APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-3144

David L. Hering

Appellant

v.

Patti Wachtendorf

Appellee

Appeal from U.S. District Court for the Southern District of Iowa - Des Moines
(4:16-cv-00574-JEG)

ORDER

The petition for rehearing by the panel is denied.

June 13, 2019

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

/s/ Michael E. Gans

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UNITED STATES COURT OF APPEALS
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v.

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Respondent - Appellee

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(4:16-cv-00574-JEG)

JUDGMENT

Before KELLY, WOLLMAN, and ERICKSON, 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. Appellant's motion for appointment of counsel is denied as moot.

April 26, 2019

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

/s/ Michael E. Gans

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

DAVID LEE HERING, Petitioner, vs. STATE OF IOWA, Respondent.	**No. 4:16-cv-00574–JEG** **ORDER**

David Lee Hering, now represented by counsel, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his conviction for first-degree murder and two counts of attempted murder in the Iowa District Court for Muscatine County. ECF No. 1. Hering, through counsel, renews his request for an evidentiary hearing, and Respondent resists. ECF Nos. 21, 23. For the following reasons, the Court must deny the petition, deny the request for an evidentiary hearing, dismiss the case, and deny a Certificate of Appealability.

I. STATE COURT PROCEEDINGS

A. Trial and Direct Appeal

A jury found Hering guilty of murdering his wife and attempting to murder two officers who responded to the 911 call from Hering's daughter about the death. *See State v. Hering*, No. 04–1222, 707 N.W.2d 337, 2005 WL 2756388, at *1 (Iowa Ct. App. Oct. 26, 2005) ("*Hering I*"), *vacated*, 2006 WL 60678 (Iowa Jan. 11, 2006) ("*Hering II*") ("Upon our review, we vacate the court of appeals' decision and affirm the defendant's convictions and sentences. We preserve the defendant's claims of ineffective assistance of counsel for a possible postconviction relief proceeding.") (citation omitted); *see also State v. Hering*, No. 10–1360, 804 N.W.2d 314, 2011 WL 3129213, at *1 (Iowa Ct. App. July 27, 2011) ("*Hering III*") (rejecting claim that Hering was fraudulently induced to waive his speedy trial rights), *further review denied*, Order (Sept. 29, 2011), https://www.iowacourts.state.ia.us (last visited Sept. 24, 2018); *see* Fed. R. Evid. 201 (allowing court to take judicial notice of facts).

Hering's attorneys at trial, David Treimer and J. E. Tobey, III, did not contest Hering's actions but raised an insanity defense. *See Hering v. State*, No. 13–1945, 885 N.W.2d 218, 2016 WL 3269454, at *1 (Iowa Ct. App. June 15, 2016) ("*Hering IV*"). The experts for the defense and the State agreed Hering had paranoid schizophrenia. *Id.* The defense expert, Dr. Kirk Witherspoon, testified Hering met the criteria for legal insanity at the time of the offenses. *Id.* In contrast, the State's expert, Dr. Michael Taylor, testified Hering was capable of forming specific intent. *Id.*

While Hering's criminal trial proceedings were pending in 2003, the county sheriff petitioned for appointment of a conservator for Hering on grounds that Hering's decision-making capacity was too impaired for him to manage his financial affairs. *Id.* The state court appointed a conservator. It found Hering was incarcerated and that it would be in his best interests that a bank be appointed as his conservator during his incarceration. *Id.*

Hering was convicted of the crimes in 2004. ECF No. 13–1 at 438 (sealed). He was sentenced to life in prison for murder, and twenty-five years in prison for each of the attempted murder charges. *Id.* at 461. The twenty-five year sentences were ordered to run consecutive to one another but concurrent with the life sentence. *Id.*

Hering appealed. The Iowa Court of Appeals rejected, among other things, Hering's argument that the district court should have instructed the jury on the lesser-included offense of voluntary manslaughter. *Hering I*, 2005 WL 2756388, at *5. On further review, the Iowa Supreme Court vacated the Court of Appeals decision, affirmed the convictions and sentences, and preserved for postconviction review Hering's claims of ineffective assistance of counsel. *Hering II*, 2006 WL 60678, at *1.

B. First Postconviction Action

1. District Court Proceedings

Hering sought postconviction relief in 2006, raising eighty-seven claims of ineffective assistance of counsel. *Hering IV*, 2016 WL 3269454, at *1. In 2010, the district court observed,

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"The conservatorship proceeding may have been prompted more by his incarceration and a desire to preserve his assets for his children, than a truly impaired capacity to make, communicate, or carry out important decisions concerning his financial affairs." *Id.* That same year, depositions of Treimer and Tobey were taken for postconviction proceedings. *Id.* In July 2013, the district court began but did not finish an evidentiary hearing where Hering and Treimer testified. *Id.* at *2. Several months later, after the parties unsuccessfully attempted to take Hering's deposition, the district court set a deadline for the parties to submit the remainder of their testimonial evidence by deposition. *Id.* The State submitted the 2010 depositions of counsel. *Id.* Hering submitted pro se briefs, exhibits, and an affidavit. *Id.*

The state district court denied relief in November 2013. It ruled that it considered each of Hering's claims but found "it unnecessary to discuss the multiple particulars" of the ineffective assistance claims. *Id.* The district court went on:

> Most, if not all, are factually without merit and are the products of the applicant's fantasy. The overwhelming credible evidence before this Court shows that criminal defense counsel made a well-reasoned and informed strategic decision to pursue an insanity defense on the applicant's behalf and that the applicant approved of that strategy at the time.

Id. It ruled the evidence was "virtually irrefutable" that Hering was the person who killed his wife and shot at officers who responded to his daughter's 911 call. *Id.* It ruled Hering failed to show he received ineffective assistance of counsel. *Id.*

2. First Postconviction Appeal

Hering appealed. He argued the district court should have made specific rulings on every issue raised in his application for postconviction relief, as required by Iowa Code § 822.7. *Id.* The Iowa Court of Appeals held the lower court substantially complied with § 822.7. *Id.*

Hering argued that in his criminal proceedings, the district court should have sua sponte ordered a competency hearing before trial under Iowa Code Chapter 812. *Id.* at *3. The Iowa Court of Appeals held the district court did not err, stating Hering did not present specific facts

showing he was suffering from a mental disorder that prevented him from appreciating the charges, understanding the proceedings, or assisting effectively in his defense. *Id.*

Hering argued the district court should have granted his motion for summary judgment in postconviction proceedings after the State did not respond to his amended application for relief. *Id.* at *1, *3. The Iowa Court of Appeals held that under Iowa law, a postconviction applicant like Hering was not entitled to a default judgment when the State fails to respond timely to the application. *Id.* at *3.

Hering also raised on appeal several claims that criminal trial counsel provided constitutionally ineffective assistance. *Id.* Hering claimed his trial counsel should have defended on a theory of general denial instead of insanity. *Id.* He argued counsel did not adequately investigate exculpatory evidence that would have shown he was not the one who shot his wife or shot at officers. *Id.* The Iowa Court of Appeals explained that decisions of trial strategy "made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," and "strategic decisions made after a less than complete investigation must be based on reasonable professional judgments which support the particular level of investigation conducted." *Id.* (quotation marks and citation omitted). It found Hering personally agreed to the insanity defense over a general denial defense after discussing the options with Treimer and Tobey. *Id.* at *4. Treimer and Tobey testified in postconviction proceedings they both believed an insanity defense was the best defense and Hering agreed to it. *Id.* To support their decision, they pointed to testimony from Dr. Witherspoon that Hering was legally insane. *Id.* They also pointed to testimony of several witnesses who described Hering's bizzare behavior shortly before the shootings, including driving his tractor late at night in his fields and shooting a neighbor's satellite dish because Hering believed it was receiving alien signals or spying on him. *Id.* On the possibility that someone else did the acts, Treimer testified, "the evidence was substantial that he had actually shot his wife, and a general denial wasn't going to fly." *Id.* As for presenting both a general denial defense and an insanity defense, Tobey testified he was against inconsistent defenses, saying, "First, it is what citizens who aren't lawyers hate about

lawyers, and when you do it, it inevitably will spray that hatred on your client. And if there's a way to avoid it, you'll avoid it." *Id.* Tobey also said, "[I]t would have been tactically irresponsible to abandon the evidence that we had and to argue that in the alternative." *Id.* (alteration in original). The Iowa Court of Appeals concluded Hering failed to show counsel provided ineffective assistance by failing to defend based on a general denial of the acts instead of insanity. *Id.*

Hering, pro se, claimed trial counsel failed to prevent or object to Dr. Taylor's opinion testimony that Hering "was fully capable of forming intent, the specific intent to kill." *Id.* Citing Iowa statutory and case law, the Iowa Court of Appeals explained opinion testimony is admissible even though "it embraces an ultimate issue to be decided by the trier of fact," so long as the expert does not give an opinion on the question of guilt or innocence. *Id.* (citations omitted). It held Dr. Taylor did not testify as to Hering's guilt or innocence but rather whether Hering could form the specific intent to kill. Consequently, it held, Hering failed to show he received ineffective assistance when counsel did not object. *Id.*

Hering claimed trial counsel should have sought to suppress evidence obtained through a search warrant. *Id.* The Iowa Court of Appeals held Hering failed to show he was prejudiced by counsel's performance. It explained Hering did not identify the evidence seized or how the evidence hurt his case. *Id.* It also pointed out Treimer testified counsel did not file a motion to suppress because "we wanted evidence that was seized from your property for us to use against the State's evidence at trial." *Id.*

The Iowa Court of Appeals rejected Hering's additional claim that counsel provided ineffective assistance by failing to request a competency hearing before trial. *Id.* at *5. It held the standard to determine a civil conservatorship under Iowa Code Chapter 633 was different than the standard to determine competency to stand criminal trial under Iowa Code Chapter 812. *Id.* Furthermore, it held, defense counsel pursued the issue with their expert, Dr. Witherspoon, who gave the opinion Hering was competent to stand trial. *Id.* Counsel said Hering understood the charge, the proceedings, and could effectively assist in his defense. *Id.*

The Iowa Court of Appeals held Hering raised additional pro se claims of ineffective assistance of counsel that were not sufficiently presented under Iowa Rule of Appellate Procedure 6.903(2)(g). For that reason, it refused to review the claims. Finally, the Iowa Court of Appeals refused, based on Iowa law, to review claims Hering raised for the first time in his reply briefs. *Id.*

3. Request for Further Review

Hering, pro se, sought further review of the Iowa Court of Appeals decision before the Iowa Supreme Court. ECF No. 12–14. He presented fourteen questions for review, eight of which focused on his attorneys' choices not to investigate exculpatory evidence that officers at Hering's farm saw two armed men shooting at them or present a defense that someone else killed Hering's wife and shot at officers. *Id.* at 2–3. Hering also argued the Iowa Court of Appeals erred on his claims that counsel should have objected to Dr. Taylor's opinion, that counsel failed to apply current law on expert testimony and the insanity defense, that counsel should have filed a motion to suppress seized evidence, that the district court erred in denying Hering's motion for summary judgment, that the district court should have sua sponte questioned Hering's competency, and that Hering suffered prejudicial error in his criminal proceedings. *Id.* at 3; *see also id.* at 8–48. The Iowa Supreme Court denied further review. *Hering IV*, Order (Iowa Aug. 29, 2016), https://www.iowacourts.state.ia.us (last visited Sept. 24, 2018); *see* Fed. R. Evid. 201 (allowing court to take judicial notice of facts).

C. Second Postconviction Application

While Hering's first postconviction action was pending in 2014, he filed a second application for postconviction relief, arguing his convictions were void because he was incompetent to stand trial under Iowa Code Chapter 812. *See Hering v. State*, No. 14–0762, 885 N.W.2d 219, 2016 WL 3285445, at *1 ("*Hering V*"). The district court dismissed the petition as untimely. *Id.*

Herring appealed. The Iowa Court of Appeals affirmed. *Id.* Iowa Code § 822.3 requires an application for postconviction relief to be "filed within three years from the date the conviction or decision is final or, in the event of an appeal, from the date the writ of procedendo is issued." *Id.* at *1 (quoting § 822.3). Procedendo issued January 24, 2006, on Hering's direct appeal. *Id.* Consequently, the Iowa Court of Appeals held, his action for postconviction relief filed in 2014 was late. *Id.*

Hering argued he met an exception in § 822.3 because the conservatorship was "a ground of fact or law that could not have been raised within the applicable time period." *Id.* The Iowa Court of Appeals held Hering knew about the conservatorship when it happened, before his criminal trial, yet he did not have a competency hearing under Iowa Code Chapter 812. *Id.* Therefore, it held, Hering failed to show he could not have raised his competency claim within the statute of limitations under § 822.3

Hering further argued § 822.3 did not apply because his criminal conviction was void based on his mental incompetency at the time of trial. *Id.* The Iowa Court of Appeals disagreed, stating criminal convictions of incompetent persons are reversed, not declared void. *Id.*

Hering, pro se, sought further review, which the Iowa Supreme Court denied. ECF No. 12–21; *Hering V*, Order (Iowa Aug. 29, 2016), https://www.iowacourts.state.ia.us (last visited Sept. 24, 2018); *see* Fed. R. Evid. 201.

II. HABEAS PETITION

Hering, pro se and through counsel, asserts ten grounds for relief in his various filings. ECF Nos. 1, 1–1, 20, 27, 28.[1] In the interest of justice, the Court will consider the arguments in all the briefs.[2] Hering raises the following grounds for relief:

[1] Counsel for Hering filed a brief incorporating by reference the lengthy brief Hering attached to his original petition. ECF No. 20 at 2; *see* ECF No. 1–1. The Court allowed Hering, pro se, to supplement the arguments. ECF Nos. 25, 26, 27. Hering then submitted another pro se brief but did not seek Court permission for it. ECF No. 28.

[2] The Court grants Hering permission to file his pro se brief. ECF No. 28. Normally, the Court does not consider pro se briefs because a litigant is not entitled to hybrid representation.

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1. Ineffective assistance of counsel: "Expert Testimony on Legal Standards." ECF No. 1–1 at 2.
2. Ineffective assistance of counsel: "Burden of Proof, Conce[d]ing Guilt, Adversarial Trial." *Id.*
3. Ineffective assistance of counsel: "Failing to Investigate." *Id.*
4. Ineffective assistance of counsel: "Failing to Present Exculpatory Evidence." *Id.*
5. Ineffective assistance of counsel: "Failing to File Motions to Suppress." *Id.*
6. State court error: "Summary Judg[]ment." *Id.*
7. State court error: "Lesser Included Offenses." *Id.*
8. State court error: "Void Judg[]ment." *Id.*
9. State court error: "Compet[e]ncy Hearing." *Id.*
10. State court error: "Illegal Sentence, Void Judg[]ment Due to Speedy Trial Violation." *Id.*

As in his postconviction proceedings, Hering challenges his convictions based on alternative theories. On one hand, he asserts someone else committed the crimes, and counsel should have investigated and presented evidence to support the theory. In Claims 2, 3, and 4, Hering faults his criminal trial attorneys' failure to investigate and present a defense that Hering was drugged and one or more others did the shooting. *Id.* at 8–32. On the other hand, Hering argues he was incompetent to stand trial, and counsel ineffectively presented the insanity defense chosen for trial. In Claim 1, Hering faults his trial counsel for not objecting to the State's expert testimony that he could form the specific intent to kill; in Claim 7, he argues the evidence of his mental abnormality warranted jury instructions on lesser-included offenses of voluntary and involuntary manslaughter; in Claim 8, Hering argues his convictions should have been declared void because he was incompetent to stand trial; in Claim 9, he challenges the state court's failure to order a

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See, e.g., *United States v. Carr*, 895 F.3d 1083, 1090 (8th Cir. 2018) (policy of the Court of Appeals is not to address issues raised pro se when defendant has counsel) (citations omitted); *see also United States v. Pate*, 754 F.3d 550, 553 (8th Cir. 2014) ("[a] district court has no obligation to entertain pro se motions filed by a represented party") (citation omitted). Normally, the Court also does not consider supplemental or amended pleadings that simply incorporate by reference other pleadings. *E.g.*, LR 15 (an amended or supplemented pleading under Rule 15 "must not, except by leave of court, incorporate any prior pleading by reference, but must reproduce the entire new pleading"). Respondent argues the issues Hering's counsel failed to raise should be deemed waived. ECF No. 24. To ensure Hering's position receives full consideration despite counsel's truncated brief, however, the Court in this instance will consider all the briefs. In the future, counsel should submit one brief on the merits of a habeas petition that fully represents the client's position. *See* Fed. R. Civ. P. 1 (promoting "the just, speedy, and inexpensive determination of every action and proceeding").

competency hearing sua sponte before his criminal trial; and in Claim 10, he argues he did not waive his speedy trial rights because he was incompetent to do so. ECF No. 1–1 at 4–8, 38–54.

Respondent argues that Hering's case does not demonstrate an extreme malfunction of Iowa's criminal justice system warranting federal habeas relief. ECF No. 24 at 15–17. The Court first will address the alleged ineffective assistance of trial counsel in Claims 1, 2, 3, 4, and 5, which Respondent argues on the merits, though Respondent argues some of the claims are procedurally defaulted based on the state court's application of its own state laws. *Id.* at 19–37. The Court will then addresses Claims 6, 7, 8, 9, and 10, which Respondent argues are based on errors of state law only, or are procedurally defaulted or not a fairly presented federal claim, or do not present an error in which there is a substantial likelihood the jury otherwise would have reached a different verdict. *Id.* at 37–45.

III. CLAIMS 1, 2, 3, 4, AND 5

A. Applicable Law

For claims properly before a federal court, a writ of habeas corpus shall be granted only if the prior adjudication of the claim:

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

28 U.S.C. § 2254(d). The Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996 "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002).

The Supreme Court has held that a state court decision is "contrary to" federal law under § 2254(d)(1) "if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts." *Bell*, 535 U.S. at 694. Under the "unreasonable application" standard, this Court

may grant a writ only if the state court identified the correct governing federal legal principle but applied that principle to the facts of a petitioner's case in an objectively unreasonable way. *See Williams v. Taylor*, 529 U.S. 362, 411-13 (2000) (O'Connor, J., delivering the opinion of the Court with respect to Part II). "Objectively unreasonable" means something more than an "erroneous" or "incorrect" application of clearly established law, and a reviewing federal court may not substitute its judgment for the state court's even if the federal court, in its own independent judgment, disagrees with the state court's decision. *See Lockyer v. Andrade*, 538 U.S. 63, 76 (2003). The reviewing court "must determine what arguments or theories supported or . . . could have supported, the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). The error must be "well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." *Woods v. Etherton*, 136 S. Ct. 1149, 1151 (2016) (quotation marks and citation omitted). "[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 180 (2011).

As for the unreasonable determination of facts prong under § 2254(d)(2), the federal court "may not characterize these state-court factual determinations as unreasonable 'merely because [we] would have reached a different conclusion in the first instance.'" *Brumfield v. Cain*, 135 S. Ct. 2269, 2277 (2015) (alteration in original) (citation omitted). "If [r]easonable minds reviewing the record might disagree about the finding in question, on habeas review that does not suffice to supersede the trial court's . . . determination." *Id.* (alteration in original) (citations omitted). Factual findings made by a state court are presumed correct, and the petitioner has "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). "The existence of some contrary evidence in the record does not suffice to show that the state court's factual determination was unreasonable." *Cole v. Roper*, 783 F.3d 707, 711 (8th Cir. 2015). The Supreme Court has recognized there is a question about the relationship between § 2254(d)(2)'s "unreasonable determination of the facts" standard and

§ 2254(e)(1)'s presumption, but it has "not yet defined the precise relationship between [them.]" *Brumfield*, 135 S. Ct. at 2282 (quotation marks and citation omitted); *see also Velez v. Clarinda Corr. Facility*, 791 F.3d 831, 834 n.1 (8th Cir. 2015) (noting possible conflict but recognizing previous Supreme Court language that § 2254(e)(1) applies to determination of factual issues, not decisions, and § 2254(d)(2) applies to granting of habeas relief, itself) (citation omitted).

If a petitioner failed to develop the factual basis of a claim in state court, the federal court cannot hold an evidentiary hearing unless the petitioner shows "the claim relies on . . . a new rule of constitutional law, made retroactive . . . ; or . . . a factual predicate that could not have been previously discovered through the exercise of due diligence; and [] the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2). "Section 2254(e)(2) continues to have force where § 2254(d)(1) does not bar federal habeas relief." *Cullen*, 131 S. Ct. at 1401.

Except for certain kinds of error that require automatic reversal, even when a state petitioner's federal rights are violated, "relief is appropriate only if the prosecution cannot demonstrate harmlessness." *Davis v. Ayala*, 135 S. Ct. 2187, 2197 (2015). "Harmlessness" in the context of § 2254 means "the federal court has 'grave doubt about whether a trial error of federal law had "substantial and injurious effect or influence in determining the jury's verdict."'" *Id.* at 2197–98 (citation omitted). This standard, which is taken from *Brecht v. Abrahamson*, 507 U.S. 619 (1993), requires "more than a 'reasonable possibility' that the error was harmful." *Davis*, 135 S. Ct. at 2198 (quoting *Brecht*, 507 U.S. at 637); *cf. Chapman v. California*, 386 U.S. 18, 24 (1967) (standard for harmlessness on direct review from a state court to the U.S. Supreme Court is whether the error was "harmless beyond a reasonable doubt"). When a state court determines the harmlessness question, "the *Brecht* test subsumes the limitations imposed by AEDPA." *Davis*, 135 S. Ct. at 2199.

These strict limitations reflect that habeas relief is granted sparingly, reserved for "extreme malfunctions in the state criminal justice systems" and "not as a means of error correction."

Greene v. Fisher, 565 U.S. 34, 38 (2011) (quoting *Harrington*, 562 U.S. at 102). As the Supreme Court has reminded courts, "[i]t bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable. . . . [Section 2254(d)] preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no farther." *Harrington*, 562 U.S. at 102.

Within that disciplined legal framework, the Court addresses Hering's Claims 1, 2, 3, 4, and 5, which challenge the performance of his criminal trial counsel.

B. Ineffective Assistance of Counsel

To demonstrate constitutionally ineffective assistance under the Sixth Amendment to the United States Constitution, a petitioner must show (1) counsel's representation was deficient, and (2) the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under the first prong, a petitioner must show counsel's performance fell below an objective standard of reasonableness. *Id.* at 687–88. "Reasonableness" depends on "prevailing professional norms" at the time counsel acted, with "every effort . . . made to eliminate the distorting effects of hindsight, . . . to evaluate the conduct from counsel's perspective at the time." *Id.* at 688–89. Hering focuses on counsel's investigation and strategic choices. The Supreme Court explained:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Id. at 690–91.

Prejudice means "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. A court need not address both

components of the test if a petitioner makes an insufficient showing on one of the prongs. *Id.* at 697.

When analyzing *Strickland* under the AEDPA standard of review, the review by the district court is "doubly deferential," *Cullen*, 563 U.S. at 202, and "federal courts are to afford 'both the state court and the defense attorney the benefit of the doubt.'" *Etherton*, 136 S. Ct. at 1151 (citation omitted). The decision must be not only incorrect but also unreasonable. *See Rainer v. Kelley*, 865 F.3d 1035, 1042 (8th Cir. 2017) (citations omitted), *cert. denied*, 138 S. Ct. 1167 (2018).

C. Claim 1 Fails on the Merits

In Claim 1, Hering argues his trial counsel should have filed a motion in limine or objected to testimony by the State's expert, Dr. Taylor, that Hering could form the specific intent to kill. ECF No. 1–1 at 4. Hering argues the expert improperly gave an opinion on legal standards or matters that are left to the jury's determination. *Id.* 5–8; ECF No. 20 at 4–5; ECF No. 28 at 4–5. Respondent argues Claim 1 fails because trial counsel did not breach a professional duty. ECF No. 24 at 21. Respondent further argues Claim 1 is procedurally defaulted because the state court decision is based on an adequate and independent state law. *Id.* at 22.

The Iowa Court of Appeals held Hering failed to show he received ineffective assistance based on counsel's decision not to object to Dr. Taylor's testimony. *Hering IV*, 2016 WL 3269454, at *4. It pointed out that under Iowa Rule of Evidence 5.704 and relevant state case law, Dr. Taylor's opinion testimony was allowable, even though it "embrace[d] an ultimate issue to be decided by the trier of fact," because he did not give an opinion on the legal standard of whether Hering was guilty or innocent. *Id.* Instead of testifying about Hering's guilt or innocence, Dr. Taylor testified more generally whether Hering could form the specific intent to kill. *Id.*

Hering fails to demonstrate he is entitled to relief on Claim 1. This Court cannot review the state court's application of its own evidentiary rules. *See Estelle v. McGuire*, 502 U.S. 62,

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67–68 (1991) ("it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions"). The state court ruled the evidence was properly admitted under Iowa law. Consequently, counsel could not have been ineffective in failing to object to it. *See Rainer*, 865 F.3d at 1045 (holding counsel was not ineffective in failing to raise a claim deemed meritless under state evidentiary rules) (citation omitted). Relief on Claim 1 will be denied.

D. Claims 2, 3, and 4 Fail on the Merits

In Claim 2, Hering asserts he never agreed to an insanity defense, yet his trial counsel conceded his guilt and denied him an adversarial trial.[3] ECF No. 1–1 at 8–9. Hering states he always maintained his innocence, and after he was declared incompetent in the conservatorship, any contracts he entered into were presumptively fraudulent. *Id.* at 10. He further argues he agreed to the insanity defense as a fail safe, not as a concession, and that he intended to defend based on his innocence, too. *Id.* at 11–16. In Claim 3, Hering argues his trial counsel did not spend sufficient time interviewing witnesses, following up on police reports, investigating whether Hering was involuntarily drugged or poisoned with hallucinogenic substances that would mimic schizophrenia, or investigating reports that other people were on Hering's property and could have committed the crimes. *Id.* at 17–20. Hering maintains his counsel made only a cursory investigation, and therefore the strategic decision to focus on the insanity defense is not entitled to deference. *Id.* at 21–22. In Claim 4, Hering argues counsel should have presented exculpatory evidence, including that children were nearby but did not hear the shotgun blasts, an officer who arrived saw an armed man who has not been identified, another responding officer saw a bearded man but Hering did not have a beard, police did not properly secure the area to prevent other suspects from leaving, and no ballistics evidence tied Hering's guns to the crimes. *Id.* at 23–27; *see also* ECF No. 20 at 4–8; ECF No. 28 at 6–10 (discussing Claims 2, 3, and 4).

[3] Hering, pro se, argues the Court should review Claim 2 under a standard that does not require him to show prejudice. ECF No. 1–1 at 8. Hering provides no valid legal basis for the Court to do so.

Respondent argues Claim 2 fails because Hering did in fact agree to the insanity defense, counsel's strategic choice is "virtually unassailable," and the state court's decision requires deference. ECF No. 24 at 25–25. As the state court pointed out, the standard for determining a civil conservatorship under Iowa Code Chapter 633 is a different standard than a competency determination for criminal trial under Iowa Code Chapter 812. *Hering IV*, 2016 WL 3269454, at *5. Counsel and the defense's own expert witness did not question Hering's competency for his criminal trial. *Id.*; ECF No. 13–3 at 213. Regarding Claim 3, Respondent argues the state court correctly determined counsel breached no duty to investigate Hering's actual innocence further because, as Treimer testified, "the evidence was substantial that he had actually shot his wife, and a general denial wasn't going to fly." ECF No. 24 at 28 (quoting *Hering IV*, 2016 WL 3269454 at *4). Treimer testified Hering's bodily fluid was tested and showed no hallucinogens but did show the intoxicant THC and prescription opiates, which counsel "felt would not fly with a jury," and counsel followed Hering's request to test his cattle for drugs, but there were no drugs in the cattle, which suggested to counsel that Hering was not drugged but perhaps was hallucinating he had been drugged. ECF No. 13–3 at 236–37, 342–43 (sealed); *see also id.* at 49–50; ECF No. 24 at 29 (citing ECF No. 13–3 at 236–37, 342–43 (sealed)). As for Claim 4, Respondent argues Hering's suggestion that he is innocent because officers saw a man with a rifle "avoids the obvious conclusion that both officers saw the same man–him." ECF No. 24 at 30. Treimer testified a lot of officers were on the property and "they apparently did not see anybody else other than Dave there on the farm, so I don't know how I could have investigated any further." ECF No. 13–3 at 360 (sealed). Respondent states Hering's hypothetically exculpatory ballistics evidence would have been countered by police testimony that Hering shot at them and they caught him rushing toward the house while carrying a rifle. ECF No. 24 at 31. As the postconviction trial court found, "The evidence of the applicant being the person who killed his wife and fired shots at law enforcement officer who responded to his child's 911 call is virtually irrefutable." *Hering IV*, 2016 WL 3269454, at *2 (quoting the district court ruling). Finally, Respondent argues Hering's defense counsel reasonably believed presenting inconsistent

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defenses would have backfired before the jury, ECF No. 24 at 32, and, as the postconviction court found, Hering's proposed explanations "are factually without merit and are the products of the applicant's fantasy." *Id.* (quoting *Hering IV*, 2016 WL 3269454, at *2 (quoting the district court ruling)). As counsel put it, abandoning the evidence they had "would have been tactically irresponsible." *Hering IV*, 2016 WL 3269454, at *4.

The state court findings of fact are entitled to a presumption of correctness, and Hering does not rebut the presumption of correctness by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). To the extent Hering argues the state court's decision is based on an unreasonable determination of fact, this Court concludes the decision, based on all the evidence before the state court, was reasonable. This Court further concludes the state court did not render an unreasonable decision that Hering's counsel performed deficiently or that the result of the proceeding would have been different but for counsel's errors. The state court determination regarding counsel's performance was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Woods*, 136 S. Ct. at 1151. Relief on Claims 2, 3, and 4 will be denied.

E. Claim 5 Fails on the Merits

In Claim 5, Hering states he was prejudiced when counsel failed to moved to suppress evidence taken from Hering's property, including photos, videotapes, and autopsy results. ECF No. 1–1 at 35. Respondent points out Hering's trial counsel made a strategic decision not to seek suppression because they wanted to use the evidence at trial, and the tactical decision is entitled to deference under *Strickland*, 466 U.S. at 690–91. ECF No. 24 at 33–34 (citing *Hering IV*, 2016 3269454, at *4). Respondent further argues Hering offers no insight into how the evidence convinced the jury. ECF No. 24 at 33.

The state court held Hering claimed defense counsel should have filed a motion to suppress evidence seized, but Hering failed to identify what items were seized or how they hurt his case. *Hering IV*, 2016 WL 3269454, at *4. I t held Hering failed to show he was prejudiced

by counsel's alleged failure. *Id.* This Court determines the state court ruling was not an unreasonable application of *Strickland.* Hering makes only a conclusory argument that without the evidence "there is a substantial probability that the jury would have had a reasonable doubt as to whether David actually committed these crimes." ECF No. 1–1 at 35. Relief on Claim 5 will be denied.

IV. CLAIMS 6 AND 8

In Claim 6, Hering asserts the postconviction district court should not have denied Hering's motion for default or summary judgment after the State failed to file a timely answer under Iowa law. ECF No. 1–1 at 36–38. In Claim 8, Hering argues the state court erred in not vacating a void judgment. ECF No. 1–1 at 41. Hering argues the judgment was void because he was incompetent. Respondent argues Hering's Claims 6 and 8 do not allege violations of federal law, therefore the Court cannot review them. ECF No. 24 at 37–40.

Section 2254 provides a remedy to persons held in state custody "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Section 2254 does not provide a remedy for violations of state law. *See id.*; *Estelle*, 502 U.S. at 67–68 ("it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions").

In Claim 6, the state court relied on Iowa case law in holding that a postconviction applicant in Iowa cannot obtain a default judgment when the State fails to respond timely to the application. *Hering IV*, 2016 WL 3269454, at *3 (citing *Furgison v. State*, 217 N.W.2d 613, 618 (Iowa 1974)). Hering attempts to incorporate the Federal Rules of Civil Procedure or federal due process principles into the state court's ruling based on state law. ECF No. 28 at 11–12. But Hering cites no authority holding the Federal Rules govern or affect the state court's ruling regarding default judgments in state postconviction proceedings. Claim 6 does not assert a violation of federal law. Consequently Claim 6 cannot be a basis for federal habeas relief.

The state court rejected Hering's Claim 8 based on Iowa case law that an incompetent defendant's "conviction is reversed, not declared void." *Hering V*, 2016 WL 3285445, at *2 (citing *State v. Pedersen*, 309 N.W.2d 490, 501 (Iowa 1981)). Hering now bases Claim 8 on the Due Process Clause of the Fourteenth Amendment to the United States Constitution. ECF No. 28 at 12–13. Just because federal due process provides protections for incompetent defendants, it does not mean this Court may declare a conviction void at any time. Hering cites no federal law permitting this Court to do so. Claim 8 does not assert a violation of federal law, therefore the Court will not grant relief on Claim 8.

V. CLAIMS 9 AND 10

In Claim 9, Hering argues the district court in his criminal proceedings should have sua sponte ordered a competency hearing. ECF No. 1–1 at 47–50; ECF No. 20 at 8–10; ECF No. 28 at 13–14. In Claim 10, Hering argues the state court should have vacated the judgment based on a violation of his speedy trial rights. ECF No. 1–1 at 50–56; ECF No. 28 at 14–15. Respondent argues Hering procedurally defaulted Claims 9 and 10 pursuant to an adequate and independent state law ground. ECF No. 24 at 40–45.

A. Applicable Law

1. Exhaustion and Procedural Default

A state prisoner's application for writ of habeas corpus generally will not be granted unless "the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). To fulfill the exhaustion requirement, "'state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process' before presenting those issues in an application for habeas relief in federal court." *Welch v. Lund*, 616 F.3d 756, 758 (8th Cir. 2010) (quoting *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999)). A petitioner must fairly present the substance of the claim to the state courts. *Wemark v. Iowa*, 322 F.3d 1018, 1021 (8th Cir. 2003). To fairly present a claim, a petitioner must raise the "same factual grounds and legal theories" in

the state courts and in federal court. *Id.* (citation omitted). In Iowa, a party appealing a district court ruling submits the appeal to the Iowa Supreme Court. The Supreme Court may then choose to transfer the case to the Iowa Court of Appeals. An Iowa prisoner whose appeal is deflected to the Iowa Court of Appeals must file an application for further review in the Supreme Court of Iowa to exhaust his claims properly before obtaining federal habeas review. *Welch,* 616 F.3d at 759.

"[I]f no state court remedy is available for the unexhausted claim—that is, if resort to the state courts would be futile—then the exhaustion requirement in § 2254(b) is satisfied, but the failure to exhaust 'provides an independent and adequate state-law ground for the conviction and sentence, and thus prevents federal habeas corpus review of the defaulted claim, unless the petitioner can demonstrate cause and prejudice for the default.'" *Armstrong v. Iowa*, 418 F.3d 924, 926 (8th Cir. 2005) (quoting *Gray v. Netherland*, 518 U.S. 152, 162 (1996)); *see also Welch*, 616 F.3d at 758 (holding failure to exhaust remedies properly under state procedure results in procedural default of federal claims). For example, a petitioner who did not comply with a state procedural rule about timely filing a particular claim in state court, or who waived a claim by failing to raise it, "meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him." *Coleman v. Thompson*, 501 U.S. 722, 732 (1991). Nevertheless, the petitioner has "procedurally defaulted" the federal claim under an adequate and independent state rule. *Id.* at 750.

2. Excuse for Procedural Default

A federal court cannot review a defaulted claim unless the petitioner shows cause for the default and actual prejudice as a result of the underlying federal violation, or unless the petitioner shows a fundamental miscarriage of justice will result if the claim is not reviewed. *Id.* Counsel's ineffectiveness in properly preserving a claim in state court may constitute sufficient cause to overcome procedural default of another claim. *Murray v. Carrier*, 477 U.S. 478, 488-89 (1986). Before a claim of ineffective assistance of counsel may be used to establish cause for a

procedural default, however, it must be presented to the state courts as an independent Sixth Amendment claim. *Edwards v. Carpenter*, 529 U.S. 446, 452 (2000). In addition, because there is no federal constitutional right to effective counsel in postconviction proceedings, ineffective assistance of postconviction counsel does not qualify as cause for defaulting a federal ineffective assistance claim.[4] *Coleman*, 501 U.S. at 752–53, 755.

The Supreme Court also has recognized a "miscarriage of justice" exception to procedurally defaulted claims. The exception "is extremely rare. To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence–whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence–that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995)). "'[A]ctual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998) (citation omitted). The actual innocence exception is a "gateway" through the wall set by procedural default, and it applies if a petitioner shows "no reasonable juror would find him guilty beyond a reasonable doubt—or, to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt." *House v. Bell*, 547 U.S. 518, 538 (2006). Although a petitioner asserting actual innocence need not "prove diligence to cross a federal court's threshold, . . . [u]nexplained delay in presenting new evidence bears on the determination whether the petitioner has made the requisite showing [of actual innocence]." *McQuiggin v. Perkins*, 569 U.S. 383, 399 (2013); *cf. id.* at 394–97 (contrasting the actual innocence excuse with the statute of limitations in § 2244(d)(1)(D)). "The gateway should open only when a petition presents 'evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free

[4] The Supreme Court recognized a narrow exception to this rule in *Martinez v. Ryan*, 132 S. Ct. 1309, 1320 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013). Hering does not argue the exceptions in *Martinez* and *Trevino* apply in his case. This Court does not make the argument for him. *See Kerns v. Ault*, 408 F.3d 447, 450 (8th Cir. 2005) (declining, like the district court, to make arguments for habeas petitioner).

of nonharmless constitutional error.'" *Id.* at 401 (quoting *Schlup*, 513 U.S. at 316). With those standards in mind, the Court addresses Hering's claims.

B. Discussion

In Claim 9, Hering asserts the state district court should have sua sponte ordered a competency hearing. Respondent argues Hering raised the issue in his second postconviction proceeding, which was held to be untimely under Iowa law. ECF No. 24 at 44. Hering replies that he raised the issue in his first postconviction appeal. ECF No. 28 at 13–14.

The Iowa Court of Appeals did address an issue similar to Claim 9 in Hering's first postconviction appeal, but it was not a stand-alone claim. Instead it was within the framework of an ineffective assistance of counsel claim. *Hering IV*, 2016 WL 3269454, at *5 (concluding Hering did not show counsel provided ineffective assistance in failing to request a competency hearing). Hering sought further review of the decision, yet he did not argue the Iowa Court of Appeals framed his claim incorrectly. He simply argued the district court should have held a competency hearing sua sponte before his criminal trial. ECF No. 12–14 at 34–35. In addition, in his application for further review Hering referred to "constitutional rights" only in describing the standard of review on the issue. *Id.* at 34. In the body of his argument, he did not cite federal law but rather argued a hearing was required under Iowa Code Chapter 812 and an Iowa case, *State v. Mann*, 512 N.W.2d 528 (1994). ECF No. 12–14 at 34. *Mann*, in turn, cites Supreme Court precedent, but Hering never directly alerted the state court to the federal source of his claim. *See Mann,* 512 N.W.2d at 531 ("Due process requires that a hearing be held to determine the competency of a defendant when there is sufficient doubt of the defendant's mental capacity to show a need for further inquiry") (citing *Drope v. Missouri*, 420 U.S. 162, 180 (1975)). Under the circumstances, this Court concludes Hering did not put the state court on notice that he was raising a federal claim that the trial court should have sua sponte ordered a competency hearing before his criminal trial. The time for him to bring such a claim has passed under Iowa law. *See Kerns v. Ault*, 408 F.3d 447, 449 n.3 (8th Cir. 2005) (noting that under § 822.3, "it is

clear that Iowa law would procedurally bar" a claim brought more than three years after a decision is final); *see also Schmidt v. State*, 909 N.W.2d 778, 798 (Iowa 2018) ("to avoid the three-year statute of limitations contained in section 822.3, an applicant must show he or she could not have raised the ground of fact within the applicable time period"); Iowa R. App. P. 6.101(1)(b) (notice of appeal must be filed within thirty days from the entry of a final order or judgment). Consequently, Claim 9 is procedurally defaulted pursuant to an adequate and independent state ground.

Hering raised Claim 10 in *Hering III*. The Iowa Court of Appeals held Hering's argument was an unavailing attempt to avoid Iowa's deadlines for filing substantive issues on appeal or in postconviction proceedings, or the court's jurisdiction over him. *Hering III*, 2011 WL 3129213, at *1 (citing Iowa law governing applicable deadlines and jurisdiction). Its ruling, based on application of Iowa state law, is an adequate and independent state ground precluding federal review of the claim. *See Coleman*, 501 U.S. at 750. Consequently, Claim 10 is procedurally defaulted for purposes of federal habeas review.

The Court determines Claims 9 and 10 are procedurally defaulted. Hering makes no argument showing cause and prejudice for the default under applicable habeas law. *See id.* As part of his challenges to counsel's performance, Hering does assert his innocence. To the extent Hering's arguments overlap with his claims that counsel should have investigated evidence that would establish Hering's innocence, the Court has rejected those claims in the context of Hering's ineffective assistance of counsel claims. Hering also does not present "new reliable evidence–whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence–that was not presented at trial." *Schlup*, 513 U.S. at 324. Hering has a heavy burden "to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt[.]" *House*, 547 U.S. at 538. The Court concludes Hering does not demonstrate any excuse to allow the Court to review his defaulted claims. Consequently, the Court cannot review the merits of Claims 9 and 10, therefore no relief will be granted on them.

VI. CLAIM 7

In Claim 7, Hering argues the state court erred in refusing to instruct the jury on the lesser-included offenses of voluntary and involuntary manslaughter. ECF No. 1–1 at 38–39. Hering does not make clear what his federal argument is or how he preserved it for § 2254 review. To the extent he argues the state court's refusal to give the instructions violated clearly established federal law, the Court must conclude his arguments fail.

On direct appeal, the Iowa Court of Appeals recognized and rejected only a claim that the district court should have given a voluntary manslaughter instruction. *Hering I*, 2005 WL 2756388, at *5. The Iowa Supreme Court vacated the decision of the Court of Appeals and affirmed the convictions, but it did not provide any reasoning for its decision. *Hering II*, 2006 WL 60678, at *1. Looking at Hering's request for further review before the Iowa Supreme Court, Hering argued the district court should have instructed on both voluntary and involuntary manslaughter. ECF No. 12–6 at 10. Hering based his claim on the Iowa Constitution and "due process," though he cited as authority the Fifth and Fourteenth Amendments to the United States Constitution and one federal case, *Fisher v. United States*, 328 U.S. 463 (1946). ECF No. 12–6 at 7–10. *Fisher*, however, concerned an instruction about mental impairment, not lesser-included offenses. *Id.* at 470–75. Moreover, citing "due process," alone, "is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the 'substance' of such a claim to a state court." *Gray v. Netherland*, 518 U.S. 152, 163 (1996).

The brief by Hering's counsel labels the claim as one under "due process" but does not discuss it. ECF No. 20 at 8. In Hering's pro se habeas brief, the federal basis of his claim is unclear. ECF No. 1–1 at 39–40. Hering relies on a case he did not cite in state court, *Mullaney v. Wilbur*, 421 U.S. 684, 703 (1975), and argues "the due process clause requires the prosecution to prove beyond a reasonable doubt the absence of heat of passion on sudden provocation." ECF No. 1–1 at 40. "Sudden provocation" is required for an instruction on voluntary manslaughter in Iowa. *See* Iowa Code § 707.4; *Hering I*, 2005 WL 2756388, at *5. Yet "sudden provocation"

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was not at issue in Hering's criminal case, where Hering asserted he either did not do the criminal acts or did so while legally insane. Hering also argues he should have received an instruction on "involuntary manslaughter," ECF No. 1–1 at 40, which in Iowa occurs when a "person unintentionally causes the death of another person." Iowa Code § 707.5. The most understandable version of Hering's argument was at his criminal trial. ECF No. 13–1 at 417–18, 423, 428. There, however, the district court refused to give the involuntary manslaughter instruction because the victim was shot twice at close range with a shotgun, and Hering was a hunter who knew how to use a shotgun, which under Iowa law could give rise to a presumption that Hering intended to kill the victim. *Id.* at 428–29. ECF No. 12–6 at 10.

In response to Respondent's argument that the state court did not unreasonably apply *Wilbur* or any other federal law, Hering in his pro se reply states the "argument does not warrant a response. The State court's ruling was contrary to and involved an unreasonable application of clearly established federal law." ECF No. 28 at 12. Hering's response is simply insufficient to explain how the state court ruling violated clearly established federal law. The Court cannot grant relief on Claim 7.

VII. NO HEARING IS NEEDED

Hering requests an evidentiary hearing. ECF No. 20. Respondent resists. ECF No. 23. This Court's power to hold an evidentiary hearing is sharply limited. *Cox v. Burger*, 398 F.3d 1025, 1030 (8th Cir. 2005). When, as here, a federal habeas petitioner "has failed to develop the factual basis of a claim in State court proceedings," the petitioner must show the claim relies on a new, retroactive law, or "a factual predicate that could not have been previously discovered through the exercise of due diligence; and . . . the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(A), (B); *see also Williams*, 529 U.S. at 434. A petitioner's '"failure" here means the petitioner was not diligent in investigating and pursuing the claim in state court. *Id.* at

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434–35. A diligent petitioner will have "made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court," even if the attempt was unsuccessful. *Id.* at 435. A diligent petitioner normally will have, at the very least, followed state procedure to ask for a hearing in state court. *Id.* at 437. If a petitioner had counsel, counsel's lack of diligence is attributable to the petitioner. *See id.* at 439–40. Hering did not develop the factual basis for his claim in state court. He does not meet the difficult standard to obtain an evidentiary hearing in this § 2254 proceeding. Consequently, the Court will deny Hering's request for a hearing.

VIII. CERTIFICATE OF APPEALABILITY

Pursuant to Rule 11(a) of the Rules Governing Section 2254 Proceedings in the United States Courts, the court must issue or deny a certificate of appealability when it enters a final order adverse to Hering. District Courts have the authority to issue certificates of appealability under 28 U.S.C. § 2253(c) and Fed. R. App. P. 22(b). "A certificate of appealability may issue under [this section] only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Such a showing means "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The Court concludes Hering has not made a substantial showing of the denial of a constitutional right, therefore the Court **denies** a certificate of appealability. Hering may request issuance of a certificate of appealability by a judge on the Eighth Circuit Court of Appeals. *See* Fed. R. App. P. 22(b).

IX. SUMMARY

The Court has carefully reviewed the submitted record of the state trial court proceedings, as well as the briefs of the parties in this habeas action. Having done so, the Court concludes that Hering's claims either cannot be reviewed, or the Iowa courts did not render a decision on the claims that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court, and the Iowa courts did not make a decision

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based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *See* 28 U.S.C. § 2254(d). No evidentiary hearing is warranted, therefore the Court **denies** the request for an evidentiary hearing. ECF No. 20.

The petition is **denied**. This case is **dismissed.** The Court **denies** a certificate of appealability. Hering may request issuance of a certificate of appealability by a judge on the Eighth Circuit Court of Appeals. *See* Fed. R. App. P. 22(b).

IT IS SO ORDERED.

Dated this 25th day of September, 2018.

JAMES E. GRITZNER, Senior Judge
U.S. DISTRICT COURT

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IN THE COURT OF APPEALS OF IOWA

No. 13-1945
Filed June 15, 2016

DAVID HERING,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Muscatine County, Marlita A. Greve (motion for summary judgment), and Gary D. McKenrick (postconviction ruling), Judges.

Applicant appeals the district court order denying his application for postconviction relief from his convictions for murder and two counts of attempted murder. **AFFIRMED.**

William R. Monroe of the Law Office of William Monroe, Burlington, for appellant.

David Hering, Anamosa, appellant pro se.

Thomas J. Miller, Attorney General, and Tyler J. Buller, Assistant Attorney General, for appellee State.

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

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BOWER, Judge.

David Hering appeals the district court order denying his application for postconviction relief from his convictions for murder and two counts of attempted murder. We find no error in the district court's rulings. Hering has not met his burden to show he received ineffective assistance of counsel. We affirm the decision of the district court denying Hering's application for postconviction relief.

I. Background Facts & Proceedings

Hering was charged with murder and two counts of attempted murder. The State alleged Hering shot his wife, Lisa, then shot at two officers who were responding to a 911 call at his home. During his criminal trial, the defense did not contest whether Hering committed the offenses but relied upon the defense of insanity. Dr. Kirk Witherspoon testified Hering suffered from paranoid schizophrenia and met the criteria for legal insanity at the time of the offenses. The State's expert, Dr. Michael Taylor, agreed Hering had paranoid schizophrenia but testified Hering was capable of forming specific intent. The jury found Hering guilty of murder and two counts of attempted murder. Hering's convictions were affirmed on appeal. *See State v. Hering*, No. 04-1222, 2006 WL 60678, at *1 (Iowa Jan. 11, 2006).

While Hering's criminal case was pending, the Muscatine County Sheriff filed a petition for the appointment of a conservator for Hering. The petition asserted Hering was a person "whose decision-making capacity is so impaired that the person is unable to make, communicate, or carry out important decisions concerning the proposed ward's financial affairs." The district court entered an order on October 6, 2003, finding "the proposed ward, David L. Hering, is

presently incarcerated in the Muscatine County Jail and that it would be in his best interests that a Conservator be appointed during the pendency of his incarceration and that [a bank] is suitable and qualified to act as such Conservator."

On April 10, 2006, Hering filed an application for postconviction relief raising eighty-seven claims of ineffective assistance of counsel. The State filed an answer on April 11, 2006. The application was amended on November 17, 2009, November 20, 2009, and November 4, 2011.[1] In responding to a motion, on May 19, 2010, the district court noted, "The conservatorship proceeding may have been prompted more by his incarceration and a desire to preserve his assets for his children, than a truly impaired capacity to make, communicate, or carry out important decisions concerning his financial affairs." Depositions of defense counsel, David Treimer and J.E. Tobey III, were taken in 2010.

On December 12, 2011, Hering filed a motion for summary judgment, claiming his convictions should be overturned because the State had not filed a response to his amended applications. The State resisted the motion. The district court entered a ruling on February 9, 2012, denying the motion for summary judgment.

A postconviction hearing was held on July 16, 2013. Hering testified via the Iowa Communications Network (ICN), but there were technological problems, and the court determined it was unable to make a proper record of his testimony. The court ordered Hering's deposition to be taken at Anamosa State

[1] Hering also filed a new application for postconviction relief on September 16, 2013. The district court considered the new application as a motion to amend the pending application for postconviction relief and denied the motion as untimely.

Penitentiary, where he was serving his sentence. The hearing continued, and Treimer testified concerning his representation of Hering, stating Hering agreed to pursue the defense of insanity. Treimer testified Dr. Witherspoon found Hering competent to stand trial. Postconviction counsel cross-examined Treimer, and then Hering engaged in a pro se cross-examination concerning many aspects of the criminal case.

The prosecutor and postconviction counsel traveled to Anamosa to take Hering's deposition on October 2, 2013. Hering stated he would not testify until after the court had the testimony of Treimer and Tobey, and then Hering would testify in rebuttal. On October 29, 2013, the district court issued an order stating the submission of evidence was not completed at the hearing on July 16, 2013, and the remainder of the testimonial evidence by deposition must be submitted by November 8, 2013. On November 6, 2013, the State submitted the depositions of Treimer and Tobey taken in 2010 in an offer of proof. Hering submitted two pro se briefs, exhibits, and an affidavit in support of his claims.

The district court entered a ruling on November 25, 2013, finding:

> Although the Court has considered and reviewed each of the applicant's claims, the Court finds it unnecessary to discuss the multiple particulars which the applicant asserts to be instances of ineffective assistance of counsel. Most, if not all, are factually without merit and are the products of the applicant's fantasy. The overwhelming credible evidence before this Court shows that criminal defense counsel made a well-reasoned and informed strategic decision to pursue an insanity defense on the applicant's behalf and that the applicant approved of that strategy at the time. The evidence of the applicant being the person who killed his wife and fired shots at law enforcement officers who responded to his child's 911 call is virtually irrefutable.

The court determined Hering had failed to show he received ineffective assistance of counsel and denied his application for postconviction relief. Hering appeals.[2]

II. District Court Rulings

A. Hering claims the district court should have made specific findings of fact and conclusions of law as to each issue he presented in his application for postconviction relief. Iowa Code section 822.7 (2005) provides, "The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." Substantial compliance with this rule is sufficient. *Gamble v. State*, 723 N.W.2d 443, 446 (Iowa 2006). "Even if the court does not respond to all of the applicant's *allegations*, the ruling is sufficient if it responds to all the *issues* raised." *Id.*; *see also Jones v. State*, 731 N.W.2d 388, 392 (Iowa 2007) (noting the "court need not address every allegation made by an applicant, but must respond to every issue raised"). We determine the district court substantially complied with section 822.7 by responding to all of the issues raised in Hering's application for postconviction relief.

B. Hering claims the district court should have held a competency hearing prior to his criminal trial. The court, on its own motion, may schedule a hearing if there are specific facts showing a hearing should be held on the issue of competency. Iowa Code § 812.3. In the postconviction proceeding, Hering

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[2] After Hering appealed on November 25, 2013, he filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2) on December 9, 2013. The district court ruled on the motion, and Hering filed a second notice of appeal on December 11, 2013. "[T]he district court loses jurisdiction over the merits of the controversy and may not consider any posttrial motions filed after the notice of appeal." *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 628 (Iowa 2000). Therefore, we do not consider Hering's posttrial motion or the court's ruling on the motion.

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did not present specific facts showing he was suffering from a mental disorder that prevented him from appreciating the charge, understanding the proceedings, or assisting effectively in the defense. *See id.* We find no error in the district court's failure to raise the issue of competency sua sponte.

C. In his pro se brief, Hering claims the district court should have granted his motion for summary judgment. He asserted the State's failure to file an answer to his amended petitions for postconviction relief meant the State conceded those issues. Our review on this issue is for the correction of errors at law. *See Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). An applicant is not entitled to a default judgment when the State has failed to file a timely response to an application for postconviction relief. *Furgison v. State*, 217 N.W.2d 613, 618 (Iowa 1974). We determine the district court did not err in denying Hering's motion for summary judgment.

III. Ineffective Assistance

We review claims of ineffective assistance of counsel de novo. *Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012). To establish a claim of ineffective assistance of counsel, an applicant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied the applicant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2009). An applicant has the burden to show by a preponderance of the evidence counsel was ineffective. *See State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 1992).

A. Hering claims he received ineffective assistance because defense counsel presented an insanity defense, rather than presenting a general denial he committed the offenses. During the trial, the defense did not deny Hering shot

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his wife and then shot at two officers but asserted he was legally insane at the time. Hering states defense counsel did not adequately investigate exculpatory evidence, which he believes could have shown he did not murder his wife or shoot at the officers.

"Miscalculated trial strategies and mere mistakes in judgment normally do not rise to the level of ineffective assistance of counsel." *Ledezma*, 626 N.W.2d at 143. "Thus, claims of ineffective assistance involving tactical or strategic decisions of counsel must be examined in light of all the circumstances to ascertain whether the actions were a product of tactics or inattention to the responsibilities of an attorney guaranteed a defendant under the Sixth Amendment." *Id.* "While strategic decisions made after 'thorough investigation of law and facts relevant to plausible options are virtually unchallengeable,' strategic decisions made after a 'less than complete investigation' must be based on reasonable professional judgments which support the particular level of investigation conducted." *Id.* (citation omitted).

We find Hering agreed to the presentation of an insanity defense, rather than a general denial he committed the offenses. Both Treimer and Tobey testified the matter was discussed with Hering and he agreed to the insanity defense. They also both testified as to why they believed the insanity defense was the best defense to present in this case. In addition to the testimony of Dr. Witherspoon, they presented the testimony of several witnesses concerning Hering's bizarre conduct shortly before the incident, such as driving his tractor in fields late at night and shooting a neighbor's satellite dish because he believed it was receiving alien signals or spying on him. Furthermore, the evidence does

not show defense counsel decided to present an insanity defense due to inadequate investigation of the case, but as Treimer testified, "the evidence was substantial that he had actually shot his wife, and a general denial wasn't going to fly."

Hering also states defense counsel could have presented inconsistent defenses by arguing he did not commit the offenses, but if he did commit the offenses, he was legally insane at the time. Tobey testified he believed inconsistent defenses should be avoided whenever possible. He stated, "First, it is what citizens who aren't lawyers hate about lawyers, and when you do it, it inevitably will spray that hatred on your client. And if there's any way to avoid it, you'll avoid it." He also stated, "[I]t would have been tactically irresponsible to abandon the evidence that we had and to argue that in the alternative."

We conclude Hering has not shown he received ineffective assistance of counsel based on the presentation of an insanity defense at his criminal trial, rather than a general denial he committed the offenses.

B. Hering, in his pro se brief, claims he received ineffective assistance because defense counsel did not file a motion in limine seeking to prevent the State's expert witness from giving opinion testimony on legal standards or object to such testimony during the criminal trial. He states Dr. Taylor was improperly permitted to testify Hering "was fully capable of forming intent, the specific intent to kill."

Iowa Rule of Evidence 5.704 provides, "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." "However, an

expert may not opine as to whether a particular legal standard has been satisfied or to 'the defendant's guilt or innocence.'" *State v. Tyler*, 867 N.W.2d 136, 153–54 (Iowa 2015) (citation omitted). Here, Dr. Taylor did not give an opinion about Hering's guilt or innocence but instead gave a more general opinion he was capable of forming the requisite specific intent. We conclude Hering has not shown he received ineffective assistance due to defense counsel's decision not to object to the testimony of Dr. Taylor on this ground.

C. Hering claims he received ineffective assistance because defense counsel did not file a motion to suppress evidence obtained under a search warrant. He states the search warrant application and the warrant were defective so everything seized during the search should be suppressed. Hering does not state what particular items were discovered during the search or how the evidence was detrimental to his criminal case. At the postconviction hearing, Treimer testified a motion to suppress was not filed because "we wanted evidence that was seized from your property for us to use against the State's evidence in trial." Hering has not shown he was prejudiced by the failure to file a motion to suppress and, thus, has not shown he received ineffective assistance of counsel. *See Ledezma*, 626 N.W.2d at 142 ("If the claim lacks prejudice, it can be decided on that ground alone without deciding whether the attorney performed deficiently.").

D. To the extent Hering may be claiming he received ineffective assistance due to defense counsel's failure to request a competency hearing prior to his criminal trial, we conclude he has not met his burden to show he received ineffective assistance. The conservatorship was a separate civil

proceeding under chapter 663 based upon a different standard than a competency determination under chapter 812. Defense counsel raised the issue with Dr. Witherspoon, who gave the opinion Hering was competent to stand trial. Defense counsel stated Hering appreciated the charge, understood the proceedings, and was able to effectively assist in his defense. *See* Iowa Code § 812.3.

E. Hering's pro se appellate brief refers to several additional claims of ineffective assistance of counsel without specifically setting out those issues, making an argument in support of them, or citing authority. We conclude these claims have not been sufficiently presented under Iowa Rule of Appellate Procedure 6.903(2)(g) and we do not address them. Additionally, the State's appellate brief refers to numerous issues not raised on appeal by postconviction counsel or Hering. Postconviction counsel and Hering then raised those issues in their reply briefs. "We have long held that an issue cannot properly be asserted for the first time in a reply brief." *State v. Walker*, 574 N.W.2d 280, 288 (Iowa 1998).

We affirm the decision of the district court denying Hering's application for postconviction relief.

AFFIRMED.

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State of Iowa Courts

Case Number	Case Title
13-1945	Hering v. State

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IN THE IOWA DISTRICT COURT FOR MUSCATINE COUNTY

David Hering, Applicant,	)	
Vs.	)	Law No. PCCV016622
State of Iowa, Respondent.	)	RULING

On July 16, 2013, this matter came before the Court for a contested trial. The applicant appeared by the Iowa Communications Network (ICN) and was represented by Joel Walker. The respondent was represented by Muscatine County Attorney Alan Ostergren. Due to problems with the ICN, the applicant's testimony was not completed. The applicant's testimony was to be completed by deposition, however no transcript of such a deposition was provided to the Court. The Court, having reviewed the documents on file, having taken judicial notice of the documents on file and transcripts of the proceedings in Muscatine County Docket No. FECR027417, and having considered the evidence and arguments of counsel and the applicant, finds as follows.

At the outset, counsel for the applicant requested permission to withdraw from representation of the applicant. The Court denied the request, and the Court also denied the applicant's renewed request to continue the trial. The reasons for those rulings are the same as set forth by the Court in the order filed July 9, 2013.

The Court must decide the facts from the evidence. The Court considers the evidence using its observations, common sense and experience. The Court will try to reconcile any conflicts in the evidence, but if the Court cannot, the Court accepts the evidence it finds more believable.

In determining the facts, the Court may have to decide what testimony to believe. The Court may believe all, part or none of any witness's testimony. In determining what testimony to believe, the Court considers the reasonableness and consistency of the testimony with other evidence and internally, whether a witness has made inconsistent statements, as well as the witness's appearance, conduct, age, intelligence, memory, knowledge of the facts, interest in the trial, motive, candor, bias and prejudice.

This is an action for post-conviction relief pursuant to Chapter 822, Iowa Code (2013). The applicant asserts that he received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United State Constitution and of Article I, Section 10 of the Iowa Constitution. The specific allegations of ineffective assistance relate to alleged failures to obtain suppression of evidence, lack of appropriate investigation, and failure to object to myriad procedures and evidence both prior to and during trial. The specific claims are set forth in the applicant's original pro se application filed April 10, 2006, previous counsel's amended application filed November 20, 2009, and the pro se amendments filed November 18, 2009; February 9, 2010; and November 7, 2011.

Additionally, the applicant filed what purported to be a new application for post-conviction relief on September 16, 2013, concerning ongoing filings and rulings entered in the underlying criminal action.[1] Due to the ongoing pendency of this proceeding, the Court determined that such filing should be considered to be a motion to amend and

[1] Essentially, the applicant claims the Court in the underlying criminal prosecution lacked jurisdiction to proceed on the prosecution of the applicant after the applicant was adjudicated to be in need of a conservatorship during the pendency of the criminal prosecution. The applicant conflates the showing of impairment necessary for appointment of a conservator with the showing required to establish incompetency for the purpose of abating a criminal prosecution. They are two entirely different standards.

amended application for post-conviction relief in this action. Due to it being filed after the commencement of the trial and not being made to conform to the proof adduced in the trial of this action, the Court denied the motion to amend as untimely. The issues raised by the applicant in those filings in the underlying criminal action and asserted by the applicant in the applicant's attempted new application for post-conviction relief clearly are issues which should and could have been raised in a timely manner in this action.

The applicant must prove his claims by a preponderance of the evidence. Preponderance of the evidence is evidence that is more convincing than opposing evidence.

Claims of ineffective assistance of counsel need not be raised on direct appeal of a criminal conviction in order to preserve such claims for consideration in a subsequent action for post-conviction relief. § 814.7(1), Iowa Code (2013). In order to establish ineffective assistance of counsel, "the applicant must demonstrate the attorney performed below the standard demanded of a reasonably competent attorney." *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). The attorney's performance is measured against prevailing professional norms commencing with the presumption that the attorney performed competently. The Court must avoid any unfair assessment of counsel's performance through second-guessing and hindsight. The inquiry must be an individualized fact-based analysis in light of the totality of the circumstances. *Id.*

A claim of ineffective assistance of counsel "is more likely to be established when the alleged actions or inactions of counsel are attributed to a lack of diligence as opposed to the exercise of judgment . . . Thus, claims of ineffective assistance involving

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tactical or strategic decisions of counsel must be examined in light of all the circumstances to ascertain whether the actions were a product of tactics or inattention to the responsibilities of an attorney guaranteed a defendant under the Sixth Amendment." *Id.*, at 143. "While strategic decisions made after 'thorough investigation of law and facts relevant to plausible options are virtually unchallengeable,' strategic decisions made after a 'less than complete investigation' must be based on reasonable professional judgments which support the particular level of investigation conducted. The accompanying investigation must be reasonable under the circumstances." *Id.* (citations omitted).

If the applicant is able to prove ineffective assistance of counsel, the applicant then must prove that counsel's error caused prejudice to the applicant. "To sustain this burden, the applicant must demonstrate 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.*, at 145 (citations omitted). In order to establish prejudice, the applicant must establish a reasonable probability that the result of the criminal proceeding against him would have been different but for counsel's failure to perform an essential duty. *State v. Smith*, 573 N.W.2d 14, 21 (Iowa 1997). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 693, 104 S.Ct. 2052, 2067, 80 L.Ed.2d 674, 697 (1984). Result is defined as the decision rendered. In other words, the applicant must show "the reasonable probability of a different verdict or that the fact finder would have possessed reasonable doubt." *Ledezma*, 626 N.W.2d at 144.

"Counsel is required to conduct a reasonable investigation or make reasonable decisions that make a particular investigation unnecessary. Thus, the duty to investigate is not unlimited . . . [I]nvestigation of a defense may be curtailed or eliminated if the facts are already known to counsel through another source. In each instance, the decision to investigate a particular matter must be judged in relationship to the particular underlying circumstances." *Id.*, at 145 (citations omitted).

In essence, the applicant denies being the person who killed his wife. He asserts that criminal defense counsel failed to investigate and pursue potential evidence that may have inculpated other persons in his wife's murder. The applicant asserts that criminal defense counsel should have pursued a defense strategy consistent with those positions rather than the insanity defense strategy which criminal defense counsel presented, effectively admitting that the applicant killed his wife.

Although the Court has considered and reviewed each of the applicant's claims, the Court finds it unnecessary to discuss the multiple particulars which the applicant asserts to be instances of ineffective assistance of counsel. Most, if not all, are factually without merit and are the products of the applicant's fantasy. The overwhelming credible evidence before this Court shows that criminal defense counsel made a well-reasoned and informed strategic decision to pursue an insanity defense on the applicant's behalf and that the applicant approved of that strategy at the time. The evidence of the applicant being the person who killed his wife and fired shots at two law enforcement officers who responded to his child's 911 call is virtually irrefutable.

Clearly, the best, and only reasonable, defense for counsel to pursue under the circumstances was the insanity defense. The applicant simply has failed to establish by

a preponderance of the evidence that: (1) criminal defense counsel breached any duty; or (2) he suffered any prejudice due to the actions or inaction of his criminal defense counsel. Indeed, the record in the underlying criminal prosecution shows that defense counsel mounted a vigorous defense of the applicant in the context of the insanity defense which was pursued and with which the applicant acquiesced at the time.

IT IS THEREFORE ORDERED that the application to withdraw by counsel for the applicant is denied.

IT IS FURTHER ORDERED that the applicant's renewed motion to continue is denied.

IT IS FURTHER ORDERED that the application for post-conviction relief, as amended, is denied, and the costs of this action shall be assessed against the applicant.

Dated at Muscatine, Iowa this 21st day of November, 2013.

Gary D. McKenrick, District Judge

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IN THE IOWA DISTRICT COURT FOR MUSCATINE COUNTY

DAVID HERING,

Applicant,

vs.

STATE OF IOWA,

Respondent.

Criminal Case No. PCCV 016622

ORDER

On the 10th day of December, 2013, the applicant's Motion to Enlarge, Amend and Modify Ruling came before the Court for consideration. The Honorable Gary McKenrick entered a ruling on November 25, 2013 denying the applicant's Application for Postconviction Relief. The Honorable Gary McKenrick (hereinafter, "the Trial Court") is now retired.

The Court finds it is without jurisdiction to address the issues raised in paragraph 13 of Applicant's motion as the applicant has appealed that decision. Additionally, the issue raised in paragraph 13 is outside of the time limits for a Motion brought pursuant to Iowa R. Civ. Pr. 1.904(2).

The applicant states that the Trial Court failed to address all of the issues he has raised. The applicant states on page 4 of his Motion that the Trial Court failed to address "the real question" of whether the applicant agreed to relieve the State of their heavy burden of proving Hering guilty beyond a reasonable doubt." A review of the Trial Court's ruling reveals that the Trial Court addressed but dismissed the majority of the applicant's issues as being "factually without merit and the product of the applicant's fantasy". This language indicates that the Trial Court made a credibility determination and that it did not believe the evidence put forth by the applicant. Additionally, the Trial Court did indirectly address "the real question" as set forth

above. The Trial Court determined that "the overwhelming credible evidence before this Court shows that criminal defense counsel made a well-reasoned and informed decision to pursue an insanity defense on the applicant's behalf and that the applicant approved of this strategy." This strategy did not encompass contesting the killing of the applicant's wife but rather introducing evidence and arguing to the jury that the applicant was insane when he committed this act. To argue that the applicant did not commit the crime and alternatively and simultaneously argue that if he did then he was insane would weaken both potential defenses. Such a strategy would not be sound. When the applicant agreed to the defense strategy of pursuing an insanity defense, he also agreed to not contest the underlying murder. The Trial Court further found, upon a review of the record, that the evidence that the applicant killed his wife and fired two shots at law enforcement was virtually irrefutable. The applicant disagrees with this conclusion. Applicant's disagreement is not a basis to modify the Trial Court's ruling.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Motion to Enlarge, Amend and Modify Ruling is denied.

Dated this 10 day of December, 2013.

Thomas G. Reidel
Judge of the Seventh Judicial District of Iowa