

IN THE IOWA DISTRICT COURT IN AND FOR JOHNSON COUNTY

Donald Lyle Clark,)	
)	
Applicant,)	
)	No. PCCV074898
vs.)	
)	
State of Iowa,)	RULING ON APPLICATION FOR
)	POSTCONVICTION RELIEF
)	
Respondent.)	

This postconviction relief matter involves contentions of ineffective assistance of counsel at the time of a previous criminal trial and newly discovered evidence. At the time set for trial, Applicant, Donald Lyle Clark, appeared in person and with counsel, Clemens Erdahl II, and the Respondent, State of Iowa, appeared through Assistant Johnson County Attorney Andrew Chappell. Proceedings were conducted as reflected in the record, including presentations by the parties, testimony by witnesses called on behalf of the Applicant, and offer of exhibits by both parties. Following reopening of the record and receipt of additional evidence and briefing, the matter was submitted March 21, 2016.

Having considered the court file, the testimony of the witnesses at trial, including the credibility of such witnesses, and the exhibits offered, the Court makes the following findings of fact and conclusions of law and issues the following ruling.

FINDINGS OF FACT

Summary of Factual and Procedural Background

Applicant, Donald Clark (“Mr. Clark”), was convicted in March of 2010 of the crime of Second Degree Sexual Abuse, in violation of Iowa Code § 709.3, pursuant to charges that had been filed in Johnson County Case No. FECR087965, of which this Court has taken judicial notice. Mr. Clark’s trial counsel in FECR087965 was Attorney John Robertson.¹ Mr. Clark was sentenced to an indeterminate term not to exceed 25 years.

Mr. Clark appealed such conviction and sentence to the Iowa Court of Appeals, which affirmed the trial court’s determinations without published opinion. See *State v. Clark*, No. 10-0511, 2011 WL 5515221 (Iowa App. 2011). Mr. Clark’s application for further review was granted, with the judgment of the Court of Appeals affirmed. See *State v. Clark*, 814 N.W.2d 551 (Iowa 2012).

Mr. Clark filed September 12, 2012, his Application for Postconviction Relief pursuant to Iowa Code Chapter 822. The State filed a responsive pleading October 19, 2012. After a period of discovery and one continuance of the trial date, the matter was set for trial September 17,

¹ John Robertson died in April, 2013.

2014, and individually assigned to the undersigned, pursuant to Trial-Scheduling Order filed March 27, 2014. The matter proceeded to trial as scheduled.

On October 29, 2014, Applicant filed a Request for Admission of Additional Evidence. The State filed a resistance November 10, 2014, and the Applicant a reply November 19, 2014. The Court entered a Ruling on Request for Admission of Additional Evidence on April 1, 2015, Following a hearing held on February 13, 2015, the Court reopened the record for six months in order to give the parties an opportunity to conduct and exchange discovery and present additional evidence relating to an independent medical examination (“IME”) report prepared for civil litigation involving these matters.

Following this period of discovery, the Court filed a Memorandum and Scheduling Order on December 4, 2015, in which the Court received into evidence Plaintiff’s Exhibits 9a, 9b, 9c and 9d, and directed Respondent to file an affidavit from the purported victim in response to Plaintiff’s Exhibits 9a, 9b, 9c and 9d. The parties also were granted the opportunity to provide additional briefs following the Court’s receipt of the additional exhibits. The matter was deemed submitted following the filing of post-trial briefs by the parties March 21, 2016.

Proceedings in the Underlying Criminal Trial

The factual and procedural history of the underlying case is discussed in detail by the Iowa Supreme Court in the decision affirming Mr. Clark’s original conviction, from which the Court draws largely in setting forth the underlying proceedings. See *State v. Clark*, 814 N.W.2d at 554-560. The parties agreed at the time of trial of this matter that the factual and procedural background set forth in the Supreme Court’s opinion generally is accurate.

During the course of his work as a guidance counselor at an elementary school (Lemme Elementary) in the Iowa City School District, Mr. Clark began seeing C.B., then a fifth-grade student who had been diagnosed with attention deficit disorder. Mr. Clark regularly saw C.B. for 20 to 30 minutes per visit during the 2003-2004 academic year. Such visits generally occurred in Mr. Clark’s office at the school.

After fifth grade, C.B.’s life “spiraled out of control” and, by seventh grade, C.B. was drinking, using drugs, and engaging in other self-harming behavior. *Id.* at 559. C.B.’s parents sent him to a highly structured school for troubled youth in Keokuk, Iowa. In May of 2009, during group therapy at the school in Keokuk, C.B. disclosed for the first time that he had been abused. June 8, 2009, C.B. wrote to his family a five-page, single-spaced e-mail in which he discussed the alleged sexual abuse but did not identify the perpetrator. After receiving the e-mail, C.B.’s parents contacted the school in Keokuk and asked that C.B. see a social worker. During sessions with social workers, C.B. indicated that he had been sexually abused during his fifth-grade counseling sessions with Mr. Clark.

August 20, 2009, the State filed a trial information charging Mr. Clark with second-degree sexual abuse, in violation of Iowa Code § 709.1(3), 709.3(2), and 702.17. August 28, 2009, an order was entered approving depositions of minuted witnesses and ordering that the

State disclose any exculpatory evidence, including any evidence related to the credibility of minuted witnesses. *Id.* at 557. A jury trial was scheduled to begin February 8, 2010.

During the course of discovery in the underlying criminal action, issues arose with respect to the e-mail sent by C.B. and as to possible hallucinations, referred to by C.B. in his e-mail. A “redacted” version of the e-mail was furnished to Mr. Clark’s defense counsel February 3, 2010, five days prior to the scheduled trial. Such “redacted” version contained only about one-sixth of the e-mail, and omitted portions of the e-mail including passages in which C.B. discussed honesty and lying, his mental state, his relationship with his parents, and other matters. February 4, 2010, Mr. Clark’s defense counsel submitted a request for an unredacted version of the e-mail, as well as a request for reopening of prior depositions and a motion to continue the trial. In the motion, defense counsel for Mr. Clark discussed the request as follows:

Although based on the information available to the undersigned at the time, depositions have been completed, the letter in question here raises information not previously made available to the Defendant. Proper exploration of said information is proper and necessary in connection with the Defendant’s fair trial and due process rights, and this, in turn, requires that depositions be reopened as they relate to the information contained in the document.

Because these matters have only come to the attention of the undersigned within the last 12 hours, and because trial in this cause is now set to occur in less than four days, a continuance is justified [in] order to allow proper time to review the document at issue, to prepare proper lines of inquiry, and then to depose the witnesses.

Id. at 558.

Hearing was conducted late in the morning of February 5, 2010. Prior to the hearing, the State provided the complete unredacted e-mail to Mr. Clark’s defense counsel. Early in the afternoon of February 5, the Court issued a ruling noting it had reviewed the e-mail and the previous depositions; ordered the entire e-mail be produced to the Defense; and denied Mr. Clark’s other requests, stating there was nothing in the e-mail that warranted further investigation, depositions, or a continuance of the trial.

The trial proceeded as scheduled beginning the following Monday, February 8, 2010. Prior to jury selection, Mr. Clark’s defense counsel renewed the motion to continue, stating counsel’s belief that Mr. Clark’s fair trial rights and opportunity to explore defenses warranted the continuance of the trial. The Court again denied the request for continuance.

C.B. was the State’s first witness at the time of trial. On cross-examination, defense counsel for Mr. Clark explored in detail subjects including C.B.’s e-mail; questioned C.B. about the fact that C.B. was highly troubled and not a credible witness; asked C.B. about previous statements that he had heard things which people had not said; and asking questions suggesting that C.B. made up the accusation as a way to get out of his school in Keokuk. Mr. Clark’s defense counsel had C.B. confirm that, earlier the same spring, Mr. Clark had been a topic of

conversation between C.B.'s father and C.B. regarding sexual acts at the Johnson County Jail, raising a clear implication that C.B. had absorbed what he heard from his father and then had leveled a false accusation against Mr. Clark. *Id.* at 559.

The State's next witnesses were C.B.'s parents, who again were subject to extensive cross-examination by defense counsel for Mr. Clark. In their testimony, C.B.'s parents acknowledged that C.B. had had attention deficit disorder as a youngster, with more serious behavioral problems after the fifth grade; that C.B. had engaged in self-destructive behavior; that C.B.'s father had shared with C.B. in the spring of 2008 information about a sexual incident involving Mr. Clark at the Johnson County Jail; and that issues had arisen regarding whether C.B. ever had been diagnosed with schizophrenia or had been a victim of abuse by a priest.

Following conclusion of evidence by the State, Mr. Clark also testified. Mr. Clark's testimony included description of his teaching career and his interactions with C.B.; his denial of ever inappropriately touching C.B.; and his discussion of the fact he is gay. Other evidence offered at the time of the trial of the underlying matter was discussed in greater detail by the Iowa Supreme Court at pages 556-559 of its June 8, 2012 opinion.

February 10, 2010, the jury returned a verdict finding Mr. Clark guilty of second-degree sexual abuse. Counsel for Mr. Clark sought a new trial, arguing that Mr. Clark should have been granted a continuance because of the late disclosure of the e-mail, and maintaining that the lack of a continuance denied Mr. Clark his statutory and constitutional right to a fair trial. The motion for new trial was denied. March 18, 2010, Mr. Clark was sentenced to an indeterminate term not to exceed 25 years in prison, with Mr. Clark required to serve at least 70% of that 25-year maximum.

Mr. Clark appealed the trial court's determinations to the Iowa Court of Appeals, which affirmed Mr. Clark's convictions and sentence on November 9, 2011, with one judge dissenting. The Iowa Supreme Court granted Mr. Clark's application for further review. As noted above, the Iowa Supreme Court affirmed the lower court's rulings. 814 N.W.2d at 551. The Iowa Supreme Court's rulings included the holding that Mr. Clark's arguments related to his claim of ineffective assistance of counsel had been raised only in a "general or conclusory manner." *Id.* at 567. For such reason, the Iowa Supreme Court concluded the record was not sufficient at that time to address such issues, and left them to be determined in a possible postconviction relief proceeding. *Id.*

The Iowa Supreme Court, with two justices dissenting, concluded the district court did not violate Mr. Clark's constitutional rights or abuse its discretion when it refused to allow additional depositions or grant a continuance. *Id.* The Court noted that its conclusion in that regard did not constitute an endorsement of the prosecution's behavior, finding that the State's reasons for not immediately producing the entire e-mail to Mr. Clark were "flimsy and unsupportable." *Id.* The Iowa Supreme Court affirmed Mr. Clark's conviction and sentence. *Id.*

The Contentions and Evidence in Support of the Application for Postconviction Relief

Mr. Clark has generally contended he is entitled to postconviction relief and a new trial based on ineffective assistance of counsel, and based on newly discovered evidence that would justify postconviction relief. Specifically, Mr. Clark alleges that his conviction and sentence was in violation of the Constitution of the United States or the Constitution or laws of Iowa, and that there exists evidence of material facts, not previously presented and heard, which require vacation of the conviction or sentence in the interest of justice. In his Application, Mr. Clark contends he was denied effective assistance of counsel and due process of the law as guaranteed by the 5th and 6th amendments to the United States Constitution, and Article I §§ 9 and 10 of the Iowa Constitution, in that:

- i. Defense counsel did not adequately investigate, and did not adequately advise or communicate with Mr. Clark about the evidence prior to trial, thus depriving Mr. Clark of his right to assist with his own defense.
- ii. With respect to the trial court's failure to allow time for investigation and additional depositions by continuing trial, defense counsel failed to raise the Due Process violation based on withholding of exculpatory evidence. Counsel also failed to make a complete record of the many reasons why Mr. Clark needed to further investigate, and not just continue the trial.
- iii. Counsel was ineffective for failing to make a motion *in limine* and failing to object at trial to discussion of Mr. Clark's prior intimate relationship.

Mr. Clark also contends there is new evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice. Mr. Clark points to deposition testimony by the victim, in the civil litigation related to this matter and subsequent to the original criminal trial, wherein the victim testified that he perjured himself by lying at the criminal trial.

Mr. Clark claims he was unaware, until it was introduced at trial, of a great deal of evidence being presented against him, including that defense counsel had not viewed the scene of the crime and did not comprehend the alleged inaccuracy of photographs introduced by the State; defense counsel did not file a motion *in limine* to suppress the allegedly inadmissible photographs; defense counsel did not object to the admission of allegedly inaccurate and inadmissible exhibits at trial; and defense counsel failed to introduce photographs provided by Mr. Clark which allegedly accurately depicted the scene of the alleged crime. Mr. Clark also claims that he expressed concerns to his defense counsel that discussion of a prior intimate relationship would mislead and prejudice the jury; yet counsel took no action before or during trial to prevent the introduction of the allegedly highly suspect and prejudicial evidence.

Mr. Clark also asserts that, if the victim's withheld statements had been offered at trial, it is doubtful the jury would have found the victim's claims credible. Mr. Clark further asserts that the most recent version of facts offered by the victim demonstrates incidents of abuse that would have been improbable given the circumstances of the location they allegedly occurred; the access

to the room in question; and the time period of the allegations. Mr. Clark claims that, under the totality of the circumstances, the victim has perjured himself and the Court cannot allow a serious conviction to rest upon such a public contradiction.

In consideration of the contentions of Mr. Clark, the Court first considers and makes findings related to the testimony of witnesses appearing at the time of the postconviction trial.

1. Testimony of Steven Exley-Schuman

The first witness at trial of the postconviction matter was Steven Exley-Schuman, who has been an Investigator II with the Public Defender's Office in Iowa City, Iowa, for eighteen years. Mr. Exley-Schuman had contact with Mr. Clark throughout the criminal case, which was a routine practice for investigators within the Public Defender's Office, due to the busy schedule of the attorneys. However, Mr. Exley-Schuman did not work extensively on the case and did not attend trial or discuss any specific trial strategy with Attorney Robertson. Mr. Exley-Schuman also was not asked to interview any potential character witnesses on behalf of Mr. Clark. Mr. Exley-Schuman testified he generally considers visits to crime scenes to be very important, and it is not sufficient to just rely on police photos of crime scenes. Mr. Exley-Schuman testified he prefers to take his own photos to preserve evidence and depict how the scene looked at the time of the alleged crime. Mr. Exley-Schuman did not visit or photograph the alleged crime scene in this matter.

Mr. Exley-Schuman testified he was surprised at Mr. Clark's conviction, and had conversations about Mr. Clark's conviction with Attorney Robertson following the criminal trial. Mr. Exley-Schuman recalls that Attorney Robertson preferred to represent clients at trials in a "seat of the pants" manner, rather than relying on an organizational scheme. Over objection by the State, Mr. Exley-Schuman testified as to his recollection that Attorney Robertson believed that he had been ineffective in his representation of Mr. Clark, which Mr. Exley-Schuman testified is not a typical admission made by attorneys at the Public Defender's Office.

Mr. Exley-Schuman had discussions with Attorney Peter Persaud (also of the Public Defender's Office) following Attorney Robertson's statements. Specifically, Attorney Robertson expressed to Mr. Exley-Schuman concerns about the "prior bad acts" evidence that had been admitted by the State against Mr. Clark. This evidence included a statement from a former lover of Mr. Clark who testified that Mr. Clark was sexually aggressive. Mr. Exley-Schuman was surprised that Attorney Robertson had not filed a motion *in limine* regarding such evidence.

Mr. Exley-Schuman admitted he was not aware of all the facts that were admitted at trial, and he had not read the trial transcript. Mr. Exley-Schuman admitted he has not heard any complaints made by Mr. Clark about Attorney Robertson's performance.

Mr. Exley-Schuman also acknowledged that Attorney Robertson's handwriting appears on Defendant's Exhibit A, pages 2 and 3, a version of which also was admitted as Exhibit B in order to permit Mr. Exley-Schuman to write on it. Attorney Robertson's handwriting appears on the upper part of page 2, which states: "Remember, when you were interviewed by DJ he asked you why a kid would make a false allegation you answered 1) maybe he's gay and needs to

'blame' it on someone 2) maybe he's sexually abused but can't safely name the real abuser." On page 3 of Exhibit A, Attorney Robertson's handwriting appears, stating "Do you think we should tell the jury about the jail incident + Dad telling Chris about it," including a spot in the middle of page three that reads "yes, no" and has a question mark. Attorney Robertson also may have written "good question," although Mr. Exley-Schuman was not exactly sure that part of page 3 was Attorney Robertson's handwriting. Attorney Robertson's handwriting does not appear on page 4 of Exhibit A.

2. Testimony of Samantha Von Spreecken

Samantha Von Spreecken also testified at the postconviction trial. Ms. Von Spreecken then was a law student at DePaul University College of Law, and previously served as an intern and then as a legal assistant at the law firm of Nidey, Erdahl, Tindal and Fisher ("the Nidey firm") in Cedar Rapids, Iowa. In her capacity as an employee of the Nidey firm, Ms. Von Spreecken began working on Mr. Clark's criminal case in January, 2012, when it was on appeal from the district court proceedings. Ms. Von Spreecken worked on evidentiary issues in the case; met with Mr. Clark; prepared memos; spoke with witnesses; and read multiple transcripts and depositions. In particular, Ms. Von Spreecken worked on a memo pertaining to a waiver of Mr. Clark's presence during a deposition. According to Ms. Von Spreecken, Attorney Robertson waived Mr. Clark's presence at a deposition, without Mr. Clark's permission.

Ms. Von Spreecken also visited the scene where the purported events took place in order to gain an understanding of the configuration of the classroom and school, and to take photographs that would accurately represent the setting. Attorney Robertson never visited Lemme Elementary for the purposes of his representation of Mr. Clark in the criminal action. Attorney Robertson did, however, refer to the window of Mr. Clark's office generally as being about waist high, although Mr. Robertson was about 6'2" or 6'3".

Comparisons of photographs taken at various times are important to the claims of Mr. Clark in his postconviction claims. The library in the school is shaped similarly to a horseshoe, with two entrances. On the outer walls of the horseshoe shape are several classrooms, and Mr. Clark's office was one of the inner classrooms, with the larger area of the horseshoe being the library. All of the classrooms have doors that enter on the hallway or the library, but they all enter into one big room.

The set of photos of the area admitted as Plaintiff's Exhibit 1 at the postconviction trial, which had been taken by a detective working on the criminal case, were admitted in the underlying criminal trial. The set of photos of the area admitted as Plaintiff's Exhibit 2 in the postconviction trial are photos that Ms. Von Spreecken reviewed with Mr. Clark, which were presented to her by Mr. Clark, but were not introduced at the criminal trial. The set of photos admitted as Plaintiff's Exhibit 3 are photos that Ms. Von Spreecken took in 2014. Ms. Von Spreecken's photos were taken at the end of a school day, and were taken several years after the incident in question.

Exhibit 1a shows the door to Mr. Clark's former school office, with the light off in the office. There had been allegations that the light was off when some of the incidents in question

took place. Exhibit 3d shows the office from a slightly different angle, with the full extent of the door shown and a perspective given to show how large and at what level the window in the door is located.

Exhibits 1b and 1c show the inside of the office, with the door open and with some furniture that is now being used in the office. Exhibit 3g is from the same angle, but with a different view due to the door being closed.

Exhibits 1d and 1e also are photos of the interior of the office, but part of Exhibit 1d has some shade in the frame that does not show the full view of the office. The furniture also is centered in the middle of the room, which is not how Ms. Von Spreecken understood Mr. Clark to have his furniture arranged. Exhibits 2b, 2c and 2d show the furniture placed against the walls, without any furniture centered in the office. Ms. Von Spreecken believes the photos taken by Mr. Clark (in Exhibit 2) show the layout of the classroom at the time when Mr. Clark was a teacher, and she believes her photos (Exhibit 3) provide a more accurate depiction of the office than those taken by the detective for the criminal trial (included in Exhibit 1). Ms. Von Spreecken does not contend that the photos admitted at the criminal trial were in any way doctored or edited.

Exhibit 3a shows one of the two entrances to the library, with this entrance being closest to Mr. Clark's office. Exhibit 3b shows the same entrance as Exhibit 3a, but is just closer in on the left side. Exhibit 3c shows two classrooms that are about nine or ten steps away from Mr. Clark's office, with the library to the right. Exhibit 3d shows the door to the room used as Mr. Clark's office. Exhibit 3e is the right side of the office, and the light switch shown in the photo is just to the right of the door, about seven steps from the doorway to the corner of the office. Exhibit 3f shows the very back of the office from where the desk sits in Exhibit 3e. Exhibit 3g shows the view from outside Mr. Clark's office, and Exhibit 3h is just a few steps to the right of his classroom. The library is shown in the distance in Exhibit 3h. Exhibit 3i shows the opening to the library. These photos purport to show that Mr. Clark's office was not in a remote location within the school.

Exhibit 4 is a drawing of the office that Mr. Clark provided to counsel in the postconviction proceedings. Ms. Von Spreecken found this drawing to be a fairly accurate depiction of the office, and testified the drawing generally comports with the photographs in Exhibit 2.

Ms. Von Spreecken testified she met with Attorney Robertson and Attorney Erdahl on August 2, 2012, for about an hour. While it is Ms. Von Spreecken's general routine to take notes at a meeting, she cannot find notes from this meeting and assumes she did not take notes at the meeting. At the meeting, Attorney Erdahl asked Attorney Robertson about the trial exhibit photos introduced at the criminal trial, and when Mr. Clark would have seen them. Attorney Robertson responded that Mr. Clark saw them during a deposition that Ms. Von Spreecken testified she knew Mr. Clark did not attend. Ms. Von Spreecken testified Mr. Clark had discussed with the Nidey office the fact that he had not seen the photographs prior to trial, and that he wanted to be at the deposition for which Attorney Robertson waived Mr. Clark's

presence. Ms. Von Sprecken remembers this conversation clearly because she had just recently prepared the memo regarding the waiver of Mr. Clark's presence at the deposition.

3. Testimony of Mr. Clark

The next witness at the postconviction trial was Mr. Clark. Mr. Clark has a bachelor's degree from the University of Northern Iowa, and a master's degree in education, with an emphasis in school counseling, from Drake University. Mr. Clark was involved in sports at his high school in Columbus Junction, Iowa, and obtained a coaching certificate. Mr. Clark coached track, cross country, and volleyball throughout his educational career. Mr. Clark was employed in various lifeguard and swimming instruction capacities from the time he was fourteen until he was about thirty-seven, and held teaching jobs for most of his adult career. Mr. Clark's teaching jobs have been in Ottumwa, Iowa; the Benton Community School District; and in Iowa City. Mr. Clark received his counseling degree in May, 2002, although he began working in the Iowa City Community School District system as a counselor in the fall of 2001, pursuant to a temporary license. Aside from the underlying incident in this case, Mr. Clark never has had a student, a teacher, a principal, or any other person make a complaint about him mistreating a child, either with respect to his teaching or his swimming instruction.

Mr. Clark's duties at Lemme Elementary involved having classroom guidance with every regular education classroom, and individual guidance lessons and small group lessons, and otherwise helping out as needed. Mr. Clark took pictures of new students and staff at the beginning of every year to post on his office wall. Individual guidance lessons were given to about five to ten students per semester. Mr. Clark taught many small groups, such as kindergartners learning about friendship skills or teaching students about death and divorce, or child study groups with troubled children. Mr. Clark mostly dealt with kindergartners through sixth-graders, and sometimes dealt with early childhood students and the behavioral disorder room. Overall, Mr. Clark interacted with all students at Lemme Elementary and knew the students by name.

Mr. Clark worked with C.B. through a child study group, and met with C.B. individually once a week for about twenty minutes. These meetings began the second semester of C.B.'s fifth-grade year, and continued into C.B.'s sixth-grade year. According to Mr. Clark, he only turned his office lights off when he was out of the building. Mr. Clark testified he liked to have his office lights on so other teachers would know he was in the building, and he never turned off the lights during counseling sessions. When Mr. Clark was counseling C.B., Mr. Clark's door window was not covered, although he had used a window covering in the past, out of concerns he had for the privacy of students coming to talk to him. Some issues were raised in the past about the window covering, which led to Mr. Clark putting a covering over the bottom half of the window so students could not see in, but adults could. Mr. Clark eventually removed the entire window covering. The Court has taken judicial notice of Iowa Administrative Code section 281-12.5(21) as it existed in 1997, with respect to visual and auditory privacy for counseling. The 1997 version is relevant due to a change to the law in 1999, just prior to Mr. Clark's employment at Lemme Elementary.

Mr. Clark testified he understood before the criminal trial that there was a possibility that character witnesses could be called on his behalf at the criminal trial, but he also understood that

calling any such character evidence might “open the door” to the possibility that his prior bad acts could be discussed. Mr. Clark acknowledged having two incidents that could be considered as prior bad acts: an incident at the Johnson County Jail at the time Mr. Clark was incarcerated for a charge of operating while intoxicated, and the incident where a former lover of Mr. Clark accused Mr. Clark of being sexually aggressive (which Mr. Clark denies). Mr. Clark testified he believes there was a strategic advantage to the jail incident coming into evidence in the criminal trial, in that, when the incident happened, C.B.’s father became aware of the incident and questioned C.B. as to whether Mr. Clark had ever hurt C.B. The jail incident was the subject of notes exchanged between Mr. Clark and Mr. Robertson during the criminal trial, reflecting their discussions about strategic advantages and disadvantages of offering the evidence. See *Exhibit B*. Both incidents were the subject of testimony offered by the State in the criminal trial, though Mr. Clark testified he believed the evidentiary issues would be the subject of a motion *in limine*.

Mr. Clark also believes that character evidence in the form of notes thanking him for his work at Lemme Elementary should have been introduced on his behalf. See *Exhibit 5*. Mr. Clark had a list of eight to ten character witnesses that he provided to Attorney Robertson, and he is not aware of any of them being contacted by Attorney Robertson. It made no sense to Mr. Clark that there were not character witnesses presented on his behalf, while the prior bad act evidence still came in at trial. However, trial notes from Attorney Robertson indicate that Mr. Clark did convey to Attorney Robertson, in writing and during the trial, his concerns regarding the prior bad acts evidence. See *Exhibit B*.

Mr. Clark describes his communication with Attorney Robertson prior to and during the criminal trial as being “not very good.” Mr. Clark claims he would “constantly” call the Public Defender’s Office but could almost never get a hold of Attorney Robertson. Mr. Clark spoke with Mr. Exley-Schuman in an attempt to be able to communicate with Attorney Robertson, which resulted in Attorney Robertson getting back to Mr. Clark “once in a while.”

The first time Mr. Clark saw the Exhibit 1 set of photos was when they were being introduced at trial, and Mr. Clark attempted to convey to Attorney Robertson that the photos were not an accurate description of what Mr. Clark’s office looked like. When the prosecutor at the criminal trial questioned the detective as to whether the pictures accurately represented the room when the photos were taken, Attorney Robertson did not object to entry of the photos. As noted above, Mr. Robertson had not visited the area prior to the criminal trial. Mr. Clark believes the Exhibit 1 set of photos does not accurately represent the room as it would have looked when it was Mr. Clark’s office, in that the light was off, and the angle of the photos does not give an accurate depiction of the actual size of the window in the door. Mr. Clark testified copies of the Exhibit 1 set of photos were not mailed to Mr. Clark prior to trial. Mr. Clark had a set of his own photos that he believed more accurately depicted his office (Exhibit 2), but Attorney Robertson did not use the photos as exhibits during the criminal trial. During his examination at the criminal trial, Mr. Clark also was not questioned by Attorney Robertson regarding Mr. Clark’s depiction of the room. However, Mr. Clark and Attorney Robertson did exchange handwritten notes regarding the room set-up at the criminal trial. See *Exhibit B*.

When Mr. Clark created the drawing admitted as Exhibit 4 in the postconviction relief trial, he was in prison and created the drawing from memory. Exhibit 4 and the Exhibit 2 set of

photos differ in that Exhibits 2a and 2b do not show that Mr. Clark had a bookshelf in the office when he was working at Lemme Elementary; Exhibits 2c and 2d do not show the exact arrangement of a filing cabinet and wall cabinet that Mr. Clark had in the office at the time of the incident in question; and Exhibit 2e shows a desk right in front of the door, whereas Exhibit 4 shows a table with a refrigerator on it against the wall. According to Mr. Clark, Exhibit 4 depicts the classroom during Mr. Clark's last four-five years of employment at Lemme Elementary, including the time when C.B. was being counseled.

Mr. Clark testified that he was not notified of and did not attend certain depositions that were taken by Attorney Robertson. Mr. Clark testified he did not find out about the depositions until they had been completed, and no one contacted him about waiving his presence at the depositions. Mr. Clark contends that, had he attended the depositions, he would have been able to provide photos and a sketch that would have better depicted the room situation. Mr. Clark views this as important to his defense because it would have shown that the room was not remote and did not have many blind spots where the incident could have occurred. However, Attorney Robertson did not offer into evidence the Exhibit 2 set of photos or any drawing of the scene prepared by Mr. Clark.

C.B. has brought civil claims against Mr. Clark, and as part of those claims, C.B. alleged additional acts of abuse on the part of Mr. Clark. Mr. Clark contends that, if the jury had evidence of the allegations of additional acts of abuse, his likelihood of conviction would have been reduced because the allegations made it clear that it was very unlikely that these events could have occurred, given where Mr. Clark's classroom was compared to the library and other classrooms. Mr. Clark testified that a person can hear through the walls of the rooms in this area of Lemme Elementary.

4. Testimony of Susie Thrans

Susie Thrans, a retired teacher for the Iowa City Community School District, testified at trial. Ms. Thrans taught for thirty-seven years, thirty-four of which were at Lemme Elementary. Ms. Thrans worked with Mr. Clark at Lemme Elementary, and thinks he did an outstanding job in his work there, including going above and beyond other counselors with whom Ms. Thrans had worked. Ms. Thrans testified she would have been willing to be a character witness for Mr. Clark at the criminal trial, but she was not asked to do so.

Ms. Thrans does not believe the Exhibit 1 set of photos accurately depicts Mr. Clark's office because his door was mostly open, with the light turned on when he was in the office. Ms. Thrans' classroom was near Mr. Clark's classroom, so she would walk past Mr. Clark's classroom daily. According to Ms. Thrans, when a person knocked on Mr. Clark's office door, his room could be seen and the light would be on if he was there. Ms. Thrans believes the Exhibit 1 photos do not show a good context of the office because it is difficult to tell how high the window is above the floor, and the configuration of furniture in the Exhibit 1 photos is different from how Mr. Clark had his furniture arranged. Ms. Thrans also believes the drawing created by Mr. Clark is an accurate depiction of the office. See *Exhibit 4*.

According to Ms. Thrans, it would be difficult for someone who has not been to the school to understand the architecture and set-up of the library and surrounding office/classrooms.

Ms. Thrans also recalled being able to hear sounds from all of the rooms around the library when classroom sessions were ongoing. Ms. Thrans would not describe Mr. Clark's classroom as being in a remote location. Ms. Thrans also testified she does not believe someone of Attorney Robertson's height could accurately describe the window of Mr. Clark's office as being about waist high; Ms. Thrans is 5'5" and testified that the window sits about eight to ten inches below her waist.

Findings Related to Background of Attorney Robertson

An affidavit provided by agreement of the parties after the initial trial evidence established that Attorney Robertson was admitted to practice law in the state of Iowa in 1993. Although the record related to Attorney Robertson's experience and credentials was not complete, the record reflects that Attorney Robertson was in private practice in Iowa City from 1999 through 2001, during which period he was on the criminal court appointment list. From 2001 to 2003, Mr. Robertson worked at the Linn County Advocate's Office handling criminal matters. From 2003 until his death in 2013, Mr. Robertson worked as an attorney in the State Public Defender's Office in Iowa City.

The record reflects Mr. Robertson also had worked in the Muscatine branch office of the Public Defender's Office for some period of time. The record reflects that, as a regular attorney in the Iowa City Public Defender's Office, Mr. Robertson had a substantial caseload, commonly between 450 and 500 cases per year at all levels of crimes. The record reflects that Mr. Robertson tried at least seven jury trials from 2003 until his death, at least two of which were homicide cases.

Additional Evidence Received After the Initial Postconviction Trial Proceedings

Following the initial receipt of evidence at trial September 17, 2014, Mr. Clark filed in October of 2014 a request for admission of additional evidence. In his request, Mr. Clark noted that C.B. had submitted to an independent medical examination ("IME") prepared for litigation of the civil matter. More specifically, Mr. Clark noted that the IME report had not been prepared until October 4, 2014, following an evaluation conducted September 25, 2014, such that such information was not available to and could not have been presented at the time of trial conducted September 17, 2014. Mr. Clark requested at that time that the record be reopened to receive four exhibits related to and pre-dating the IME. The State filed a resistance to Mr. Clark's application November 10, 2014, and Mr. Clark filed a reply November 19, 2014.

Following hearing in connection with the application, February 13, 2015, the Court filed a ruling April 1, 2015, granting Mr. Clark's request to reopen the record. The Court noted in such ruling that the IME report had been prepared following the original trial but that, had it been prepared prior to the date of trial, the parties would have had the opportunity to consider and conduct discovery related to the IME and report. The Court found that the timing of the report should not determine whether the information should be available to the parties for possible presentation in evidence to the Court in the postconviction matter. The Court also found that it was appropriate to reopen the record to allow discovery and opportunity for further presentation of evidence related to such matters, with the goal of reaching more clearly the merits of the

matter. Accordingly, the Court's order April 1, 2015, reopened discovery, directed the parties to conduct such discovery, and directed the parties to file a joint report to the Court, after such period of discovery.

The parties filed a joint status report October 20, 2015. In such status report, the parties noted that the record had been reopened by the Court to allow the parties to conduct discovery related to the proffered documents. The parties noted that good-faith discovery efforts had been hampered somewhat by the pending civil lawsuit, but that the discovery then had been completed. Mr. Clark renewed his request that the proffered documents be received into evidence. The State resisted, contending such documents were inadmissible hearsay, including hearsay within hearsay of purported statements of C.B. In the alternative, the State requested the Court allow it to submit an affidavit from C.B. regarding such hearsay statements attributed to him in the proffered documents.

By order entered December 4, 2015, following status conference December 3, 2015, the Court entered its Memorandum and Scheduling Order concluding the reopened record should include the proffered documents proposed by Mr. Clark, to be filed under seal, along with an affidavit of C.B. in response to such proffered documents. The Court also set forth in such order a post-trial briefing schedule for the parties, and noted that the matter would be deemed submitted upon the filing of the post-trial briefs March 18, 2016.

Following the entry of the Court's Ruling on Request for Admission of Additional Evidence on April 1, 2015 and of the Court's Memorandum and Scheduling Order on December 4, 2015, Mr. Clark submitted his Exhibits 9a-9d, under seal, and Respondent submitted its Exhibit C, under seal. Exhibit 9a is a Neuropsychological Assessment of C.B. Exhibit 9b is a Psychological Assessment of C.B. Exhibit 9c is a letter from Jill Johnson, Synchrony Counselor, regarding C.B.'s sessions with Synchrony Services from March, 2011, through October, 2011. Exhibit 9d is a medical history and physical summary for C.B. Exhibit C is a December 29, 2015 affidavit from C.B. These submissions completed the evidentiary record for the postconviction trial proceedings, and the Court has reviewed all of the sealed documents in their entirety.

Because the reopening of the record resulted in the Court's receipt of additional exhibits, and because those exhibits were received under seal, the Court concludes that its findings related to such matters also should be maintained under seal, at least for the present time and until each of the parties has the opportunity to review the findings and consider any request for relief related to the filing of such findings under seal. The Court therefore is filing with this ruling its Separate Findings of Fact Related to Exhibits Received Under Seal, including findings related to Exhibits 9a, 9b, 9c, 9d and Exhibit C.

Positions of the Parties

Mr. Clark has alleged that Attorney Robertson was ineffective in his assistance as Mr. Clark's counsel, based on four general assertions:

1. Attorney Robertson failed reasonably and properly to investigate and prepare Mr. Clark's defense, in that:
 - a. Attorney Robertson failed to visit the scene of the alleged crime;
 - b. Attorney Robertson failed to send an investigator to investigate, photograph and document the scene; and
 - c. Attorney Robertson failed to speak with potential defense witnesses (including character witnesses) or have his investigator do so.

2. Attorney Robertson failed reasonably to communicate with Mr. Clark, in that:
 - a. Attorney Robertson did not ensure that Mr. Clark was informed of discovery depositions in a timely manner;
 - b. Attorney Robertson compounded his error by waiving the presence of Mr. Clark at depositions without Mr. Clark's knowledge or consent;
 - c. Attorney Robertson further compounded these failures by not discussing the depositions with Mr. Clark prior to trial;
 - d. Attorney Robertson failed to show Mr. Clark the State's exhibits prior to trial;
 - e. Because Attorney Robertson had not provided and discussed photos of the school with Mr. Clark and had not visited the scene of the alleged crime before trial, Mr. Clark had no opportunity to provide input and basis for objections to the State's evidence. Moreover, Attorney Robertson failed to object to the State's photographic exhibits when introduced, even though the scene had been altered;
 - f. Attorney Robertson did not use photos provided by Mr. Clark, which could have countered the misimpression created by the State's exhibits; and
 - g. Due to his failures to investigate, communicate and prepare, and because of his unfamiliarity with the scene, Attorney Robertson failed to present evidence rebutting the State's contention that Mr. Clark's office was remote.

3. When Attorney Robertson requested a continuance based upon the late disclosure of the C.B. e-mail, he failed to make a complete record on the specific reasons why Mr. Clark needed to undertake further investigation, including that:
 - a. Attorney Robertson failed to raise the withholding of exculpatory evidence by the State; and
 - b. Attorney Robertson failed to make a record that he needed to obtain mental health records of C.B.

4. Attorney Robertson failed to file a motion *in limine* or timely object regarding “prior bad acts” evidence in the following particulars:
 - a. Attorney Robertson failed to object to questions concerning the alleged sexually aggressive relationship between Mr. Clark and a former lover;
 - b. Attorney Robertson admitted to a colleague that he was ineffective as a result of these specific failures;
 - c. Mr. Exley-Schuman, who was prepared to assist Attorney Robertson in this case, indicated Attorney Robertson was disorganized and took pride in his disorganization;
 - d. As a rationale for not speaking with potential witnesses, Attorney Robertson informed Mr. Clark that he should not use character evidence because it would open the door to prior bad acts evidence; and
 - e. Despite the introduction of the prior bad acts evidence, Attorney Robertson failed to introduce character evidence without having ever interviewed the witnesses.

Mr. Clark argues that Attorney Robertson’s failures with respect to the photographic evidence allowed the State to create, unrebutted, the incorrect impression of the visibility of Mr. Clark’s office. Mr. Clark contends the failure to prevent introduction of prior bad acts testimony irreparably prejudiced his case. Mr. Clark contends Attorney Robertson was ineffective for failing to provide the trial court with specific reasons for a continuance. Mr. Clark contends Attorney Robertson’s cumulative failures to fulfill his duties to Mr. Clark resulted in ineffective assistance of counsel to Mr. Clark.

Mr. Clark also contends C.B.’s testimony in the civil case includes an admission that C.B. perjured himself during the original criminal trial, which is new evidence that should be considered through postconviction relief.

The State argues, as an initial matter, that the Court erred in admitting hearsay statements of Attorney Robertson. With regard to the merits of the postconviction relief action, the State argues that Attorney Robertson was not ineffective in relation to the photographic evidence admitted at trial because the Court only has before it Mr. Clark’s self-serving testimony as to what Mr. Clark believes the investigation should have entailed, and the Court does not know what Attorney Robertson examined before trial. The State does not believe there would have been much for Attorney Robertson to investigate, and contends the State’s photographs accurately represent the shape, configuration and layout of the office. The State contends it is possible that Attorney Robertson thought there was little value in arguing over how busy the corridor next to the closed office door really was. The State also contends the Court cannot know whether Mr. Clark really provided Attorney Robertson with alternate photos, and even if they were provided to Attorney Robertson, it was reasonable for Attorney Robertson not to have used them. The State asserts that the photos appear to contradict Mr. Clark’s drawing submitted as Exhibit 4; the photos contradicted Mr. Clark’s testimony that the door was only covered during Mr. Clark’s first year of teaching; and the photos demonstrate that Mr. Clark retained

photos of former students years after teaching at Lemme Elementary, for no apparent reason. The State argues that, for such reasons, Attorney Robertson might have been reluctant to offer Mr. Clark's photos into evidence. The State further argues there has been no showing of prejudice as a result of the failure of Attorney Robertson to introduce Mr. Clark's photos because there was nothing misleading about the photos offered by the State.

With respect to the communications problems Mr. Clark claims to have had with Attorney Robertson, the State argues that Attorney Robertson mailed Mr. Clark notice of the depositions, but the notice did not arrive in time, and it was reasonable for Attorney Robertson to assume Mr. Clark would not be attending the depositions due to his incarceration.

As to the prior bad acts evidence, the State argues that the evidence would not have been subject to exclusion because it did not constitute bad acts evidence, and its admission was not unfairly prejudicial under Iowa Rule of Evidence 5.403. The State further argues that, even if the evidence was prejudicial, its impact was muted by the fact that the detective questioned about Mr. Clark's relationship with a former lover was asked only one question about this issue, and the detective did not go into detail as to what was aggressive within the sexual relationship. The State contends Attorney Robertson made decisions about the admission of this evidence and as to Mr. Clark's testimony regarding the evidence, such that the admission of the evidence was based on some strategy. With respect to the character evidence issue, the State contends that there would not have been much benefit to such evidence being offered, and it would be speculative to find that the evidence would have had a positive impact on the jury.

Turning to the continuance issue, the State argues that Mr. Clark has not shown prejudice as a result of Attorney Robertson's alleged failure to do a better job at seeking the continuance, and the Iowa Supreme Court already has ruled that Mr. Clark was not prejudiced by the denial of his request for a continuance. The State further argues that, if the Court looks beyond the prejudice element, Attorney Robertson was not ineffective in this regard because there were not many more specifics he could have provided to the trial court on this issue, and it was appropriate for Attorney Robertson to move on with trial preparation once the continuance had been denied. The State contends Attorney Robertson could not be ineffective in failing to seek a continuance to obtain C.B.'s medical records because there is no evidence that the trial court would have granted such a request under the case law that existed at that time.

With respect to the newly discovered evidence issue, the State acknowledges that C.B., to some extent, failed to uphold his oath at trial, which the State does not condone. However, the State argues that the evidence reflects C.B.'s expansion of his prior description of Mr. Clark's abuse, and is cumulative of the evidence presented at trial. The State further argues Mr. Clark has not shown that the evidence would have changed the result of the trial, and nothing about C.B.'s expanded evidence includes an incident that could not have occurred in Mr. Clark's office. The State contends Mr. Clark cannot establish that the newly discovered evidence would have resulted in a different verdict.

Finally, the State asserts that the Iowa Supreme Court has not adopted the cumulative error doctrine for ineffective assistance of counsel claims; but, even if it had, Mr. Clark has not

shown that Attorney Robertson failed to perform an essential duty, and the failures alleged by Mr. Clark were not errors in the first place.

Mr. Clark replies that the Court's evidentiary ruling at trial regarding Attorney Robertson's statements was properly decided, and need not be revisited at this time. Mr. Clark argues that, under the hearsay exception of a statement against interest, Attorney Robertson's statements are admissible. With respect to the photographic evidence admitted at trial, Mr. Clark argues that investigation into the crime scene was essential to his defense, and the photos offered by the State did not accurately depict the crime scene. As to the prior bad acts evidence, Mr. Clark contends that there is no indication that Attorney Robertson failed to object to this evidence because of trial strategy, and there was no reasonable value in allowing the incriminating testimony. Mr. Clark also contends there is value to calling character witnesses on behalf of a defendant in a criminal trial, and character evidence in this case could have invalidated concerns regarding other testimony that Mr. Clark's classroom was in a remote location. Mr. Clark asserts the continuance issue was not finally resolved by the Iowa Supreme Court, and was specifically reserved for postconviction relief proceedings, and C.B.'s medical records would have undoubtedly been helpful to the defense, had Attorney Robertson argued for the continuance on this ground. As to C.B.'s failure to uphold his oath at trial, Mr. Clark argues that a conviction based on perjured testimony undermines confidence in a just result at trial. Mr. Clark claims the evidence is not merely cumulative, and C.B. has described different incidents from what he originally claimed. Finally, as to the cumulative errors, Mr. Clark asserts that the combined errors of Attorney Robertson show overwhelming prejudice against Mr. Clark, and violated Mr. Clark's constitutional rights.

CONCLUSIONS OF LAW

Standards Governing Ineffective Assistance of Counsel Claims

Iowa Code § 822.2 provides:

1. Any person who has been convicted of, or sentenced for, a public offense and who claims any of the following may institute, without paying a filing fee, a proceeding under this chapter to secure relief:
 - a. The conviction or sentence was in violation of the Constitution of the United States or the Constitution or laws of this state.

Ineffective-assistance-of-counsel claims have their basis in the Sixth Amendment to the United States Constitution. *State v. Madsen*, No. 09-1500, 2012 WL 1366607 (citing *State v. Vance*, 790 N.W.2d 775, 785 (Iowa 2010)). To establish an ineffective-assistance-of-counsel claim, a claimant must prove by a preponderance of the evidence "(1) his trial counsel failed to perform an essential duty, and (2) this failure resulted in prejudice." *Id.*, citing *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). See also *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2064-65, 80 L.Ed.2d 674, 693 (1984). The claimant must prove both elements by a preponderance of the evidence. *King v. State*, 797 N.W.2d 565, 571 (Iowa 2011).

If the Applicant makes an insufficient showing on either prong of the two-part test, the Court need not address both components. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997); *White v. State*, 380 N.W.2d 1, 3 (Iowa App. 1985). When the prejudice component can be more easily disposed of by Applicant's insufficient showing, courts are encouraged to make a disposition without having to wrestle with the issue of the allegedly deficient performance. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995); *Strickland*, 466 U.S. at 697.

To satisfy the first prong of the *Strickland* test, a petitioner 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, the Court examines "whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.* at 690. The Court evaluates the attorney's performance against "'prevailing professional norms.'" *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001) (quoting *Strickland*, 466 U.S. at 688). "Miscalculated trial strategies and mere mistakes in judgment normally do not rise to the level of ineffective assistance of counsel." *Id.* at 143. Accordingly, claims of ineffective assistance involving tactical or strategic decisions of counsel must be examined in light of all of the circumstances to ascertain whether the actions of counsel "were a product of tactics or inattention to the responsibilities of an attorney guaranteed a defendant under the Sixth Amendment." *Id.*

Strategic choices made after a thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after a less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitation on investigation.

Strickland, supra, 466 U.S. at 690-91.

To satisfy the second prong, prejudice must be demonstrated, not inferred. *King v. State*, 797 N.W.2d 565, 572 (Iowa 2011). In order to establish the prejudice prong of the *Strickland* test, an applicant must show that there is a reasonable probability that the result would have been different. *Id.* (citation omitted). The likelihood of a different result need not be more probable than not, but it must be substantial, not just conceivable. *Id.* (citation omitted). To establish prejudice under the second prong of the *Strickland* test, a petitioner must establish "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Millam v. State*, 745 N.W.2d 719, 722 (Iowa 2008) (citations omitted). "A reasonable probability is one that is 'sufficient to undermine confidence in the outcome.'" *State v. Bayles*, 551 N.W.2d 600, 610 (Iowa 1996) (citations omitted). "This requirement does not mean a defendant must establish that counsel's deficient conduct more likely than not altered the outcome [of the case, rather a] defendant need only show that the probability of a different result is sufficient to undermine confidence in the outcome." *State v. Graves*, 668 N.W.2d 860, 883 (Iowa 2003) (citations omitted).

The overall test of effective assistance of counsel is "whether, considering all the circumstances, the attorney's performance was within the normal range of competency." *State v. Gambell*, 262 N.W.2d 792, 795 (Iowa 1978); *State v. Wilkens*, 346 N.W.2d 16, 18 (Iowa 1984). The Court must indulge a strong presumption that counsel's conduct falls within the wide range

of reasonable professional assistance. *Sims v. State*, 295 N.W.2d 420 (Iowa 1980); *Taylor v. State*, 352 N.W.2d 683 (Iowa 1984).

When considering a claim of ineffective assistance of counsel, a court's "ultimate concern" is with "the fundamental fairness of the proceeding whose result is being challenged." *Strickland* at 668, 696. The court must decide whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. The focus is not on whether the claimed errors would have required reversal if it had been preserved but, rather, whether a different outcome was reasonably probable but for this error. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). Examination of the counsel's performance

should proceed while resisting, in light of hindsight, the temptation to Monday morning quarterback the lawyer in the arena. Nor should the inquiry degenerate into post-mortem, microscopic dissection of each desperate effort of counsel to save a terminal case.

Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980).

A defense counsel's reasonable tactical decisions are not grounds for ineffective assistance of counsel. *Fryer v. State*, 325 N.W.2d 400 (Iowa 1982). "When trial counsel makes a reasonable decision concerning trial strategy, the [reviewing court] will not interfere simply because the chosen strategy does not achieve the desired result." *State v. Wilkens*, 346 N.W.2d 16, 18 (Iowa 1984). Considerable deference is given to counsel's professional judgment. *Kimmelman v. Morrison*, 477 U.S. 365 (1986). A defendant is not entitled to perfect representation but only to that which is within the range of normal competency. *Cuevas v. State*, 415 N.W.2d 630, 632 (Iowa 1987).

Analysis of Evidentiary Issues and Ineffective Assistance of Counsel Claims

1. Receipt of Hearsay Statements of Attorney Robertson

At the outset, the Court reaffirms the ruling it made at trial regarding the admission of the hearsay statements of Attorney Robertson made after the criminal trial before his death. The Court finds that, given the unusual circumstances of the case, i.e., Attorney Robertson's death prior to the trial of this action and the lack of a deposition from Attorney Robertson regarding his representation of Mr. Clark before his death, the hearsay statements should be and are considered. The Court finds that such statements of Mr. Robertson to his colleagues (related to the effectiveness of his representation) constitute statements against interest, within the meaning of Iowa R. Evid. 5.804(b)(3), and also have general circumstantial guaranties of trustworthiness, as contemplated by Iowa R. Evid. 5.807.

As to the former ground for receipt of such testimony, the Court finds that such testimony was sufficiently inculpatory of Attorney Robertson that implicitly it suggests Attorney Robertson knew or at least believed that the statements were against his penal interest at the time they were made. See *State v. Paredes*, 775 N.W.2d 554, 565 (Iowa 2009). While Attorney Robertson may have had "mixed motives" for making statements indicating he had not provided effective assistance of counsel, the presence of conflicting motivations does not preclude the receipt of the

statements into evidence. *Id.* at 566 (citation omitted) (noting that the presence of conflicting motivations is ordinarily a question for the fact-finder to consider).

As to the latter ground for receipt of such testimony, the Court finds it is clear that such statements are offered as evidence of a material fact; that such statements are more probative on the point for which they are offered than any other evidence which Mr. Clark can procure through reasonable efforts, particularly given Mr. Robertson's untimely death; and the purposes of the rules in the interests of justice are best served by admission of the statements into evidence. Iowa R. Evid. 5.807.

The Court's decisions to receive such statements into evidence, and to consider such statements in connection with Mr. Clark's ineffective assistance claims, however, are only one factor in and are not dispositive of the Court's determinations in this matter. The Court recognizes that these statements need not be explicit admissions in order for them to be received into evidence. See *State v. Paredes, supra*, 775 N.W.2d at 566. Although such statements of Mr. Robertson have some probative value, they are not dispositive of the issues before the Court, but rather must be evaluated in context of other factors. *Id.* at 568. More specifically, the Court recognizes that Attorney Robertson, as a long-time advocate for criminal defendants in his long history of work for the Public Defender's office, may have made statements related to his ineffective assistance of Mr. Clark at least in part to assist Mr. Clark in any postconviction case. The Court finds, nonetheless, that such statements of Mr. Robertson were clearly contrary to his interests and that a reasonable person in Mr. Robertson's position would not have made the statements unless believing them to be true. See Iowa R. Evid. 5.804(b)(3). Accordingly, the Court does not treat such statements of Attorney Robertson as admissions rising to a dispositive level on the issues before the Court. Rather, the Court has considered such statements and weighed such statements along with other evidence submitted at trial. *State v. Paredes, supra*, 755 N.W.2d at 568.

2. Failure Properly to Investigate

The Court next considers Mr. Clark's arguments regarding Attorney Robertson's alleged failure properly to investigate and prepare for trial by not examining and photographing the area alleged to be the crime scene. The Court concludes that, in failing to visit the scene of the alleged crime and to take photographs of the crime scene, and in failing to object to the entry of the State's photos of the crime scene, Attorney Robertson fell well below an objective standard of reasonableness; thus, Attorney Robertson failed to perform an essential duty owed to his client.

The Court finds compelling language of Justice Appel in his dissent in the Iowa Supreme Court's *Clark* decision:

This case involves a claim of sexual abuse made by a troubled sixteen year old, six years after the alleged crime. While there was some additional evidence on the periphery, this criminal proceeding was essentially a "he said, he said" case. The defendant, a school counselor, faced a mandatory minimum prison term of seventeen and one-half years if convicted of the offense.

In this kind of case, nothing is more important than thorough, methodical, and strategic pretrial preparation of a plan to meet the testimony of the alleged victim.

...

As noted decades ago by Justice Sutherland in the *Scottsboro Case*, perhaps the most critical period in a criminal proceeding is the period between arraignment and trial because “consultation, thorough-going investigation and preparation [are] vitally important.” *Powell v. Alabama*, 287 U.S. 45, 57, 53 S.Ct. 55, 59–60, 77 L.Ed. 158, 164 (1932). The Standards for Criminal Justice of the American Bar Association requires defense counsel to “explore all avenues leading to facts relevant to the merits of the case.” ABA Standards for Criminal Justice: Prosecution and Defense Function 4-4.1 (3d ed.1993). According to one noted authority, “[t]he outcome of a criminal trial is astonishingly correlative to the thorough nature of defense counsel's investigative preparation.” 1 Fred Lane, *Goldstein Trial Technique* § 4:9, at 4-66 to 4-67 (3d ed.2011) [hereinafter Lane].

Clark, 814 N.W.2d at 567-68 (Appel, dissenting).

In this type of “he said, he said” case involving a serious claim of sexual abuse in a room with windows in a public area of an elementary school, investigation, thorough understanding and photography of the scene was a critical step in preparation of Mr. Clark’s defense. The classroom itself was discussed extensively in the depositions prior to and at the criminal trial, including with regard to how busy the area around the classroom was; whether the classroom was remotely located in comparison to the other classrooms; and whether there was covering on the classroom door. This subject also was a matter of much questioning and debate at the postconviction relief trial, and the colloquies engaged in by this Court, counsel and witnesses regarding the classroom’s location and configuration demonstrate that there are multiple, reasonable perceptions and descriptions that can apply to the classroom.

Given the clear and serious importance of the configuration of the room and its visibility to others in the school, the fact that Attorney Robertson did not visit and photograph the area or, alternatively, designate an investigator to do so, is outside the wide range of professionally competent assistance. The school is in the same city as the office of the Public Defender’s office, and no logistical problem in examining the area is presented. The Court can deduce nothing in this failure by Attorney Robertson that could go to trial strategy or judgment; rather, the Court concludes failure to view the area to be a failure to make a reasonable and necessary investigation of facts relevant to plausible options. See *Strickland*, 466 U.S. at 690-91. In a case without physical evidence of abuse by Mr. Clark, the lack of a visit to and independent photography of the area allegedly involved is a product of inattention to the responsibilities of an attorney guaranteed to Mr. Clark under the Sixth Amendment to the United States Constitution. See *Ledezma*, 626 N.W.2d at 142. Stated simply, it was unreasonable and inattentive for counsel not to drive across town and view the alleged crime scene.

Additionally, the Court concludes Mr. Clark has shown prejudice as a result of Attorney Robertson’s failure to investigate and photograph the crime scene. The Court concludes there is a reasonable probability that the result of the case would have been different had the jury been

offered a differing view of the classroom, such that the probability of said change undermines confidence in the outcome reached by the jury. See *Bayles*, 551 N.W.2d at 610. The jury could have been presented with an entirely different perspective of the classroom and area of the school, and Attorney Robertson would have had a more thorough basis upon which to object to and/or examine witnesses regarding the configuration and location of the classroom.

At a minimum, Attorney Robertson had an independent set of photos from Mr. Clark, but Attorney Robertson did not offer these photos as exhibits at trial. Attorney Robertson also did not provide Mr. Clark with a set of the State's photos prior to trial, so that Mr. Clark could give Attorney Robertson input as to how the classroom might be perceived in a different way based on a different set of photos. Attorney Robertson also did not object to the use of the State's photos, which may not be surprising since Attorney Robertson himself had no independent knowledge of whether the photos accurately represented the area, having never viewed it himself.

The Court concludes that Mr. Clark has met his burden of establishing grounds for relief for ineffective assistance of counsel based upon failure properly to investigate, constituting failure to perform an essential duty resulting in prejudice. *State v. Straw, supra*, 709 N.W.2d at 133.

3. Failure to Communicate and Consult with Mr. Clark Before Trial

Further, Attorney Robertson's failure to timely inform Mr. Clark about the scheduled discovery depositions, or to obtain and document Mr. Clark's consent to waiver of his presence at the discovery depositions, fell below an objective standard of reasonableness. Given the clear importance to the issues on the criminal case of the configuration of the area of the alleged crime, including the location of and visibility of Mr. Clark's office, the presence of Mr. Clark at depositions which included testimony about such matters would have been crucial. No evidence is offered that Mr. Clark did waive his presence at such depositions, nor any reason why he would. The failure to have Mr. Clark attend depositions or to discuss the testimony gleaned from the depositions precluded Mr. Clark from having an opportunity to provide Attorney Robertson with what may have been other relevant evidence that could refute the deponents' testimony. The Court can discern no trial strategy that could be supported by failing to have Mr. Clark attend depositions. As with crime scene investigation issues, there is a reasonable probability that the result of the trial would have been different if Mr. Clark had attended or had been informed of the information obtained at the depositions, particularly as it pertained to the perspectives of the classroom in the library area of the school.

The Court also is troubled by the apparent statements of Attorney Robertson that he had obtained waiver of Mr. Clark's presence at the depositions. The preponderance of the evidence in this matter suggests that Mr. Clark in fact had not waived his presence at such depositions. The Court concludes that, in addition to the prejudice to Mr. Clark which resulted from his failure to be able to provide input at the time of such depositions, Attorney Robertson failed to meet his responsibilities as an attorney of Mr. Clark to obtain and document waiver of Mr. Clark's presence at the depositions.

The Court concludes that Mr. Clark has met his burden of establishing grounds for relief for ineffective assistance of counsel based upon failure to communicate and consult with Mr. Clark in connection with discovery depositions and/or in waiving Mr. Clark's presence at such depositions, without his permission to do so. The Court finds that such failures of counsel resulted in failures to perform essential duties, resulting in prejudice. *State v. Straw, supra*, 709 N.W.2d at 133.

4. Prior Bad Acts Evidence

The Court next considers Mr. Clark's claim that the failure to prevent introduction of prior bad acts testimony irreparably prejudiced Mr. Clark's case. Iowa Rule of Evidence 5.403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Iowa R. Evid. 5.403*. Iowa Rule of Evidence 5.404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Iowa R. Evid. 5.404(b).

The Court finds that the failure to object to prevent introduction of prior bad acts testimony does not itself amount to ineffective assistance of counsel on the part of Attorney Robertson. It cannot be said with certainty that the failure to prevent introduction of prior bad acts testimony fell below an objective standard of reasonableness, or was outside the wide range of professionally competent assistance. Rather, it appears that this may have been a miscalculated trial strategy or a mistake in judgment on the part of Attorney Robertson. Such matters were the subject of strategic discussions and decisions by Mr. Clark and Mr. Robertson at the time of trial. State's Exhibits A, B. As the State notes, the trial transcript reflects that Attorney Robertson questioned the detective regarding the issue of Mr. Clark's purported sexual aggressiveness with a former lover, and questioned Mr. Clark about the issue when Mr. Clark testified. See *Transcript*, pp. 129-30, 158. The fact that Attorney Robertson questioned the detective and Mr. Clark about such subjects, combined with the fact that Attorney Robertson did not object to the admission of the testimony, leads to a conclusion that Attorney Robertson had some strategy for how he would address the evidence. Additionally, Attorney Robertson used the evidence in his closing argument to assert that the State was attempting to utilize incidents from Mr. Clark's past to paint a picture that he abused C.B. See *Transcript*, p. 192-93.

The Court concludes that Mr. Clark has not met his burden of establishing that Attorney Robertson failed to perform an essential duty in failing to prevent introduction of prior bad acts testimony. Therefore, his claim of ineffective assistance of counsel on this issue fails.

5.Character Witness Investigation and Evidence

While the Court concludes, above, that Mr. Clark has not met his burden of establishing that Attorney Robertson failed to perform an essential duty in failing to prevent introduction of prior bad acts testimony, the Court concludes that Mr. Clark has met his burden of showing that Attorney Robertson failed to perform an essential duty in failing to investigate, discover and introduce character evidence in favor of Mr. Clark at the time of the criminal trial. Allowing the State to introduce the evidence of prior bad acts may have been strategic. The Court sees no strategic basis, however, with such evidence having been received, to support an argument Mr. Clark could in any way be benefited by not having character evidence and testimony offered on his behalf. In effect, by receipt of the prior bad acts evidence and by not having the benefit of the character evidence, Mr. Clark received the “worst of both worlds,” in that prior bad acts were introduced without the benefit of character evidence which might have been designed to meet such evidence. Attorney Robertson’s representation as it pertains to this issue fell below an objective standard of reasonableness.

It appears no character evidence may have been presented because Mr. Robertson had not spoken to any such potential character witnesses. The Court cannot fathom a trial strategy or other reason that would have led Attorney Robertson to decline to perform an investigation into the issue of character witnesses, particularly given the “he said, he said” nature of the evidence in this case. The lack of presentation of character witnesses on Mr. Clark’s behalf may in theory have been a strategic decision made in order to keep out the “prior bad acts” evidence at the time of trial. When that evidence was introduced at the time of trial, however, the door to the character evidence was opened and the Court can see no reason why such character evidence would not properly and reasonably have been investigated and introduced.

The Court also concludes there is a reasonable probability that the result of the trial would have been different if the character witness issue had been investigated. As reflected in the testimony of Ms. Thrans, had such evidence been investigated, discovered and offered, the jury also could have had another perspective of the classroom setting, and could have had another view of the likelihood of Mr. Clark committing the crime of which he was accused. The lack of investigation into and presentation of such evidence undermined confidence in the outcome of the trial.

The Court concludes that Mr. Clark has met his burden of establishing grounds for relief for ineffective assistance of counsel based upon failure of counsel to investigate and offer character evidence in the face of the “bad acts” evidence offered by the State. The Court finds that such failure to investigate and present such evidence represented failure to perform an essential duty, resulting in prejudice. *State v. Straw, supra*, 709 N.W.2d at 133.

6.Efforts to Obtain a Continuance

The Court next addresses the issue of whether Attorney Robertson was ineffective for failing to provide the trial court with specific reasons for a continuance. The Iowa Supreme Court noted, in *Clark*:

Apart from the desire to retake depositions, Clark's reasons advanced below for needing a continuance were "vague and uncertain." *See State v. Melk*, 543 N.W.2d 297, 300 (Iowa Ct.App.1995) (finding the trial court did not err in denying a continuance where defendant failed to identify specific "good and compelling cause" for continuance). Clark said only that he wanted to conduct more "investigation." Although Clark's appellate briefing cites *Cashen*, 789 N.W.2d at 408–10, which establishes a protocol for obtaining a victim's mental health records, Clark's counsel never argued below that he needed to obtain C.B.'s mental health records or made this a reason for wanting a continuance.

Clark also has made no showing that any information he would have obtained from further investigation would be material to his defense. *See Simpson*, 587 N.W.2d at 774 (defendant failed to establish due process violation where there was no showing that prospective testimony was "*clearly* exculpatory"). There has thus been no demonstration of prejudice resulting from the trial court's denial of his motion. Therefore, Clark's claim that the district court's denial of his motion for continuance and additional depositions violated his due process rights and right to present a complete defense must fail.

Clark, 814 N.W.2d at 562.

The Court concludes that the Iowa Supreme Court already has made a determination that Mr. Clark was not prejudiced by the denial of his request for a continuance. It follows that, if the Iowa Supreme Court already has made this determination, there is unlikely to be a set of facts that would support a finding of prejudice if Attorney Robertson had formulated a "better" reason for the requested continuance. Attorney Robertson provided to the trial court all the specifics he could regarding the e-mail that formed the basis for the requested continuance, and the other evidence relied on by Mr. Clark in support of this postconviction argument is information that was not available to Attorney Robertson at the time the request for continuance was made. *State v. Cashen*, 789 N.W.2d 400 (Iowa 2010), was decided after Mr. Clark's criminal trial. Further, there simply is nothing to support a finding that, if the trial court had made a *Cashen*-like request before trial, the trial court would have granted the request for continuance.

Mr. Clark has not shown that Attorney Robertson's representation fell below an objective standard of reasonableness in making the request for continuance, nor that there is a reasonable probability that the result of the requested continuance would have been different if a "better" request had been made. Therefore, Mr. Clark's claim of ineffective assistance of counsel fails on this issue.

Standards Governing Newly Discovered Evidence

The Court next turns to consideration of Mr. Clark's argument that there is newly discovered evidence,² in the form of more recent sworn statements by C.B., which warrants a new trial. In order to consider this argument, the Court first notes the standards governing newly discovered evidence.

To succeed on a claim of newly discovered evidence, Mr. Clark must show that (1) the evidence was discovered after the verdict; (2) it could not have been discovered earlier in the exercise of due diligence; (3) the evidence is material to the issues in the case and not merely cumulative or impeaching; and (4) the evidence probably would have changed the result of the trial. *Ledesma v. State*, No. 14-1345, 2015 WL 5285665, *2 (Iowa App. 2015), citing *Jones v. State*, 479 N.W.2d 265, 271 (Iowa 1991). The Iowa Supreme Court very recently utilized these standards in the case of *More v. State*, --- N.W.2d --- (Iowa 2016). "Additionally, 'by definition, newly discovered evidence refers to evidence which existed at the time of the trial proceeding.'" *Ledesma*, 2015 WL 5285665 at *2, citing *Grissom v. State*, 572 N.W.2d 183, 184 (Iowa App. 1997). "Under Iowa law, 'newly discovered evidence' sufficient to merit a new trial is evidence which existed at the time of trial, but which, for excusable reasons, the party was unable to produce at the time." *Benson v. Richardson*, 537 N.W.2d 748, 762-63. "We recognize an exception to this rule in extraordinary cases in which an 'utter failure of justice will unequivocally result' if the new evidence is not considered or where it is no longer just or equitable to enforce the prior judgment." *Id.*

Analysis of Newly Discovered Evidence Claim

Mr. Clark's claim is based on the fact that C.B. provided testimony regarding the alleged incidents of abuse in the criminal trial, but provided, after the criminal trial, different testimony in civil litigation based on this incident. The State notes, in its briefing for this action:

...Respondent is compelled to acknowledge that it appears undisputed that the victim or complaining witness in this case failed to some extent to uphold his oath at trial. That is, the victim has admitted, also under oath, that he failed to tell the whole truth about the extent of Applicant's actions at trial and at the deposition he gave prior thereto. The State cannot and does not condone or down play this fact. While the victim was candid in admitting that he had intentionally failed to tell the entire truth due to embarrassment about the nature of the allegations, as opposed to him having blocked out the memories, he should have disclosed all of the details at the time of trial.

See *Respondent's Post-Trial Brief*, p. 18. The State admits that Mr. Clark can meet the first two elements necessary for succeeding on a claim of newly discovered evidence. The State disputes,

² As set forth in the Separate Findings of Fact Related to Exhibits Received Under Seal, filed this day by the Court under seal, the Court finds and concludes that information contained in the sealed medical records of C.B. which were received by the Court were largely cumulative of information available at the time of and addressed in the criminal trial, and do not constitute newly discovered evidence warranting a new trial.

however, that Mr. Clark can prove the third and fourth elements necessary to succeed on such a claim.

The Court considers first whether the evidence relied on by Mr. Clark is material to the issues in the case and not merely cumulative or impeaching. The Court concludes that it is material to the issues in the case, and is not merely cumulative or impeaching. The fact that C.B. did not provide completely truthful testimony regarding the alleged incidents of abuse at trial is material to the question of Mr. Clark's guilt. As has been discussed earlier in this ruling, this was primarily a "he said, he said" case, and the jury's credibility assessments made with regard to C.B.'s testimony were critical to the outcome of the case. Had this information been available to Mr. Clark at trial, the examination of C.B. potentially could have taken a different course, and the inconsistent testimony may have been utilized to discredit C.B.'s allegations against Mr. Clark. The discrepancies in C.B.'s testimony also call into question whether the timing and specific allegations of abuse could have taken place in Mr. Clark's classroom. These are material issues in the case that are not merely cumulative or impeaching.

Further, there is a probability that this evidence would have changed the result of the trial. In the deposition given in the civil matter, C.B. testified that he lied under oath at the criminal trial; that he also had lied under oath in a prior deposition in the criminal proceedings; and that he knew he was lying under oath when he did so. C.B.'s lies were made about the very subject which was the basis for the charges – the nature and frequency of sexual contacts initiated by Mr. Clark. The Court concludes Mr. Clark was entitled to challenge C.B. as to such prior lying under oath, and that there is a fair likelihood that the jury may not have believed some or all of the specific allegations of abuse to which C.B. testified. At a minimum, the inconsistencies in C.B.'s statements, particularly with regard to the number of incidents of abuse as compared to the number of counseling sessions C.B. had with Mr. Clark, present a possibility that the jury may have formed reasonable doubts about the allegations stated against Mr. Clark. Where the credibility of the alleged victim clearly was at issue and crucial to the State's case, and where there is undisputed evidence that the alleged victim "failed to some extent to uphold his oath at trial," it is difficult to envision a scenario in which such facts are not material to the issues in the case and where the jury's knowledge of such facts probably would not have changed the result of the trial. *Ledesma, supra*.

In short, the newly discovered evidence relied on by Mr. Clark is a basis upon which Mr. Clark's Application for Postconviction Relief must be granted.

Cumulative Failures

Finally, the Court considers Mr. Clark's assertion that Attorney Robertson's cumulative failures to fulfill his duties to Mr. Clark resulted in ineffective representation of Mr. Clark by Attorney Robertson. The Court already has found that postconviction relief is warranted based on Attorney Robertson's alleged failure to properly investigate and prepare for trial and to properly communicate with Mr. Clark, and on the newly discovered evidence, but not as to the other grounds alleged by Mr. Clark. For this reason, the Court does not reach the issue of whether Attorney Robertson's cumulative failures to fulfill his duties to Mr. Clark resulted in ineffective representation of Mr. Clark by Attorney Robertson.

RULING

IT IS THEREFORE ORDERED that Mr. Clark's Application for Postconviction Relief is **GRANTED**. Mr. Clark's postconviction relief counsel shall be permitted to file an application for new trial-setting conference in Mr. Clark's criminal case, FECR087965, and new trial proceedings shall be scheduled in FECR087965 upon the filing of the application.

IT IS FURTHER ORDERED that the Clerk shall file the Court's accompanying Separate Findings of Fact Related to Exhibits Received Under Seal at Security Level 3 so only counsel of record have access to such order.

E-FILED 2016 MAY 26 3:51 PM JOHNSON - CLERK OF DISTRICT COURT



State of Iowa Courts

Type: OTHER ORDER

Case Number PCCV074898
Case Title DONALD CLARK VS STATE OF IOWA

So Ordered

A handwritten signature in black ink, appearing to read "Sean McPartland". The signature is written in a cursive style and is positioned above a horizontal line.

Sean McPartland, District Court Judge,
Sixth Judicial District of Iowa

Electronically signed on 2016-05-26 15:51:19 page 29 of 29