *(Trial Tr. Vol. I, [ECF No. 11-1 at 1])* Bitzan didn't testify at trial. *(Trial Tr. Vol. IV, [ECF No. 11-4 at 41-42])*

Jan. 17, 2012, the jury returned a guilty verdict for First Degree Kidnapping, Count 1. *(Verdict, [ECF No. 11-6 at 272])* They answered a special interrogatory, finding that a dangerous weapon was displayed during the First Degree Kidnapping offense. *Id.* The jury also found that Bitzan was convicted of a prior offense under *Iowa Code §902.14* as alleged in Count 2 of the Amended Trial Information.[3]

II. Direct Appeal

The State Appellate record shows that the Iowa Court of Appeals summarized the trial evidence as follows:

> "During the evening of December 17, 2010, Bitzan was inside the women's handicap stall at an interstate restroom when nineteen-year-old

[1] The Amended Trial Information lists *Iowa Code §902.14* rather than *§901A.2*. *[ECF No. 11-6 at 13]*
[2] Bitzan requests the Court take judicial notice of all records from the State-Court during Trial, Appeal proceedings, PCR proceedings, and all records from Federal District Court proceedings.
[3] The Iowa District Court conducted a separate enhancement phase of the jury trial to reach a separate verdict on Count 2. *(Trial Tr. Vol. V, [ECF No. 11-5 at 31-36])* The second phase occurred with the original jury but was conducted after the verdict was announced on Count 1. *Id. at 28.*

Natasha stopped at the rest area and used the restroom. As she stood at the sink and washed her hands, Bitzan exited the stall, walked up behind her, placed one hand over her mouth, placed the other hand around her torso, and kissed the top of her head. After asking her if she was "going to be quiet," Bitzan forced Natasha away from the sink area and into the handicap stall at the back of the restroom. Bitzan reached back and latched the stall door as he pushed her up against the wall. Bitzan stood in front of her, between Natasha and the stall door, and began asking questions in a clam voice, for example, "where are you going" "are you alone" "Do you have people waiting for you or are people expecting you?"

When Natasha would not tell Bitzan her name and slapped his hands away from the zipper on her hoodie, Bitzan responded by changing his body language, reaching into his pocket, and pulling out a collapsible pocketknife. Natasha then gave a name, and Bitzan put the knife away and asked more questions. When Bitzan reached for her pants and she slapped his hand away, Bitzan displayed "frustration or anger" and stated, "This will just be easier if you cooperate." Natasha asked, "Are you going to hurt me?" Bitzan replied, "Not if you cooperate." Bitzan then asked personal questions, "Are you on birth control?" and "Is this a bad time of the month?" When Natasha hesitated in her response to his questions or to his demands, Bitzan gestured toward the knife in his pocket. At some point, Natasha asked herself, "What can I do to live?"

Bitzan proceeded to remove Natasha's boots, pants, and underwear. Bitzan began touching Natasha's genitals as she begged him to stop. Bitzan ordered Natasha to the floor, and he confirmed that she was not visible from outside the handicap stall. Natasha testified, "so I'm lying in that corner, and I remember him remarking..."good, you are out of sight," because he kind of glanced off to the side to...check under the stalls to see if I would be visible." Bitzan pulled down his pants, raped Natasha, and ejaculated inside her. Bitzan wiped himself off and ordered Natasha to remain in the stall until he left. Natasha waited for a few minutes after she heard the bathroom door close, dressed, and drove away.

Natasha, who was in ROTC at college, called her commanding officer for advice. The officer advised Natasha to go directly to a hospital, and she stayed on the phone while Natasha drove to the hospital. Natasha called her

> mother, and her parents came to the hospital. The hospital was not equipped to perform a sexual assault exam, so the family went to a nearby hospital where Natasha provided samples for a sexual assault kit. The samples were analyzed by the Iowa DCI laboratory. The DNA in the samples matched Bitzan's profile. Bitzan's DNA was in the data bank as a result of a previous sexual abuse conviction in Wyoming." *State v. Bitzan, 837 N.W.2d 679 (Table), 2013 WL 3273813, at *1 (Iowa Ct. App. June 26, 2013)*

Bitzan's primary argument on Appeal was that the evidence at trial was insufficient to support a finding of kidnapping or use of a dangerous weapon. *(Appellant's Brief, [ECF No. 11-7 at 29-54])* The Iowa Court of Appeals affirmed his conviction for First Degree Kidnapping. *Bitzan, 2013 WL 3273813 at *5.*

In reaching its decision, the Iowa Court of Appeals reviewed Iowa kidnapping precedent and concluded that there was "substantial evidence from which a rational jury could find the period of confinement or the distance of removal exceeded what is normally incidental to the commission of a sexual abuse." *Id. at *3-*4.* The Iowa Court of Appeals specifically noted that the victim was moved from the open area of the restroom to a stall, the door was latched, and she was further secluded beside a toilet, thus the risk of detection or interruption was significantly reduced. *Id. at *4.*

Bitzan also argued that counsel was ineffective for failing to challenge a sentence enhancement or an action during the enhancement portion of the trial. The Iowa Court of Appeals bypassed the arguments because it concluded that no enhancement was applied to Bitzan's sentence. Bitzan sought further review but was denied. Procedendo issued on Sept. 23. 2013.

III. Postconviction

Bitzan initiated PCR proceedings Aug. 11, 2014. He retained Counsel James ("Jim") McGuire who filed multiple Amended PCR Applications. *(Amended PCR Application, [ECF No. 11-14 at 52-66]; Second Amended PCR Application, [ECF No. 11-14 at 68-83])* Ultimately, Bitzan argued that:

> (1) trial counsel was ineffective for failing to conduct a sufficient pretrial investigation; (2) trial counsel was ineffective regarding Bitzan's right to testify, (3) trial counsel was ineffective for failing to challenge certain jurors, (4) trial counsel was ineffective for failing to protect confrontation rights, (5) trial counsel was ineffective for failing to file a motion in limine regarding testimony on a possible sexual assault spree, (6) trial counsel was ineffective for failing to object to the in court identification by the victim, (7) the State committed a Brady violation, (8) trial counsel was ineffective for failing to call an expert on victim credibility, (9) trial counsel was ineffective for failing to raise prosecutorial misconduct, (10) trial counsel was ineffective for failing to challenge Nurse Wear's vouching testimony, and (11) trial counsel was ineffective for failing to call a medical expert regarding vaginal tears. *(Second Amended PCR Application, [ECF No. 11-14 at 68-83])*

McGuire amended the PCR Application to include an additional claim of ineffective assistance of trial counsel in failing to properly cross-examine the alleged victim. On Aug. 17 and 18, 2016, the Iowa District Court for Monona County conducted a two-day evidentiary hearing on Bitzan's PCR Application. *(PCR Tr. Vol. I and II; [ECF Nos. 24-1 and 24-2])* Bitzan's original trial counsel, Dean Stowers and Nick Sarcone, both testified at the PCR hearing. Bitzan also testified on his own behalf for the first time.

Trial Counsel testified the theory of the case was that the sexual encounter was consensual in the rest stop bathroom. Bitzan testified that during their representation of him, trial counsel refused to listen to his version of the events. *(PCR Tr. Vol. II; [ECF No. 24-2 at 11])* Bitzan proceeded to testify that he first met the victim at the Sonic Restaurant in Sioux Falls, South Dakota, where the two agreed to drive in a caravan. *Id. at 10-16.* About 40 minutes into the drive, the victim pulled off at a rest stop and invited Bitzan into her vehicle where flirting quickly escalated into consensual intercourse in the back seat. *Id. at 17-21.*

Bitzan testified that his travel companion and best friend Louis Hamilton was in his vehicle right next to the victim's and certainly would've seen the sexual encounter. *Id. at 24.* Bitzan further testified that, at trial, Stowers: "[p]ushed [him] to testify. If we went to court and I testified to what he was telling me, like a story that I had met her and we had sex on the floor in the bathroom, and he gave me some random little details that were close to what her story was in the deposition that he had sent, and he told me that it just needed to be close. It needed to be close to what hers was, and he kept cutting me off when I would try to tell him my information that I was never in Iowa." *Id. at 35-36.*

Bitzan also stated that he kept trying to tell Stowers "[i]f anywhere, it would have been north in South Dakota," but "[h]e basically ignored me. He didn't really acknowledge that I said anything." *Id. at 38.* When confronted on cross-exam

about Stowers' notes from attorney client meetings that corroborated the theory of consensual sex at a rest stop, Bitzan stated that such notes would be incorrect and "not what [he] said to them." *Id. at 55-56.* Additionally, when confronted with a postconviction filing wherein Bitzan personally stated that he took a route through Iowa, he said it was probably a typo. *Id. at 66-67.*

Bitzan testified that he had ten to fifteen minutes at trial with his attorneys to discuss whether he would testify. *Id. at 41.* He claimed trial counsel never prepared him to testify or rehearsed his testimony, and that in the short meeting during trial, they suggested he shouldn't testify because he wouldn't make a good witness. *Id. at 42-43.* Bitzan said he felt "horrified" about the way Stowers described his option to testify, and felt uncomfortable because Stowers "wanted [him] to testify to something different than the truth, something different than what actually happened." *Id. at 43.* On cross-exam, Bitzan admitted that he said nothing about problems with his choice to testify or counsel until his allocution at sentencing. *Id. at 64.*

The record further shows that both Stowers and Sarcone testified at the PCR hearing that Bitzan never told them he met the victim at the Sonic in Sioux Falls, South Dakota. *Id. at 87, 92, 115, and 210-12.* Stowers testified that much of the preparation for trial and investigation of the case, as well as the trial strategy itself, was based on Bitzan telling them that the sexual encounter was in Iowa and that it was consensual. *(PCR Tr. Vol. I; [ECF No. 24-1 at 207])*

The PCR Court took the matter under advisement and issued a written decision denying the PCR Application on all accounts. Bitzan appealed this outcome which was denied. He also applied for Further Review with the Iowa Supreme Court, but his Application only concerned a subset of the issues raised at the PCR hearing. Specifically, he argued that the District Court erred by determining there was no prejudice from the vouching testimony; the Court of Appeals erred by failing to consider the prejudice of the cumulative errors by trial counsel; and the Court of Appeals erred by determining that there was a breach of duty during jury selection but no prejudice. Ultimately, the Iowa Supreme Court denied Further Review. *Bitzan v. State, 912 N.W.2d 855 (Iowa 2018)*

IV. Federal Habeas Petition

Bitzan initiated these proceedings March 26, 2018 by filing a *Pro Se* Habeas Petition and a request for counsel. */ECF Nos. 1, 2/* He filed an Amended Petition June 15, 2018 in which he presented 13 Claims. */ECF No. 4/* On Dec. 19, 2018, District Court Judge Linda Reade granted Bitzan's request to Amend the Petition, denied counsel, and ordered the State to provide all relevant evidence. */ECF No. 8/*

Feb. 13, 2019, Benjamin Parrott entered as State's Counsel and subsequently mailed documentary evidence to Bitzan on Feb. 15, 2019. Parrott mailed the documents a second time on April 24, 2019[4] wherein Bitzan discovered the "Iowa

[4] The first mailing of the documents were inadvertently destroyed by a postal machine and had to be re-sent.

Supreme Court Transmission Log" and found the record contained 2 volumes and 1 "gold" envelope making a reference to "confidential evidence" which was provided to the State Court of Appeals during Direct Appeal proceedings. *([ECF Nos. 9, 10, 11]; Bitzan Affidavit @ 1-2; Supp. Evid. Page 3)*[5]

March 14, 2019, the briefing schedule was established and Bitzan again requested the appointment of counsel which the Judge Reade denied on May 28, 2019, but held that he could request the documents he seeks through Discovery. *[ECF Nos. 13, 14, 15]* On June 12, 2019, Bitzan filed his Discovery request which included the *Pro Se* PCR Brief and PCR Trial Transcript that Parrott had failed to provide. *[ECF No. 19]* Parrott then provided the Brief but resisted Discovery of all other documents. *[ECF Nos. 20, 20-1]*

June 27, 2019, Bitzan filed a Reply which showed the relevance of the PCR Transcripts, depositions, police interviews, police reports, DNA reports and that State PCR Counsel had checked out ("Monona County Court File-State v. Bitzan, FECR015085"), which had been part of the State PCR proceedings. *[ECF No. 21]* July 18, 2019, Parrott subsequently provided the PCR Transcripts. *[ECF No. 24]*

July 19, 2019, Magistrate Mahoney granted Discovery as a request for copies of the record while noting Parrott's delayed response in providing the documents as

[5] Bitzan has never had the opportunity to review these confidential documents. Nor did PCR or Federal Habeas Counsel, thus forming the basis for ineffective assistance of both postconviction counsels in failing to fully develop the record before the District Court which resulted in a denial of both the Habeas Petition and COA based on both an incomplete and inaccurate record based on the records that were provided.

concerning because the previous denial of counsel was partially based on Discovery being provided. Magistrate Mahoney further stated that Bitzan never had access to all of the Discovery and ordered Parrott to provide them. *[ECF No. 25]*

Aug. 2, 2019, Parrott submitted a "notice of compliance" that they had provided most of the Discovery documents in accordance with "Rule 5" and that "[c]ertain documents had not yet been located but that they would supplement their filings." *[ECF No. 26]*

Sept. 5, 2019, Parrott filed a status update and explained that only four documents were available in the electronic records and that the Monona County District Court had granted access to counsel of record but they were denied access to all records as counsel of record wasn't allowed a sufficient security level to access the record. *[ECF Nos. 28, 28-1]*

After analyzing the records, Bitzan connected the alleged victim, Rau's statements, to medical personnel in the Medical Records part of the confidential evidence from the Transmission Log, and filed a subsequent Motion on Sept. 5, 2019 to Expand Discovery in order to obtain these otherwise confidential documents. *[ECF No. 29]*

Sept. 9, 2019, Parrott filed a status update, advising that the Monona County District Court reduced the security level from 5 to 3, which allowed access, and that Parrott found all but one document from Discovery, and further stated that some of

the confidential documents were located in the Minutes of Testimony, which were confidential under Iowa State Law. *[ECF Nos. 30, 30-1]*

Sept. 9, 2019, Parrott filed several incomplete supplemental exhibits of evidence, and a number of supplemental documents, several of which he sought to submit under seal, which the District Court granted. *[ECF Nos. 31, 32, 33, 34]*

Bitzan then determined that McGuire never had access to the confidential files during State PCR proceedings, never took additional efforts to obtain them, and had he tried to challenge the security level, he may have been able to access them in preparation for the PCR hearing. *(McGuire Affidavit; Supp. Evid. Pages 1-2)*

Oct. 10, 2019, Bitzan filed a Motion to Compel Production of all confidential evidence. *[ECF No. 35]* Oct. 15, 2019, he filed a *Pro Se* Supplemental Addendum which also expanded his argument as to the relevance of his potential claims for postconviction relief. *[ECF No. 36]*

Oct. 24, 2019, Parrott resisted claiming Bitzan sought "[a]dditional unnamed confidential documents from the state court records"; is speculating that confidential documents exist within the files, and argued that McGuire could've obtained a paper copy of the file. Parrott further argued that Bitzan is referring to 3 'court exhibits,' containing medical records of the victim that were admitted at trial for the limited purpose of motion practice. Namely, Court Exhibits 201; 202; and 203, and that the documents contain "privileged and confidential information" in which Respondents

believe an "in camera review" of the documents would greatly aid the Court in deciding the Motion to Compel. The State finally conceded that Bitzan needed the appointment of counsel, as he didn't know what he was doing. *[ECF No. 37]* On that same day, Parrott filed Respondent's Notice of In Camera Review and the District Court acknowledged receipt of the confidential documents. *[ECF No. 38]*

Nov. 5, 2019 Bitzan filed a Reply explaining that based on having viewed the Transmission Log from the Iowa State Supreme Court, he believed that; (1) the undisclosed medical records labeled as "confidential" were relevant to his trial as they would show significant inconsistencies of the alleged victim's testimony at trial, and (2) it was highly probable that other documents existed within this "confidential" file other than just the medical records, such as law enforcement reports and other materials not disclosed at trial which would have aided in his defense. *[ECF No. 39]*

Nov. 14, 2019, the Court appointed counsel to represent Bitzan. *[ECF No. 40]* Jennifer Jo Frese ("Frese") was the Counsel appointed and a new briefing schedule was established. *[ECF No. 40]*

March 3, 2020, Frese filed a Brief on Bitzan's behalf. *[ECF No. 44]* Frese presented 13-Claims for relief and adopted several Claims from the Amended Petition Bitzan previously filed including the following: 1. The trial evidence was insufficient to prove Bitzan confined or removed the victim or that Bitzan used a dangerous weapon, 2. Bitzan received ineffective assistance of trial counsel as his

attorney's failed to object to vouching testimony from a nurse, 3. Bitzan received ineffective assistance of trial counsel when his attorneys failed to conduct a proper pretrial investigation; and 4. The police failed to disclose exculpatory evidence.

Bitzan made numerous attempts to contact Frese during this time to request that she add additional claims to the Brief, but he was provided neither a copy of the intended brief nor a copy of the actual brief when Frese did file it.

Without having any knowledge of what Frese had filed, or if she filed anything at all, Bitzan attempted to Supplement her Brief with a *Pro Se* Supplemental Brief he filed on March 7, 2020, presenting numerous Claims that he believed she didn't present, but his filing was stricken. *[ECF Nos. 45, 46, 49]* In this stricken Brief, he presented numerous Claims which he believed were relevant to his case including ineffective assistance of trial counsel claims that Frese had simply never responded to in his failed attempts to communicate with her. March 17, 2020, Bitzan's *Pro Se* Reply to the State's resistance to his Supplemental Brief was filed. *[ECF No. 50]*

April 29, 2020, Parrott timely filed the State's Brief. *[ECF No. 53]*

May 15, 2020, Frese filed a Reply Brief on Bitzan's behalf. *[ECF No. 56]*

V. District Court Ruling

Aug. 27, 2020 Judge Reade's 26 page Order denied Habeas Relief and a COA. *[ECF No. 58][6]* Sept. 24, 2020 Bitzan filed a Notice of Appeal. *[ECF No. 60]*

[6] Because both PCR Counsel and Appointed counsel at the Federal Habeas level failed to fully develop the record, the District Court denied Habeas relief and the COA based on a woefully incomplete record.

VI. 8th Circuit Court of Appeals Proceedings

Oct. 9, 2020, the 8th Circuit Court of Appeals re-assigned Frese to represent Bitzan for the appeal. Oct. 30, 2020, Bitzan filed a motion for new counsel, which was denied. Nov. 12, 2020 Frese submitted a 343-word Application for COA.

March 25, 2021, the case was submitted, and March 26, 2021, the Panel denied the COA. Bitzan made numerous attempts to contact Frese and request she withdraw. She ultimately withdrew on April 6, 2021 only after Bitzan had a legal assistant contact her, his family contact her, and filed a Complaint with the Iowa Attorney Disciplinary Board. The Court granted Bitzan permission to file a *Pro Se* Petition for Rehearing, several extensions of time, and an overlength Petition.

VII. Panel Decision

March 26, 2021, in a 3-0 decision, the Panel decided Bitzan's Application for a Certificate of Appealability stating, in pertinent part, that its decision was based on having "[r]eviewed the original file of the district court..."

VIII. Newly Discovered and Incomplete Evidence

Aug. 2, 2019, in response to Judge Reade's Order that Parrott produce all Discovery under Rule 5 *[ECF No. 5]*, Parrott provided 29 documents. *[ECF No. 26]* However, the documents were either incomplete and/or didn't match the description of what the documents were purported to be. For example, Document *[ECF No. 26-10]*, which was labeled as "7k Heidi Priestley December 28, 2010

Interview", contained only the first page of what was clearly a multi-page interview. This report was crucial evidence as it was the first person whom the alleged victim had contacted immediately after the alleged assault, and the contents of this interview weren't provided as required by the District Court and therefore the Court didn't have a full record before it when deciding Bitzan's case.

Document *[ECF No. 26-12],* titled "DCI - Section 7 - Suspect Information" was also incomplete and contained only the first page of what was a multi-page report. This report was also crucial as it contained additional exhibits relating to witness statements relevant to the case. *[ECF No. 26-4]* contains both of the incomplete interviews as stated above.

On or about June 2, 2021, Bitzan received documents from a legal assistant which included documents that Habeas Counsel had never provided, including *[ECF No. 40]:* a District Court Order denying Bitzan's previously filed Motion for Discovery, *[ECF No. 27],* and the denial of his *Pro Se* Motion to Compel Production of Confidential Documents and Request for a Continuance. *[ECF No. 35]* This Order was never provided to Bitzan either by the Court or from his appointed counsel. *[ECF No. 41]:* Notice of Appearance filed by Jennifer Frese.

In a never-before-seen Status Report, *[ECF No. 42],* Frese agreed with Parrott that Bitzan didn't need the Discovery documents that he previously requested. Bitzan's understanding was that Parrott was ordered by Judge Reade to provide them

to Bitzan and there was a dispute about the State Court lowering the confidentiality status on the confidential items. Parrott claimed to have sent them, Bitzan received some of the documents, however many weren't provided, and Parrott claimed that some were returned and destroyed.

Additionally, in a conversation between Bitzan and Frese, she misinformed him regarding the Motion to Compel, claiming that Judge Reade didn't need to rule on it, when in fact she knew that she agreed with Parrott that Bitzan didn't need those documents.[7]

IX. PCR Counsel James McGuire

While having received some documents from Bitzan's trial counsel, PCR Counsel Jim McGuire didn't receive the complete file. McGuire was informed by Stowers that he had a "large" client file, yet he provided only 5-pages of documents, all of which were phone records! *(McGuire Affidavit; Supp. Evid. Pages 1-2)* While realizing the file was woefully inadequate and aware of the existence of confidential files that may exist, McGuire still took no further steps to compel Stowers to provide the complete record and made no attempt to obtain the confidential records.

X. Federal Habeas Counsel Jennifer Jo Frese

[7] Had Bitzan known of all these documents, they would've strongly supported his ineffective assistance of trial counsel and actual innocence claims, and would've formed the basis for additional claims for ineffective assistance of trial counsel and other potentially meritorious claims for postconviction relief.

When Judge Reade appointed Jennifer Frese, she was simultaneously representing other clients as well as Christhian Rivera, who was the defendant in the high-profile Mollie Tibbits murder trial.[8] At the time of her appointment in Bitzan's case, Frese and her husband Chad Frese, entered as Rivera's counsel and immediately withdrew the request to bar media from the court in his case.

From Nov. 13 to 14, 2019, hearings occurred on a detailed motion to suppress Rivera's confession. Jennifer Frese was appointed this same date as counsel in Bitzan's case. *[ECF No. 40]* Dec. 3, 2019, the Court ruled part of Rivera's interrogation violated Miranda, but that key statements which led police to find her body and the body itself were admissible. Jan. 22, 2020, Frese submitted a detailed application to stay proceedings and supplement the application for discretionary review and interlocutory order; Feb 4, 2020, the Iowa Supreme Court denied it. Dec. 17, 2020, Rivera's trial date was reset and occurred May 17, 2021.

All of these actions occurred during crucial phases of Bitzan's case. In Bitzan's case, after Judge Reade appointed Frese Dec. 23, 2019, *[ECF Nos. 40, 41, 42, 43],* she spoke briefly with Bitzan on Jan. 22, 2020 where she agreed he could submit a *Pro Se* Brief and affirmed that Judge Reade must address the Motion to Compel because he submitted it prior to her appointment. *(Bitzan Affidavit @3;*

[8] Frese was actively representing clients in many cases at the time of her appointment in Bitzan's case including, but not limited to: *U.S. v. Ceja, 820 Fed. Appx. 477 (8th Cir. 2020); U.S. v. Busch, 2020 U.S. Dist. LEXIS 76059 (8th Cir. April 13, 2020); U.S. v. Mims, 2020 U.S. Dist. LEXIS 186806 (8th Cir. Sept 23, 2020); U.S. v. Goad, 2020 U.S. Dist. LEXIS 175098 (8th Cir. Sept. 24, 2020)*

*Dec. 23, 2019 & Jan 15, 2020 Letters from Frese; April 6, 2021 Letter to Frese *1-2; Supp. Evid. Pages 3; 7-8; 16-17)*

Frese's March 3, 2020, Merits Brief pointed mostly to Bitzan's initial *Pro Se* documents. *[ECF No. 44]* Bitzan filed a *Pro Se* Brief late, on March 7, 2020, as another inmate assaulted him. *([ECF Nos. 45, 46], Bitzan Affidavit @4; April 6, 2021 Letter to Frese *1-2; Supp. Evid. Pages 4; 16-17)* Upon Parrott's request, Magistrate Mahoney struck the *Pro Se* Brief before his response arrived. *[ECF Nos. 47, 48, 49, 50]* Parrott's Motion to Strike informed Bitzan that Frese filed a Brief.

March 20, 2020, Bitzan called Frese's office and advised that he hadn't reviewed the Brief in advance of her filing, nor had he received a copy. *(Bitzan Affidavit @5-6; March 20, 2020 Letter from Frese; April 6, 2021 Letter to Frese *1-2; Supp. Evid. Pages 4; 9; 16-17)* April 29, 2020 Parrott submitted the State's Brief. *[ECF No. 53]* May 15, 2020 Frese submitted her Reply. *[ECF No. 56]* Aug. 10, 2020, Bitzan called Frese's office seeking an update on the Motion to Compel. *(Bitzan Affidavit @7; April 6, 2021 Letter to Frese *2-3; Supp. Evid. Pages 4; 17-18)*

Aug. 27, 2020, Judge Reade issued her Order denying Habeas Relief. *[ECF No. 58]* Bitzan wasn't aware that this had occurred and called Frese on Sept. 24, 2020 for a status update; he was advised it was mailed and would arrive the following week. *(Bitzan Affidavit @8; April 6, 2021 Letter to Frese *3-4; Supp. Evid. Pages 4; 18-19)* Bitzan received a Notice of Appeal in the mail on Sept. 28, 2020, not a status

update. *([ECF No. 60]; Bitzan Affidavit @9; Sept. 25, 2020 Letter from Frese; Supp. Evid. Pages 4; 10)* Bitzan then immediately called Frese's office requesting a copy of the Order. *(Bitzan Affidavit @10; April 6, 2021 Letter to Frese *3-4; Supp. Evid. Pages 4; 18-19)*

Notably, he was informed of the ruling two days after the Sept. 26, 2020 deadline for reconsideration of incorrect factual findings, failure to rule on 4 issues, and was thus foreclosed from filing any intended reconsideration, in *Pro Se* or otherwise. Frese then requested appointment in the 8th Circuit which the Court granted Oct. 9, 2020. At that time, Bitzan hadn't received any filings or Orders and requested his mother to contact the Clerk. *(Bitzan Affidavit @11; Supp. Evid. Page 5)* Bitzan's mother, Cassie Zent, mailed the Order denying Habeas Relief which he received Oct. 14, 2020. *(Bitzan Affidavit @12; Supp Evid. Page 5)*

Bitzan spoke with Frese on Oct. 21, 2020; explaining that he hadn't received the ruling supposedly sent to him on Sept. 28, 2020; Frese responded that she didn't know why they would send another copy and stated the Court would conclude she protected his rights. *(Bitzan Affidavit @13; Sept. 28, 2020 Letter from Frese; Supp. Evid. Pages 5; 11)*

This prompted the Oct. 28, 2020 *Pro Se* Motion for Substitute Counsel, to submit a Pro Se COA Application, and to proceed *Pro Se* if substitute counsel was denied which the Court denied Oct. 29, 2020. On Nov. 4, 2020, Bitzan filed notice

of Interlocutory Appeal to the U.S. Supreme Court, requested a stay of proceedings, and that the Court strike all documents Frese had filed. Nov. 12, 2020, Frese filed a 343-word COA Application that didn't specify a basis for relief and deflected responsibility to the Court. Nov. 23, 2020, Bitzan filed the Interlocutory Appeal.

March 26, 2021, the 8th Circuit dismissed the Appeal and denied the COA and the Motion for Stay. April 1, 2021, Frese's office refused multiple calls from Bitzan and eventually answered one call where Bitzan demanded that Frese withdraw, and he was advised to call her cell phone which Frese ignored. *(Bitzan Affidavit @14; April 6, 2021 Letter to Frese *4-5; Supp. Evid. Pages 5; 19-20)*

April 2, 2021, Bitzan received the March 26, 2021 Judgment. *(Bitzan Affidavit @15; March 30, 2021 Letter from Frese; Supp. Evid. Pages 5; 12)* Frese's office continued to refuse multiple calls from Bitzan but finally answered one call where Bitzan again demanded that she withdraw; was advised to call her cell which she ignored; Bitzan again called her office and they continued to refuse his calls. Eventually the office answered and advised Bitzan to call Frese's cell phone again and she ignored 3 more attempts. *(Bitzan Affidavit @16; Supp. Evid. Pages 5-6)*

April 6, 2021, Bitzan and Frese finally spoke and she agreed to withdraw. *(Bitzan Affidavit @17, April 6, 2021 Letter to Frese, April 7, 2021 Letter from Frese; Supp. Evid. Pages 6; 13-14)* Bitzan then filed an Attorney Disciplinary Board Ethics Complaint and asserted Frese's unethical conduct:

a. Misled him concerning the Court's duty to rule on his Motion to Compel;
b. Misled him about the *Pro Se* Brief and the Court's duty to rule on it;
c. Caused her failure to timely serve him with her "Merits Brief";
d. Caused her refusal to adequately communicate;
e. Caused her failure to serve him with the Aug. 27, 2020, Court Order;
f. Prevented him from filing a motion to reconsider;
g. Prevented him from obtaining a complete record to present to the Court;
h. Obstructed his right to be heard by the Court;
i. Caused her to try to run out the clock and procedurally time-bar him.
(File No: 2021-088, Supp. Evid. Pages 14-15; 22)

April 7, 2021, the Court allowed her to withdraw, allowed Bitzan to proceed *Pro Se*, file a Petition for Rehearing, and a time extension through May 7, 2021.

During the time Frese represented Bitzan, she was handling multiple cases including the high profile and complex Tibbits case. As a result of her juggling multiple cases, she failed to pursue the confidential documents; obstructed Bitzan's efforts to obtain them, failed to secure a complete copy of the record, and failed to verify that the record provided to the District Court was complete (which it was not, and had she checked she would've seen that).

Frese failed to properly present Bitzan's facts, details, or legal theories; precluded the Court from hearing many facts and contradictions for the first time; and had she adequately reviewed the record, and presented proper pleadings, the District Court would've granted COA for all issues.

Additionally, Bitzan's State PCR Counsel, James McGuire, repeatedly offered to assist Frese at least 4 times with his extensive knowledge of the case, but Frese refused his assistance or input. *(McGuire Affidavit; Supp. Evid. Pages 1-2)*

In sum, Judge Reade ruled on an incomplete record.

STATEMENT OF FACTS

Bitzan had extraordinarily strong and legitimate claims for ineffective assistance of trial counsel based on counsel's failure to effectively cross-examine the alleged victim at trial and many other potentially meritorious IAC claims. Under Iowa statutory law, all claims of IAC must be brought in the first instance in PCR proceedings, and not on Direct Appeal.

Bitzan's counsel during the PCR proceedings, failed to obtain either the complete client file from trial counsel or to take further steps to obtain the confidential file from the State, such as filing for an in camera review or a request to lower the security level. As such, PCR Counsel was unprepared for the PCR hearing and was unable to present crucial evidence in support of Bitzan's claims.

Once Bitzan filed his Federal Habeas Petition, appointed Counsel Frese also failed to pursue these confidential documents nor did she verify the accuracy of the documents that were provided to the District Court under Rule 5. As a result, she provided a woefully incomplete Brief and subsequently incomplete record to the Habeas Court upon which Bitzan's Habeas Relief and COA were denied.

Furthermore, Frese didn't communicate or confer with Bitzan about crucial matters and didn't provide him with copies of the Briefs she filed with the Court or the Court's subsequent Orders. As a result, Bitzan was unable to file any necessary replies or confer with counsel regarding necessary responses which were controlled by statutory deadlines. This was due, in large part, to Frese's numerous cases which she was handling simultaneously with Bitzan's case, including the Mollie Tibbits case, which was a high profile and extraordinarily complex trial.

Despite Bitzan's many attempts to contact Frese and to have her either file necessary responses or remove herself from the case, she simply never responded. Bitzan's attempts to file anything with the Court were also categorically stricken as he had the appointment of counsel. Most egregious of all, was Frese's agreement with the State that Bitzan didn't need the missing records.

ARGUMENT AND AUTHORITIES

This Court should grant this Petition and Rehear the case En Banc. The issues requiring a full Court resolution concern the *Sixth Amendment* and existing Supreme Court precedent as held in *Martinez v. Ryan, 132 S. Ct. 1309 (2012); Trevino v. Thaler, 133 S. Ct. 1911 (2013),* and a recent 8th Circuit decision in *Harris v. Wallace, 984 F.3d, 641 (8th Cir. 2021).* Review by the full Court is "necessary to secure or maintain uniformity of the Court's decisions." *Fed. R. App. P. 35(a)(1).* The question is also one of "exceptional importance." *Fed. R. App. P. 35(a)(2).*

I. *The Panel opinion, while silent, tacitly allowed the District Court to decide the Claims set forth in Bitzan's case while not having a complete record before it due to the failure of appointed postconviction counsel's at both the state and federal levels, to perfect the record.*

II. *Should the doctrine outlined in Martinez, Trevino, and Harris apply with equal force to similar petitions filed by State prisoners claiming denial of Habeas relief or procedural default as a result of the ineffectiveness of postconviction counsel appointed during federal Habeas review?*

Bitzan never received a full and adequate consideration of all his potentially meritorious claims for postconviction relief to which he was entitled. This included the PCR review at the State level and during the Federal Habeas review. Bitzan had strong claims of ineffective assistance of trial counsel that should've been, and could've been, presented during both the PCR and federal review, but neither counsel at either level fully and adequately presented these claims and the result was extremely prejudicial to Bitzan's entire postconviction review at all levels.

PCR counsel was aware that there was a "confidential" file that the State was withholding from him during the PCR review but made little effort to obtain these crucial documents that went directly to the heart of Bitzan's claims of actual innocence and ineffective assistance of trial counsel. Had counsel filed a motion to

reduce the security level (which the State did later during the federal proceedings), its highly likely that such a request would've been granted and the files produced.

After the Federal District Court appointed Frese as counsel to represent Bitzan during the Habeas proceedings, who was juggling multiple cases, (including the high profile and complex Mollie Tibbits case), she also failed to develop the record or ensure that the portions of the record, as provided to the District Court under Rule 5, was complete.

Bitzan disagrees with the Panel's silent denial of his COA, which tacitly relied on the District Court's denial based on an incomplete and undeveloped record before it. Because the District Court in denying him both Habeas Relief and his request for COA, didn't have either the complete record before it, or, what it did have before it, was incomplete, Bitzan was denied a full and adequate hearing before the District Court and was denied his right to due process.

The recent 8th Circuit decision in *Harris v. Wallace, 984 F.3d 641 (8th Cir. 2021),* is instructive on this issue.

In *Harris,* the 8th Circuit Court of Appeals ruled that the so-called *"Martinez exception"* should've allowed a procedurally defaulted Federal Habeas Claim of ineffective assistance of state postconviction counsel to be heard by the U.S. District Court for the Eastern District of Missouri, remanding for a hearing on that claim.

Jim Harris, a Missouri state prisoner, encountered an obstacle to Federal Habeas relief that many prisoners face - procedural default. In 2010, he was charged in State Court of robbery and gun offenses. Before that case got moving, federal authorities "borrowed" Harris from State custody and charged him with robbery and gun charges - unrelated to his State case. He pleaded guilty to the Federal charges and was sentenced to 25 years in Federal prison. He was then returned to State custody and handed a 15-year sentence in State Court, to run concurrent with his already-imposed Federal sentence. He remained in State custody until he completed that sentence and then went into Federal custody.

Harris assumed his Federal sentence was already running with his State sentence. After all, that's what his State lawyer told him. However, the Federal District Court was silent on whether the federal sentence was concurrent with the State sentence. This required the Bureau of Prisons to begin his 25-year Federal sentence on the day he entered Federal prison.

Harris then filed a counseled State postconviction motion under Rule 24.035, claiming ineffective assistance of counsel as to "the amount of his sentence he was to serve." After a hearing, where plea counsel admitted Harris pleaded guilty "in light of the fact he was already serving a 25-year sentence, which would completely swallow the 15-year sentence," the Court still denied his motion.

Harris appealed and argued that postconviction counsel was ineffective for not raising that plea counsel was ineffective in her advice that the two sentences would be concurrent. The Missouri Court of Appeals, however, found he had procedurally defaulted this claim because it wasn't raised in his Rule 24.035 motion. His appeal was denied without the Court hearing the claim.

Harris, now *Pro Se*, filed a timely Federal Habeas Corpus Petition, under *28 U.S.C. §2254*, reiterating his original plea counsel IAC claim. The District Court denied his petition. He appealed, and the 8th Circuit granted a certificate of appealability on the issue.

It's well established that before a Federal Court can hear a State prisoner's Habeas claim, he must "exhaust" that claim in any State postconviction proceedings available to him. Failure to do so results in the claim being "procedurally defaulted," meaning the Federal Court cannot hear it. *Coleman v. Thompson, 501 U.S. 722 (1991)* But a Federal Court may hear a defaulted claim if "cause and prejudice" can be shown. That is, there was "cause" to excuse the failure to raise the claim, and the petitioner would be "prejudiced" if the Federal Court declines to hear the claim.

The U.S. Supreme Court created a narrow exception to allow IAC claims to excuse procedural default. In *Martinez v. Ryan, 566 U.S. 1 (2012),* the Court held that a "substantial" IAC of trial counsel claim that is procedurally defaulted, may still

be heard if postconviction counsel was ineffective for not raising it (and if State postconviction review was the "initial" proceeding for such claims).

The Supreme Court said in *Martinez,* that to show an IAC claim is "substantial," the claim must have "some merit." At a minimum, the petitioner must show that the issue - in the present case, whether plea counsel was ineffective under *Strickland v. Washington, 466 U.S. 668 (1984)* - "was debatable among jurists of reason." *Miller-El v. Cockrell, 537 U.S. 322 (2003)* With respect to cause, the petitioner must show that during the State collateral-review-proceeding, counsel - in the present case, PCR counsel - was ineffective under *Strickland.*

The Court noted that since the District Court didn't recognize Harris's claim, "it never reached the issue of procedural default or determined whether the *Martinez* exception applies." Thus, the Court remanded to the District Court with instructions to "hold an evidentiary hearing to consider these matters in the first instance. If the District Court determines that procedural default is excused for Harris's claim, it should proceed to the question on whether the claim merits habeas relief." Accordingly, the 8th Circuit vacated the District Court's dismissal of Harris's IAC claim.

Bitzan's immediate case is on point with Harris as his Habeas Petition was denied based upon both his PCR and Federal Habeas Attorneys failing to adequately develop the record which resulted in a denial of his Habeas Petition and

the resulting denial of his COA. Had counsel at both levels provided effective assistance, the record would've been developed, the inadequate record that was provided would've been identified as incomplete, further steps would've been taken to make the record complete, and Bitzan's ineffective assistance of trial counsel claims would've resulted in a more favorable outcome.

In particular, it's appropriate to consider whether *Martinez v. Ryan, ___ U.S. ___, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012)*, and *Trevino v. Thaler, ___ U.S. ___, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013)*, should not be limited to petitions for postconviction relief filed by State prisoners under *28 U.S.C. §2254*, or similar petitions filed by federal prisoners under *28 U.S.C. §2255*, and expanded to include whether, perhaps under limited circumstances, these two cases may also apply to ineffective assistance of postconviction counsel at both the State level and during Federal Habeas proceedings.

If *Martinez* and *Trevino* have an animating principle, it's that a prisoner must be afforded at least one opportunity to present their claim that trial counsel was ineffective and to present it with the assistance of effective counsel. *Martinez* pointed out that "if counsel's errors in an initial-review-collateral-proceeding do not establish cause to excuse [a] procedural default in a federal habeas proceeding, no court will review the prisoner's claims." *Id. 132 S. Ct. at 1316. Trevino* reiterated that "failure to consider a lawyer's 'ineffectiveness' during an initial-review-collateral-

proceeding as a potential 'cause' for excusing a procedural default will deprive the defendant of any opportunity at all for review of an ineffective-assistance-of-trial-counsel claim." *Id. 133 S. Ct. at 1921.*

In this case, if one grants that Bitzan's *§2254* counsel was ineffective in failing to research and attach the evidence in support of her ineffectiveness claim to Bitzan's Petition, Bitzan will have completed his journey through the Court system without ever having had a chance to present a colorable ineffective assistance of trial counsel claim to a Court with the aid of an effective lawyer - which seems to be exactly the problem that *Martinez* and *Trevino* sought to remedy.

Whether the concerns that motivated *Martinez* and *Trevino* apply equally to postconviction procedures afforded to State prisoners who have ineffective counsel perpetrated by counsel appointed during the Federal Habeas Review, is a question worth examining. See: *Ramirez v. United States, 799 F.3d 854, 854 (7th Cir. 2015)*

Like the State systems that *Trevino* discussed, the Federal system also strongly discourages ineffective trial counsel claims on direct appeal. See *Ramirez, 799 F.3d at 852-53.* In our circuit, "[w]e only review ineffective assistance of counsel claims on direct appeal in 'exceptional circumstances.'" *United States v. Mathison, 760 F.3d 828, 831 (8th Cir. 2014)*

As a result, the *§2254* Petition that Bitzan brought was effectively his first opportunity to bring an ineffective assistance of trial counsel claim. *Martinez* was

clear that Habeas review for similarly situated prisoners convicted in State Court shouldn't be foreclosed unless they had the benefit of attorney representation in bringing their ineffectiveness claims, and that representation was effective. See: *132 S.Ct. at 1317* ("To present a claim of ineffective assistance at trial in accordance with the State's procedures,...a prisoner likely needs an effective attorney.").[1]

Again, here in Bitzan's immediate case, he was denied the effective assistance of postconviction counsel at both the State and Federal levels. The decision in *Martinez* is instructive in this case. In *Martinez v. Ryan, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012),* the Supreme Court considered the right of a state prisoner to raise, in a Federal Habeas proceeding, a claim of ineffective assistance of trial counsel. In that case, an Arizona procedural rule required a defendant convicted at trial to raise a claim of ineffective assistance of trial counsel during his first State collateral proceeding – or lose the claim.

The defendant in *Martinez* didn't comply with the State procedural rule. But he argued that the Federal Habeas Court should excuse his State procedural failing, on the ground that he had good "cause" for not raising the claim at the right time, namely that, not only had he lacked effective counsel during trial, but also he lacked effective counsel during his first State-collateral-review-proceeding. The Supreme Court held that lack of counsel on collateral review might excuse a defendant's State law procedural default: "[A] procedural default will not bar a federal habeas court

from hearing a substantial claim of ineffective assistance at trial if, in the [State's] initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Id. 132 S. Ct. at 1320.*

At the same time, the Supreme Court qualified its holding. The high court said that the holding applied where State procedural law said that "claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding." *Ibid. (emphasis added)*

In the immediate case, Iowa State law requires a defendant to raise an ineffective-assistance-of-trial-counsel claim only in a State collateral-review proceeding: An ineffective assistance of counsel claim in a criminal case shall be determined by filing an application for postconviction relief pursuant to chapter 822. The claim need not be raised on direct appeal from the criminal proceedings in order to preserve the claim for postconviction relief purposes, and the claim shall not be decided on direct appeal from the criminal proceedings. *Iowa Code §814.7; State v. Tucker, ___ N.W.2d ___ (Iowa 2021)*

The plain language of the Iowa statute makes it impossible for an ineffective assistance claim to be presented on direct review. As such, the *Martinez* exception applies in this procedural regime.

CONCLUSION

While the Panel's decision is silent, it rests on the record of the lower court proceedings. Unfortunately, both Bitzan's state PCR Counsel and especially his appointed Habeas Counsel failed to fully develop the record or ensure the record that was before the District Court (or the State Court for that matter) was complete. If not for the ineffectiveness of both counsels, there is a reasonable probability that Bitzan's Habeas Petition would've been decided more favorably, and his COA would've been granted.

These failures on the part of both postconviction counsels fall under *Martinez/Trevino/Harris* and their progeny. As such, the Court must remand these proceedings back to the District Court for further development of the record where Bitzan can fully present his potentially meritorious claims for ineffective assistance of trial counsel. Based on the foregoing reasons, Bitzan respectfully requests that this Court grant Rehearing En Banc and settle these important questions of Federal law.

Respectfully submitted,

Dated the 7 day of July, 2021

Mark Bitzan

Mark Bitzan 6290077
Iowa State Penitentiary
P.O. Box 316
Fort Madison, IA 52627

CERTIFICATE OF COMPLIANCE

The above Document complies with *Fed. R. App. P. 35(b)(3)* and is submitted as both a Petition for Panel Rehearing and Rehearing En Banc.

The above Document complies with the Type-Volume word limit of *Fed. R. App. P. 35(b)(2)(A)* and *Fed. R. App. P. 40(b)(1)* because it contains 8653 words according to Microsoft Office Word 2007 word count as prescribed by *Fed. R. App. P. 32(g)(1)* and in accordance with the 8th Circuit Court Order granting permission to submit an overlength Petition on June 1st, 2021.

The above Document complies with the Typeface and Type-Style Requirements of *Fed. R. App. P. 32(a)(5)* and *Fed. R. App. P. 32(a)(6)* as required by *Fed. R. App. P. 40(b)(1)* because it's prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in size 14 Baskerville Old Face font.

Dated the 7 day of July, 2021

Mark Bitzan

Mark Bitzan 6290077
Iowa State Penitentiary
P.O. Box 316
Fort Madison, IA 52627

CERTIFICATE OF FILING & SERVICE

I, Mark Bitzan declare the following under the penalty of perjury. I placed (1) copy of each of the following stated documents into two separate 9x12 manila envelopes:

a. *Pro Se* Petition for Rehearing with Suggestion for Rehearing En Banc;

b. Motion Requesting to Submit an Overlength Petition as per the Court's June 1st, 2021 Order;

c. Appendix of Supplemental Evidence in Support of Petition for Rehearing with Suggestion for Rehearing En Banc;

d. The Attached Supplemental Evidence Documents.

I further state that I personally handed the two 9x12 manila envelopes containing (1) copy of each of the above stated documents to a correctional officer at the Iowa State Penitentiary marked with prepaid FedEx Guaranteed Next-Day Delivery Postage.

The 9x12 manila envelopes contained (1) complete copy of each set of the above stated documents specifically addressed to the following recipients:

1. Clerk of 8th Circuit Court of Appeals, Thomas F. Eagleton Courthouse, 111 South 10th Street, #22.300, St. Louis, MO 63102;
2. Office of the Attorney General of Iowa, Hoover State Office Building, 1305 E. Walnut Street, Des Moines, IA 50319.

I further declare that the statements made herein are true and correct subject to the penalty for perjury.

Dated the 7 day of July, 2021

Mark Bitzan

Mark Bitzan 6290077
Iowa State Penitentiary
P.O. Box 316
Fort Madison, IA 52627

APPENDIX OF EVIDENCE

UNDERLYING *FEDERAL COURT* PROCEEDINGS

EXHIBIT

Z

(July 7, 2021)

Eighth Circuit Court of Appeals

Request to Submit the Overlength Petition for Rehearing and

Rehearing En Banc per the Court's June 1, 2021 Order

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Mark Bitzan, Defendant-Appellant, v. Patti Wachtendorf, and ISP, Respondent-Appellees.	Case No. 20-3003 REQUEST TO SUBMIT OVERLENGTH PETITION AS PER THE COURT'S JUNE 1st, 2021 ORDER.

COMES NOW, Mark Bitzan *Pro Se*, and States the following:

1. May 23rd, 2021, Bitzan submitted a Motion for permission to file an overlength Petition for Rehearing citing the rare and extraordinary circumstances that have occurred in this case in addition to several other pertinent reasons.
2. June 1st, 2021, the 8th Circuit Court of Appeals granted this request.
3. Bitzan has since undertaken substantial research and effort to develop an on point and streamlined Petition.
4. However, to accurately apprise the Court of the necessary and relevant facts concerning both existing and novel topics, the Petition has indeed run overlength.
5. Microsoft Office Word 2007 word count as prescribed by *Fed. R. App. P. 32(g)(1)* shows a total of 8653 words in the document.
6. Bitzan therefore requests that the Court please accept the Petition as prepared and submitted in accordance with the June 1st, 2021 Order so the novel topics of factual and legal importance may be properly addressed.

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WHEREFORE, Bitzan prays that the 8th Circuit Court of Appeals will grant this request and allow the overlength *Pro Se* Petition for Rehearing with a Suggestion for Rehearing En Banc in accordance with its previous June 1st, 2021 Order.

Dated the 7 day of July, 2021

Respectfully Submitted,

Mark Bitzan

Mark Bitzan 6290077
Iowa State Penitentiary
P.O. Box 316
Fort Madison, IA 52627

APPENDIX OF EVIDENCE

UNDERLYING *FEDERAL COURT* PROCEEDINGS

EXHIBIT

AA

(May 28, 2021)

Eighth Circuit Court of Appeals

Pro Se Request for Expanded Word Limit for Petition for

Rehearing with Suggestion for Rehearing En Banc

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Mark Bitzan, Appellant, v. Patti Wachtendorf, and Iowa State Penitentiary, Appellees.	Case No. 20-3003 REQUEST FOR EXPANDED WORD LIMIT CONCERNING PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC.

COMES NOW, Mark Bitzan *Pro Se*, and States the following:

1. Bitzan filed for Habeas Corpus on March 26th, 2018.
2. The District Court granted Discovery of specific underlying documents, evidence, and records that the State Courts considered during Direct Appeal and PCR.
3. During this process, he learned that the State Courts considered 'confidential' records and evidence during both Direct Appeal and PCR with a security level that allowed access to Court employees only and he filed a Motion to Compel Production of the entire 'confidential' file.
4. The State responded that he didn't understand Habeas Corpus and requested counsel for him.
5. Dec. 23rd, 2019, the District Court appointed Jennifer Frese as his counsel.
6. She misled him concerning the District Court's obligation to review the issues, to address the Motion to Compel or his *Pro Se* Supplemental Brief; she failed to serve him the Aug. 27th, 2020 Court Order denying Habeas Relief, and they disagreed on numerous issues.
7. The circumstances caused months of contention seeking Frese's withdrawal which Bitzan achieved April 7th, 2021 two days prior to the April 9th, 2021 expiration of the timeline to file a Petition for Rehearing.
8. On April 7th, 2021, the Court granted its own motion for time extension through May 7th, 2021.
9. On May 7th, 2021, the Court granted Bitzan's request for time extension through June 7th, 2021 and he is now seeking a request for extension of time through July 7th, 2021.

10. During this time, Bitzan has only just obtained newly discovered evidence from PCR Counsel (as of May 19th, 2021), is seeking affidavits in this regard, has been preparing the Petition, and is still seeking the newly discovered relevant underlying 'confidential' State Court evidence.
11. Bitzan has encountered numerous obstacles in obtaining the complete State Court Record and all relevant documents contained therein which has obstructed numerous arguments, Claims, and untold volumes of relevant evidence from reaching the Court.
12. Through painstaking research and connection of events in all records now available, Bitzan seeks to show the Court how far reaching the substance of the newly discovered and suppressed 'confidential' evidence is, and the impact it had concerning the truth and accuracy of the State Court rulings that upheld his conviction.
13. While a Petition for Rehearing, *Fed. R. App. P. 40(b)(1),* or Rehearing En Banc, *Fed. R. App. P. 35(b)(2)(A),* is limited to 3,900 words, the present situation is rare and extraordinary and to apprise the Court of all necessary facts and resulting prejudice requires an increased word-limit of 7,000 words or at least a substantial increase as determined by the Court.

WHEREFORE, Bitzan prays that the 8th Circuit Court of Appeals will grant this request and allow him an expanded word limit to file the Pro Se Petition for Rehearing with a Suggestion for Rehearing En Banc.

Dated the 25th day of May, 2021

Respectfully Submitted,

Mark Bitzan

Mark Bitzan 6290077
Iowa State Penitentiary
P.O. Box 316
Fort Madison, IA 52627

CERTIFICATE OF FILING & SERVICE

Mark Bitzan declares the following under penalty of perjury. He placed (1) copy of the Motion to Expand the Word Limit for the Petition for Rehearing with Suggestion for Rehearing En Banc to the Clerk of 8th Circuit Court of Appeals, Thomas F. Eagleton Courthouse, 111 South 10th Street, St. Louis, MO, in the Prison Mail Bag marked for FedEx Second-Day delivery on the following date. Bitzan further certifies the Clerk of Court served the above document on the appropriate parties through Electronic Filing.

Dated the 25th day of May, 2021

Mark Bitzan

Mark Bitzan 6290077
Iowa State Penitentiary
P.O. Box 316
Fort Madison, IA 52627

APPENDIX OF EVIDENCE

UNDERLYING *FEDERAL COURT* PROCEEDINGS

EXHIBIT

BB

(May 28, 2021)

Eighth Circuit Court of Appeals

Pro Se Request for Extension of Time to Submit Petition for Rehearing with Suggestion for Rehearing En Banc

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Mark Bitzan, Appellant, v. Patti Wachtendorf, and Iowa State Penitentiary, Appellees.	Case No. 20-3003 REQUEST FOR EXTENSION OF TIME TO FILE PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC.

COMES NOW, Mark Bitzan *Pro Se*, and States the following:

1. Bitzan filed for Habeas Corpus Relief on March 26th, 2018 and requested counsel twice.
2. The District Court denied counsel but granted Discovery which exposed that the State Court's considered 'confidential' evidence during appeal that neither he nor his Counsel could access.
3. Bitzan then filed a Motion to Compel Production of all 'confidential' evidence and the State requested that counsel be appointed for him claiming that he didn't know what he was doing.
4. The Court appointed Jennifer Frese as his counsel on Dec. 23rd, 2019.
5. During her duration as counsel, she misled him concerning the District Court's obligation to address the Motion to Compel, his *Pro Se* Supplemental Brief, or even to review the issues, and she failed to serve him the Aug. 27th, 2020 Court Order denying Habeas Relief.
6. These circumstances forced Bitzan to seek Frese's withdrawal which the 8th Circuit Court of Appeals granted on April 7th, 2021 two days prior to the April 9th, 2021 expiration of time to file a Petition for Rehearing.
7. On April 7th, 2021, the Court granted its own motion for time extension through May 7th, 2021.
8. On May 7th, 2021, the Court granted Bitzan's request for time extension through June 7th, 2021.
9. During this time, Bitzan only just obtained newly discovered evidence from PCR Counsel, is seeking affidavits in this regard, is seeking untold volumes of newly discovered relevant underlying evidence from State Court Records, and he has been preparing the Petition.

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10. Bitzan is requesting that due to the exceedingly rare and extraordinary circumstances in this case, the Court please grant an additional extension of time to file a Pro Se Petition for Rehearing with a Suggestion for Rehearing En Banc up to and including July 7th, 2021.

WHEREFORE, Bitzan prays that the 8th Circuit Court of Appeals will grant this request and allow him the additional extension of time to file the Pro Se Petition for Rehearing with a Suggestion for Rehearing En Banc.

Dated the 25th day of May, 2021

Respectfully Submitted,

Mark Bitzan

Mark Bitzan 6290077
Iowa State Penitentiary
P.O. Box 316
Fort Madison, IA 52627

CERTIFICATE OF FILING & SERVICE

Mark Bitzan declares the following under penalty of perjury. Bitzan placed (1) one copy of the Motion to Extend the filing deadline until July 7th, 2021 for the Petition for Rehearing with Suggestion for Rehearing En Banc to the Clerk of 8th Circuit Court of Appeals, Thomas F. Eagleton Courthouse, 111 South 10th Street, St. Louis, MO, in the Prison Mail Bag marked for FedEx Second-Day delivery. Bitzan further certifies the Clerk of Court served the above document on the appropriate parties through Electronic Filing.

Dated the 25th day of May, 2021

Mark Bitzan

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