IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

JOHN WEST SICKELS, Petitioner, vs. DAN CRAIG, Respondent.	NO. 5:15-cv-4080 PETITIONER'S MERITS BRIEF IN SUPPORT OF HABEAS CORPUS RELIEF

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FACTUAL AND PROCEDURAL BACKGROUND AND CITES TO THE RECORD

The procedural background of the instant action in State proceedings is set out in full detail in the Petition filed herein on September 18, 2015. The pertinent filings, decisions and dates are completely included therein and need not be restated here.

The Petitioner will cite to the record with the following abbrevatiations:

1. **App.** = PCR Appeal Appendix filed herein by Respondent on February 17, 2016.
2. **Tr.** = Transcript of Criminal Trial
3. **D. A. App.** = Direct Appeal Appendix
4. **PCR Tr.** = Postconviction Trial Transcript

Statement of the Facts

On the direct appeal, the Iowa Court of Appeals panel set out its statement of the facts in six pages of its slip opinion. (Slip Op. 3-9; App.423-429) In the opinion the same court issued on the PCR appeal, the panel stated the facts were

detailed in the direct appeal opinion and would be "reiterated only where relevant" to the PCR claims. (Slip Op., 3/25/15, p. 2). A full discussion of the facts raised in the criminal jury trial *and* in the PCR proceedings is necessary to a full analysis of this factually and legally complex habeas litigation.

At 1:00 a.m. on April 18, 2008, Elisa Smith punched out for the night from her bartending shift that had started at the Crestmoor Golf Club at 6:00 p.m. At 1:49 a.m., Smith's live-in boyfriend, Larry Will, telephoned Smith to see what was going on, and what time she would be home. Smith told Will something like, "Everything's okay. The police are here." With that, she handed the phone to Jamie Christensen, the Chief of Police of the Creston Police Department. Christensen briefly spoke with Will and told him everything was just fine. Smith also told Will she "was really busy" and had to go. (Ex. "1", Ex. "3D", p.3, par. 2, Ex. "3E" , p. 3, par 1; Ex. "4G", pp. 14-16, L. 14-5; App 514, 519, 586-588) In fact, Smith was not busy and was not even on the clock. She was drinking and socializing with Christensen and Assistant Police Chief John Sickels. It was just the three of them. Two other men had left a half hour previously. Larry Will was highly possessive, jealous, and controlling in the relationship with Smith. He had subjected her to domestic and sexual abuse prior to this night in question. (Ex "3B, pp. 5-6, L. 172-199; Ex. "3D", p. 3, par. 3; Ex. "3F", p. 3 par. 2; Ex.

"3I", p. 2, par. 3; Ex. "4A", p. 20, L. 8-22; Ex. “4B”, p. 49, L. 13-25; Ex. "4F, pp. 9-12, L. 19-16, p. 18, L. 5-13; Ex."4G", pp. 14-15, L. 9-25 Ex. "3J", pp. 1-2; L. 3-5; App. 505-506, 514, 523, 527, 529-530, 537, 552, 580-584, 586-587) The criminal investigation against Christensen and Mr. Sickels began when agents of the Iowa division of Criminal Investigation (DCI) interviewed Elisa Smith and Larry Will on April 28, 2008. (App. 502-503). Larry testified in discovery deposition on December 2, 2008, that he had gone to bed after phoning Smith and did not get up until she arrived home. He did not remember anything after the phone call until he woke up when Smith got home. In his previous statement to the DCI seven months earlier, on April 28, 2008, Will said Smith got home about 4:00 a.m. and went straight to bed. (Ex. "3B", p. 6, L. 201-208; Ex. "4G", pp. 15-17, L. 4-25; App. 506, 587-589). A full review of facts shows that story would be difficult to believe. For some reason, Larry felt compelled to significantly change his story as the jury trial approached, almost a year after his initial statement to the DCI. Shortly before trial, defense counsel was notified that Will needed to change the testimony he gave in deposition. At trial, Smith testified Larry actually may have tried to call her a couple times after that 1:49 phone call, without success. Will testified he did not remember trying to make those calls, but he did testify he suddenly happened to remember in the week

before the March 2009 trial that he had left the house in the early morning of April 18, 2008. He testified he left the house about 4:00 a.m. to get a pack of cigarettes. Elisa Smith was not home yet at that time. Will testified he was "not really" concerned about Smith, but he drove out past the golf club. He saw her car was the only one in the parking lot, and there was a light on in the club. Then, he simply went on his way to a convenience store to get his cigarettes and returned home. The golf club was not on the way to the store. He admitted he had to go out of his way to check on Smith at the club. (Cr. Tr. , pp. 215-216, L. 17-21; pp. 386-390, L. 1-14; App 139-140) (State Ex. "B", pp. 50-52, L 9-3; App 639A-639B) Larry Will did not tell the DCI agent anything about trying to call Smith again, leaving the house, going by the golf course and seeing Smith's car, or going to the convenience store. He talked to that agent ten days after the fact on April 28, 2008. It was the day the DCI investigation began against Mr. Sickels. (Ex. "3B", pp. 5-6, L. 177-208)

John Sickels testified in the criminal trial. After all other patrons left, except for himself and Christensen, he did engage in consensual intercourse with Smith while Christensen was out of the room. According to both Elisa Smith and Mr. Sickels, the sex act took place sometime after Will's call to the club at 1:49 a.m. Mr. Sickels testified he and Christensen then left the club sometime before

2:30. (Cr. Tr. pp.134-135, L. 9-6, pp. 883-895, L. 15-14; App.94-95, 254-256) Lesha Clark was the club manager. When she arrived later on the same morning for work, she found interior doors to the dining room that Smith was supposed to lock were in fact unlocked, and the security alarm was not set. Those doors were to be locked to secure cash that had been received. The bar area was in disarray with stir straws and toothpicks knocked over. Smith had not vacuumed or cleaned up tables properly. Clark's first thought was that Smith had been assaulted by Larry Will. Clark had seen bruises, swelling and a black eye on Smith in the past, when Smith told her Will had inflicted the injuries on her. Smith told her Will had assaulted her sometime in the fall of 2007 because she was not "putting out enough" at home, and Will accused Smith of having sex with someone else. Smith also told Lesha Clark that Will "tried to run a shotgun up her vaginal area," in that prior incident. Upon finding the club was not properly closed up, on April 18, 2008, Clark tried to call Smith around 8:10 a.m., but got no answer. She also called the community college and learned Smith had not gone to school. (Ex. "3D", p. 3, par 1-5; Ex. "4A", pp. 60-62, L. 3-18; Ex. "4E", pp. 8-13, L. 1-23; App. 514, 540-542, 556-561)

Larry Will told the DCI agent the day the investigation was initiated, that Smith was always working out at the Club on Thursday night. The night in

question, and every Thursday night, was Men's Night. Larry told the DCI he was ***always*** "concerned" about that, and he "didn't quite care" for that. He also stated the Club's location on the edge of town made it "sort of a dangerous place." Larry said in that interview that when Smith handed the phone to Christensen, he did not know he was talking to a police officer. He told the DCI Smith was usually home by 2:00 or 2:30. (Ex. "3B", pp. 5-6, L. 177-208; p. 13, L. 484-504; App. 505-506, 507).

There had been another key transformation in Larry Will's story, as well. When he spoke to the DCI ten days after the fact, Will said nothing about turkey hunting. When he gave the deposition December 2, 2008, Will testified he slept from the time he talked to Elisa Smith and Christensen on the phone until Smith got home and went to bed. He said he stayed in bed awake another half hour to hour, and then he got up and went turkey hunting. He said his son went with him. He did not say in the deposition whether his son had spent the night before going hunting. The son actually lived in another town. (Ex. "4G", pp. 17-18, L. 2-16, pp. 26-27, L, 3-19; App. 589-592) At trial, Larry Will testified his son had stayed the night, and he and his son got up when Smith got home. She went to bed, and they went hunting. Will testified at trial that when Smith got home he asked her why she was so late. He added: "She didn't say a word. She just went

and curled up in bed." Then Larry and his son went hunting. (Cr. Tr. 378-382, L. 20-18, pp. 390-391, L. 12-13; App 141-145, 150-151) At trial, the defense attorney completely failed to cross-examine Larry Will on his highly inconsistent stories about where he went and what he did after he talked to Smith and an unknown man at 1:49 a.m. Larry was an extremely jealous and hard-drinking man.

The DCI reports entered into evidence herein as Exhibits 1 and 3A through 3F show exactly what the DCI had developed in their first two weeks of the investigation that commenced with recorded interviews of Smith and Will on April 28, 2008. As always, the most important information to an objective analysis of the facts comes from the independent witnesses. Perhaps the most striking of the initial facts developed in the first interviews of the independent witnesses is the timing of the phone call Larry Will placed to Elisa Smith on the night in question. This critical fact was set out in the summaries of DCI interviews with the Crestmoor manager, Lesha Clark, and the bookeeper, Susan Stofferahn. They were interviewed May 12 and 13, 2008. Because Clark had arrived at work on the morning of April 18 to find Ms. Smith had not locked up or cleaned up properly after her bartending shift the night before, she set out to figure out what Smith had done.

> CLARK checked SMITH's timecard and noticed it read 6:00 p.m. to 1:00 a.m., which was handwritten, as that's how they keep track of their hours. CLARK checked the last call on the phone as she normally does, and noticed it said 1:50 a.m. with a call coming from SMITH's home. (Ex. "3D", p. 3, par. 2-3; App 514)

Stofferahn told the DCI she was not only the bookkeeper, but also the president of the Women's Association at Crestmoor, which made her a member of the Club's board of directors. She assisted Lesha Clark with her "investigation" of Smith's job failures on the night in question. Stofferahn corroborated Clark's check of the telephone I.D. record and more precisely reported that the call from Smith's home came into the Club at 1:49 a.m. (Ex. "3E", p. 1, par. 1, p. 3, par. 1; App. 517-519).

Two paragraphs on page 3 of the Lesha Clark interview summary show the failure in her investigative logic. That failure in logic was a red flag and the key to unraveling the true facts. Defense counsel inexplicably failed to discern the importance of Clark's *non sequitur*. The summary report says Clark described how the Club had not been properly locked up. Toothpicks and straws from the bar were knocked into the sink and "the place wasn't as clean as it usually was." That's when Clark checked Smith's timecard and checked the phone to see the last phone call to the Club at 1:50 a.m. That meant Smith was still at the Club

almost an hour after she should have been done cleaning up and leaving at 1:00 a.m. From that paragraph, the first line of the next paragraph shows Clark's investigative failure. The circumstances Clark found led her to this theory:

> "Clark got worried thinking maybe something had happened to SMITH when she got home, as LARRY had been abusive to her in the past." (Ex. "3D", p. 3, par. 2-3; App 514).

How would domestic abuse "when she got home" explain the failures in properly closing up the Club before Smith went home? The logical connection between improper closing of the Club and the domestic abuse was that Larry Will showed up at the Club, assaulted Ms. Smith and hustled her out of there to get her home. A central complaint in Mr. Sickels's PCR action is that his trial counsel, Mr. McConville, failed to effectively focus the jury's attention on the fact Larry Will would have gone into the golf Club that early morning in question and interrupted her closing routine. While McConville made some references to the toxic relationship between Smith and Will, he did not make Smith's fear of Will, and his intense jealous streak, a central and forceful theme in an effective defense. Counsel for Christensen touched on that cursory explanation of the circumstantial evidence in closing argument to the jury:

> Mr. McConville went through a litany of things, not the least of which is the tumultuous relationship she

> has with Larry Will. The place is a mess, the straws are knocked over. Got a guy who is concerned about his girlfriend. When he drives up to the country club and doesn't go in - - or does he? Does he go in? Does he sense that something is wrong? Does he go in there and throw a tantrum? Obviously the guy has a violent temper. I don't know. But it's not something that we have to deal with. They have to deal with it. They have to show that stuff didn't happen. We don't have to show that it happened. (Cr. Tr. P. 1249, L. 8-20; App. 383)

Mr. Sickels's position on postconviction was that counsel *did* have to show "that stuff" probably *did* happen in order to present an effective defense. The jury needed to hear counsel tell the story of how and why Smith told a false story. Smith's motives for fabrication were driven by her need to keep her job, her need to sustain her severe alcoholism, and to protect herself from the wrath of Larry Will**.**

Defense counsel failed to investigate and present evidence to show the role alcoholism played in Ms. Smith's accusation. In August of 2005, Smith voluntarily committed herself into alcohol detoxification treatment at Broadlawns Hospital in Des Moines. She had been drinking heavily and increasing her intake for at least two years. She was a victim of Larry Will's physical abuse at the same time. Ms. Smith stayed in detox for seven days. When she requested help for her drinking problem at the hospital, she reported she "was feeling suicidal,

very depressed, [and] helpless." (Smith Civil Suit Depo., 6/15/12, Ex. "4B," 49-51, L. 13-14; App. 552-554)

After that intense alcohol abuse and inpatient treatment in August 2005, Smith took the job as bartender at Crestmoor in July of 2006. She always worked Men's Night until closing time. (Ex. "4B", p. 24-25, L. 1-11; App. 550A-550B). It was in the summer of 2007 that Smith was involved in the incident with the Downeys in the parking lot of the Club at 3:45 in the morning after a Men's Night. Curtis Downey generally was at the Crestmoor only on Thursday for Men's Night, every Thursday. He told the DCI that when Smith was the bartender, she was "usually the drunkest person in the bar after 10:00 p.m. if there were not a lot of people around." (Ex. "3L", p. 2, par. 4-10; Cr. Tr. , pp. 714-717, L. 19-18; App. 208-211, 532). It was in the fall of 2007 that Smith told Lesha Clark that Will had beaten her because he thought she was being unfaithful. (Ex. "3D", p. 3, par 3; App. 514). The bartending job was not a good thing for Smith, but it was a job she wanted to keep. Working Men's Night every Thursday, she could make good tips. She could work nights a few days a week and go to school during the day. She had just started studies at the community college in January of 2008. The job fit her schedule, and she could drink for free. (Ex. "4A", pp. 8-9, L. 18-25; Ex. "4B", pp. 27-28, L. 1-25; App. 535-536, 550C-550D). Mr. Sickels

made the argument on PCR that follows here. When Smith felt the pressure of losing her job because she helped herself to too much of the Club's liquor, she changed the subject to "rape."

To convince a jury a complaining witness has fabricated a claim of sexual abuse, it is absolutely necessary to demonstrate the motive for the false claim. The improper closing of the Club was not the only problem Smith was facing. Lesha Clark also had a large bottle of Crown Royal whiskey that was drained and not accounted for when she got to work the morning of April 18, 2008. Clark tried to call Smith about 10 minutes after she got to work that morning, but Smith did not answer. About 1:00 p.m. that afternoon, "SMITH finally called CLARK back." Lesha Clark questioned Smith about the missing Crown Royal, and she was thinking Smith had been giving the whiskey away. Smith told Clark that Mr. Christensen and Mr. Sickels had been drinking the Crown Royal the night before. Clark told the DCI that after that phone conversation with Smith she thought maybe everything was "okay," but she "still felt that something wasn't right and there was a piece of the puzzle missing." (Ex."3D", pp. 3-4; App.514-515)

For some reason, Clark did not talk to Smith again for a week after that phone call. She summoned Smith to come into the Club the morning of April 24, 2008. She told Smith the whiskey "was not all accounted for and she wanted to

know what happened." Smith started "shaking more than usual" and appeared to be "an absolute nervous wreck." When Clark pressed her and said "tell me what happened," Smith replied, "I was raped." (Ex. "3D" p. 4, par. 3; App. 515).

The jury's focus should have been on Smith's main problem when she was confronted by her boss the morning of April 24, 2008. More important than the fact Smith had failed to clean up and close up properly, was the fact Lesha Clark found an entire bottle of Crown Royal was empty and not paid for. It was not just a fifth. It was the large 1.75 liter bottle. (Ex. "4E", pp. 23-28, L. 9-8;App. 562-567). When Clark confronted Smith about the fact the Crown Royal was not accounted for and she wanted to know what happened, Smith's answer was, "I was raped." That answer did not explain the missing Crown Royal, but it certainly did change the subject. And that is what Smith's answer was intended to do. The question as to what happened to the large bottle of Crown Royal that was not paid for was never answered. Elisa Smith never said she was giving any whiskey away. She never said Sickels and Christensen were taking it by force. She said they paid cash for their drinks. (Ex. "4A", pp. 90-91, L. 16-7; App. 544-545). She never answered the question. It is not a path to recovery for a severe alcoholic to take a job as a bartender. If defense counsel had effectively focused their investigation on the alcohol abuse that Smith and Will had mentioned, they would have found

Smith was an alcoholic with some desperate symptoms, and the question as to what happened to the bottle of Crown Royal would have been answered.

State Court Proceedings

Mr. Sickels and his co-defendant, James Christensen, were charged in June 2008 by Trial Information with Sexual Abuse in the Second Degree in violation of Section 709.3, the Code. The State's accusation is that Christensen aided and abetted Mr. Sickels in a sexual assault upon Elisa Smith. (Tr. Info; App. 1) Christensen was the Chief of the City of Creston Police Department. On the night and early morning in question, April 17 to 18, 2008, Mr. Sickels was the Assistant Chief of Police in Creston. Because they were police officers, the accusation against them was investigated by the Iowa Division of Criminal Investigation (DCI), and the case was prosecuted through the office of the Attorney General.

Upon motion from the defendants, without resistance from the State, a Motion for Change of Venue was granted, moving the jury trial from the original venue in Union County to Woodbury County. (Motion and Order; App. 3-15). Neither defendant moved for a separate trial. After a joint trial in March of 2009, the jury convicted both defendants on the stated charge of Sexual Abuse in the

Second Degree. The criminal jury trial proceeded before the Honorable Arthur E. Gamble. By agreement of the parties, the sentencing actually took place in Des Moines. The sentence was a mandatory prison term of not to exceed 25 years. Mr. Sickels took a direct appeal and his conviction was affirmed. (Sentencing Tr. , p. 1; Ct. App. Decision; App. 420-440)

Mr. Sickels filed his Application for Postconviction Relief (PCR) on December 27, 2011. (App. 441-447). The evidentiary hearing proceeded before Judge Scott on September 18, 2013. The judge denied relief by ruling filed October 22, 2013. Timely Notice of Appeal was filed November 19, 2013. (Ruling and Notice; App. 723-734, 748)

The theory Mr. Sickels advanced in the PCR was firmly based in the fact-driven argument that his trial attorney failed to properly focus the defense upon the destructive relationship between the complaining witness and her live-in boyfriend, Larry Will. The volatile effects of the combination of alcoholism, jealousy, and domestic violence in that relationship collided with Elisa Smith's dream job as a bartender. The result was a false claim of sexual abuse against Mr. Sickels after a consensual sex act. The arguments below set out additional failures of counsel on critical strategy questions and evidentiary issues. Those omissions added to the fundamental failure on the factual theory of the defense in combined

prejudice. On PCR, Mr. Sickels asserted two of counsel's evidentiary failures were particularly devastating to the defense. The fighting issue in the jury trial was in the credibility contest between the complaining witness and Mr. Sickels. Was the sex act consensual, or was it not? Counsel failed in legal investigation and argument that would have persuaded the judge to allow the jury to hear the complainant's prior false denials of consensual sexual conduct. That prior conduct was with another man in a situation almost identical to the instant facts. Mr. Sickels argued that the failure to show the jury that the complainant was previously untruthful about prior consensual sexual conduct was compounded in prejudice by the prosecutors' repeated questioning of witnesses on subject matter the trial judge had previously excluded. Counsel failed in the mechanics of precluding prosecutors from delivering multiple testimonial questions regarding allegations of previous lewd conduct on the part of Mr. Sickels. Judge Gamble had ruled before trial that the allegations of Mr. Sickels's prior conduct were improper character evidence *and* that prosecutors could not attempt to reopen that ruling in front of the jury without first obtaining approval from the judge. As the prosecutors recited their testimonial questions to defense witnesses on cross-examination, defense counsel sat mute. When the prosecution finally presented the witness who allegedly witnessed the lewd conduct in an offer of proof, Judge

Gamble again ruled the evidence was improper and barred use of the witness in the State's rebuttal case. The evidence regarding the complainant's prior denial of consensual sexual conduct with another man is referred to in the record as the Downey Incident. The evidence regarding the use of testimonial questions as to improper character evidence of lewd conduct is referred to in the record as the Twilight Zone Incident. (Applicant's Closing Argument and Brief, 10/7/13, pp. 20-23, 27-30; Applicant's Rebuttal Argument, 10/17/13, p. 1-5, 8-14; App 693-694, 715-722). The opinion filed on direct appeal clearly showed the great damage done to Mr. Sickels's defense by going into a joint trial with Christensen. Counsel's failure to fully evaluate and make a Motion for Severance is the first assignment of error, below.

The PCR proceeded to appeal and a three-judge panel of the Iowa Court of Appeals denied relief to Mr. Sickels in a decision filed March 25, 2015, and Further Review was denied by the Iowa Supreme Court on May 22, 2015.

Federal Court Proceedings

Mr. Sickels timely filed the instant Petition for Habeas Corpus Relief in the Southern District on September 18, 2015. The action was transferred to this Court the same day.

STANDARDS OF REVIEW

Federal Habeas Review

> There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom, contrary to law. *Harris v. Nelson* 394 U.S. 286, 292, 89 S. Ct. 1082, 1086-1087 (1960)

The Court must be guided by Justice Kennedy's first three sentences in the unanimous decision he wrote relatively recently in *Harrington v. Richter*, 131 S. Ct. 770, 780 (2011):

> The writ of habeas corpus relief stands as a safeguard against imprisonment of those held in violation of the law. Judges must be vigilant and independent in reviewing petitions for the writ, a commitment that entails substantial judicial resources. Those resources are diminished and misspent, however, and confidence in the writ and the law it vindicates undermined, if there is judicial disregard for the sound and established principles that inform its proper issuance.

With the foregoing principles in mind, Justice Kennedy recited the well-established standard employed by federal courts to determine whether State court

fact findings and applications of law are unreasonable:

> As a condition for obtaining habeas corpus from a federal court, a State prisoner must show that the State court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement. *Richter*, 131 S. Ct. at 786-787.

The statutory standard of review is set out for this Court at 28 U.S.C. 2254 (d):

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the 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.

The factual findings determined by the Iowa courts are presumed to be correct, unless Petitioner is able to rebut the findings by clear and convincing evidence. 28 U.S.C. § 2254 (e)(1). As set out in Section 2254(b), the federal habeas petitioner must exhaust his federal constitutional claims in the state court before this Court has authority to grant relief. In his PCR appeal brief, Mr. Sickels

raised all four of the claims set out for deficient performance of counsel as violations of his federal constitutional right to the effective assistance of counsel as set out by the U.S. Supreme Court in *Strickland*. (PCR Appeal Brief, pp. 23-24, Doc No. 7, attachment # 11). The federal claim is exhausted in the state courts by giving that state's appellate courts a full opportunity to rule on the federal claim. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S. Ct. 1728, 1732 (1999) The Iowa Supreme Court denied Mr. Sickels's request for Further Review of the ineffective assistance claims in its order of April 11, 2015.

Contrary to Law

The standards of review under 2254 (d)(1) are broken down into two alternatives providing relief. A state court decision is "contrary to . . . .clearly established federal law " if the state court applies a rule "that contradicts the governing rule" established by a Supreme Court case. *Laffler v. Cooper*, 132 S. Ct. 1376, 1390 (2012). A state court decision is also "contrary to . . . clearly established federal law" if it "confronts a set of facts that are materially indistinguishable from a Supreme Court precedent," but "arrivers at a result different " from the precedent. *Williams v. Taylor*, 529 U.S. 362, 406 120 S. Ct. 1495 (2000). That is the "unreasonable application standard."

Unreasonable Determination of Facts

Under 2254 (d) (2), relief may be granted where the exhausted claim in state court "resulted in a decision that was based on an unreasonable determination of the facts." The question is "not whether a federal court believes the state court's determination was incorrect, but whether that determination was unreasonable - - a substantially higher threshold." *Schirro v. Landrigan,* 550 U.S. 465, 473, 27 S. Ct. 1933 (2007). That *Landrigan* decision also dictates the standard for the definition of "unreasonable" used in the 2254 (d)(1) analysis for "unreasonable application." The review proceeds on both subsections not for simple correction of errors of law, but upon the question of whether the error of law was "unreasonable." *Williams* 529 U.S. at 411, 120 S. Ct. At 1522. "[T]he purpose of AEDPA is to ensure that federal habeas relief functions as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction." *Green v. Fisher*, 132 S. Ct. 38, 43 (2011). The resulting definition of "unreasonable" pays great deference to the state court decision. The error is unreasonable only if that conclusion is one that "fairminded" jurists could not disagree upon. *Richter*, 131 S. Ct. At 786-787.

Ineffective Assistance of Counsel

In *Strickland v. Washington*, 466 U.S. 668, 690,104 S. Ct . 2052 (1984) the

Supreme Court held the reviewing court must judge the "reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." The claim of ineffective counsel is then reduced to a determination as to whether the conduct was "the result of reasonable professional judgment." The Court must keep in mind there is a strong presumption of competence and reasonable professional judgment. 466 U.S. at 690. In *Taylor v. State*, 362 NW 2d 683 (Iowa 1984), the Court clarified *Strickland* and set out the necessary elements for proof of ineffective assistance of counsel:

> The person claiming his trial counsel was ineffective, depriving him of his Sixth Amendment right to counsel, must show that, (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. 352 NW 2d at 685

The Iowa Supreme Court has incorporated *Stickland* into numerous decisions. In determining whether counsel omitted an essential duty, the Court looks to the nature of counsel's conduct and the reason behind it. Where counsel's trial strategy is not reasonable, the Court will find counsel failed in an essential duty. *State v. Tracy*, 482 NW 2d 675, 679 (Iowa 1992). The *Strickland* decision explained that there must be a determination that "but for counsel's unprofessional errors" the accused would have been acquitted or obtained a more favorable result. This proposition need not be proven to a certainty, but only a

reasonable probability. The probability must be sufficient to undermine confidence in the outcome. 466. U.S. at 694.

The duty to investigate applies to legal investigation through research, as well as factual investigations. *State v. Westeen*, 591 N.W. 2d 203, 207-211 (Iowa 1999).

> [C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigation unnecessary. *Strickland*, 466 U.S. at 691, 80 L.Ed. 2d at 695, 104 S. Ct. 2066.
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> * * * *
>
> On the other hand, a decision by counsel based upon tactical judgment does not completely immunize the decision from an ineffective assistance of counsel claim. While strategic decisions made after "thorough investigation of law and facts are virtually unchallengeable" strategic decisions made after a "less than complete investigation" must be based on reasonable professional judgment which support the particular level of investigation completed. *Ledezma v. State*, 626 N.W. 2d 134, 143 (Iowa 2001) (quoting *Strickland*)

ARGUMENT

TRIAL COUNSEL WAS INEFFECTIVE IN FOUR ESSENTIAL DUTIES CRITICAL TO LEGAL AND FACTUAL INVESTIGATION, PREPARATION AND PERFORMANCE AT TRIAL

A.

Failure to Move for Separate Trials

Preservation of Error In State District Court: This claim was set out in paragraphs 8-9 of his Application (App. for PCR, pp 4-5; App. 444-445). The first assignment focused on the undisputed fact Mr. Sickels first lied to Chief Christensen by denying the consensual sex act with Smith occurred. Christensen, as a victim of that lie, would create the effect of being a second prosecutor in his defense. He would emphasize that Sickels had lied to him. Secondly, and more importantly, counsel failed to focus on the fact that Christensen would be a very poor witness, and his testimony had to be avoided by moving for separate trials. The argument was not that Christensen was actively, or even knowingly, taking action in concert with the prosecutors against Mr. Sickels. The argument was that Christensen performed so poorly in his out-of-court recorded admissions against interest and in-court testimony, that he caused great damage to the Sickels defense. Counsel for Mr. Sickels had all the resources at his disposal to anticipate

Christensen's damaging out-of-court statements and poor performance as a witness. The prejudice in the statements Christensen made to the DCI and the very emotional conversation Smith engaged with Christensen in the audio recording of a private meeting she set up at a hospital gazebo, were devastating to both defendants, and it all would have been excluded in a separate trial for Mr. Sickels. (PCR Closing Argument, 10/7/13, pp. 23-27; App. 694-698).

In his ruling, Judge Scott concluded there was no evidence Christensen or his attorney "worked with the State in any way." On the second point, the judge said, "The fact that Christensen, the chief of police, would not make a good witness was not known before trial. It is only speculation to say otherwise." Finally, Judge Scott concluded the recording of the hospital gazebo conversation would have been admitted in a separate trial for Mr. Sickels, as Christensen's statements on the audio recording would be evidence of "a co-conspirator attempting to cover up the crime." (Findings and Conclusions, 10/22/13, pp. 8-9; App. 730-731)

State Appellate Conclusions: The PCR appellate panel concluded ineffective assistance was not established, citing two points on the performance prong:

> 1. Counsel weighed the pros and cons of a joint trial. "He correctly believed Christiansen would testify and most of what he said would be helpful to Sickels." (Slip

Op. 3/25/15, p. 6).

2. "Counsel also desired to keep the two parties together because of the fear that Christensen would work a deal with the prosecutor and testify against Sickels." (Slip Op. 3/25/15, pp. 6-7)

The Iowa Court of Appeals panel also addressed the prejudice prong on two points, but only on two points:

1. The audio recordings of conversations between Elisa Smith and Christensen would have been admitted against Mr. Sickels in a separate trial "as a statement of a co-conspirator." (Slip Op. 3/25/15, pp. 5-6)

2. The Iowa case Mr. Sickels Cited for the prejudicial effect of a tape recording of emotional pleas from a complaining witness was not on point. That tape recording was considered coercive. Sickels has failed to point out how the taped conversation between Christensen and [Smith] is in any way coercive." (Slip Op., 3/25/15, p. 6)

Deficient Performance: The defense attorneys were allowing virtually all the contact between the Defendants before trial to be directly between Mr. Sickels and Mr. Christensen. Attorney McConville admitted that in his deposition, and he admitted he knew before trial that the co-defendant, Christensen, was inclined toward testifying at trial. (McConville depo., State Ex. “B”, p. 22, L. 11-21, p.24, L. 1-7; App. 614C).

The tapes of conversations the DCI had recorded between Christensen and Elisa Smith should have been the first big indicator Christensen would make a poor witness. (Cr. Tr. State Ex.'s 1 though 3). The interview Christensen had with DCI Agent Kietzman should have demonstrated to Mr. McConville before trial that Christensen had poor skills under questioning. (Cr. Tr. State Ex. 4, Audio interview). If Mr. McConville was not going to get the opportunity to talk to Mr. Christensen himself, it was only logical and prudent that he should have asked Mr. Sickels to focus and assess how he thought his friend and boss, Jamie Christensen, might perform as a witness. If Mr. McConville was developing the opinion that "Mr. Christensen's out-of-court statements were more helpful than harmful," then McConville most definitely should have been taking reasonable steps to determine whether Jamie would be a strong witness who could effectively convey what he wanted to say. (St. Ex. "B", pp. 20-21; L.8-18; App. 614A-614B). There was clearly potential that Christensen could be a "make-or-break" witness. The Court of Appeals considered him the key to the case against Mr. Sickels when the panel examined the Sickels direct appeal issue for sufficiency of the evidence. (Slip Op. 7-9; App. 427-429)

One of the most basic judgments a trial attorney has to make on a routine basis is whether to call a witness to the stand. That judgment always requires the

balancing of the importance of the information the witness has, and whether he is the only person who has it, versus the prospects of how the witness will perform on the stand. Attorney McConville failed on this second prong. Review of Christensen's audio and video recordings should have led McConville to seriously question Christensen's ability as a witness. If McConville had then asked Mr. Sickels to focus on that question, Mr. Sickels would have told him Christensen is intelligent enough, but he is just not skilled in expressing himself orally. While Mr. McConville could not call Mr. Christensen as a witness, he could keep him off the witness stand in Mr. Sickels's separate trial. All he had to do is move for a separate trial. He failed.

Prejudice: Mr. McConville was not the only attorney failing to assess Christensen's ability as a witness. Christensen's trial attorney, Paul Scott, testified in deposition:

> Q. Did it ever occur to you as a strategy matter that your client, Mr. Christensen, might tend to look relatively good as compared to Mr. Sickels in that he wasn't the actual perpetrator and that might be an advantage to him?
>
> A. I think that you think about that sometimes, but I don't really know that in this - - I mean, had the evidence come out a little bit differently that's probably the case. I mean, in my personal opinion, I don't think that severing this trial would have

> made a hill of beans of difference. I do feel a little bit different about whether or not I should have counseled Jamie differently about testifying. That's something that kind of eats at me a little bit.
>
> Q. Okay. And you should have - - I mean, in what way? Tell us.
>
> A. Just because - - he was so bad on the witness stand. He was terrible. I mean, I let him - - every question I asked him was a leading question. He did not - - I mean, "How old are you?" - - "Well"- - Then I'd have to come back, "Aren't you" - - I don't remember how old he was. I'd have to come back with, "Aren't you 43?" Every question was like that. I'm certain that that had to have played - - or had an effect on the jury.
>
> Q. But you couldn't have known how he was going perform as a witness before he testifed.
>
> A. No. I know I mean I thought he was going to be a lot better. (St. Ex."C", pp. 86-88, L. 23-1; App. 692)

The prejudice from Christensen's testimony is clearly shown in the Court of Appeals opinion from Mr. Sickels's direct appeal. (No. 09-0897) (11/24/10). The opinion quite clearly points out that Mr. Sickels was already starting out his defense with the strong disadvantage that he admittedly had started out lying to Christensen and the DCI about whether he actually engaged in a sex act. In explaining the evidence against Mr. Sickels, the appellate panel quoted

Christensen's testimony and his failures as a witness three times, and described other inconsistences in *Christensen's* statements. (Slip Op, pp. 7-9; App.427-429)

If there might have been a small amount of uncertainty before trial as to how Mr. Christensen would perform as a witness, there was no doubt the recording of the hospital gazebo confrontation was going to be highly damaging. (Cr. Trial Ex.2). In an extremely similar situation, the Iowa Supreme Court said this about the improper emotional effect on the jury resulting from an extended and unfettered speech from a complaining witness in a sexual abuse case:

> Here N.S. repeatedly and emotionally stated her opinion that Cromer took advantage of her. N.S. presented herself as a sympathetic, suffering victim, as shown by such comments as decent guys would have taken her home and the "little pieces" of her had been "taken away." Conversely, these statements suggested Cromer was not a "decent guy" and implied he was deserving of punishment on that ground. Overall, there was an abundance of comments that likely appealed to the jury's emotion and created a danger for the jury to convict Cromer based on the contents of the emotional conversation. *State v. Cromer* 765 N.W. 2d 1, 9-10 (Iowa 2009).

In *Cromer*, the defendant did get a trial separate from his co-defendant, but he did have to concede that some of the content of the recorded phone conversation would be admissible against him. The phone conversation was

between Cromer and the complaining witness. His out-of-court statements were taken out of the realm of hearsay as admissions of a party opponent. 765 N.W. 2d at 8. In the instant case, Mr. Sickels was not a participant or even present for the phone conversations, the gazebo conversation, or the DCI interview of Christensen that were all recorded and played for the jury as State's Exhibits 1 through 4. All Mr. Sickels' attorney had to do was move for a separate trial and thereby exclude all of the recordings the State could not wait to play for the jury. All of those statements would have been hearsay in a separate trial for Mr. Sickels. The inability to confront Christensen about those statements if he chose not to testify in a joint trial, would have forced the trial court to separate the trials to prevent a *Bruton* violation from arising. The State alerted defense counsel to the escape hatch in separate trials with its Motion for *Bruton* Ruling filed October 30, 2008. (App. 16-17). A separate trial would have excluded all of Smith's and Christensen statements in Exhibits 1 through 4, and Christensen's damaging trial testimony set out in the Sickels direct appeal decision. This Court must listen to those recordings. It would have been a trial that was immeasurably more fair to Mr. Sickels as it would have focused on his own statements and testimony. His testimony that he first lied about having consensual sex with Smith because he wanted to protect his family and his career was something a jury could and would

understand. All of the evidence that could have been excluded in a separate trial must serve to undermine the Court's confidence in the outcome.

The State Panel's Error: The appellate panel assessment of counsel's performance is quite simplistic in concluding McConville would reasonably believe most of Christensen's testimony "would be helpful to Sickels" at trial, and he feared Christensen "would work a deal with a prosecutor" if separate trials were ordered. (Slip Op., 3/25/15, pp. 5-6). The latter proposition is nonsensical. Maintaining a joint trial does nothing to prevent Christensen from making a deal with the prosecution. While it is true Christensen could testify to support Mr. Sickels's testimony in some ways, McConville did nothing to assess Christensen's ability as a witness or the extreme prejudice in the audio recordings that Christensen brought as heavy baggage into the jury trial. On the prejudice prong, no rational jurist would ever conclude that the co-conspirator exception to hearsay would allow everything Christensen ever said about the case into a separate trial. The panel's brusque analysis of the *Cromer* case is a complete failure in legal reasoning. The importance of *Cromer* to the instant case is not in the coercive effect of the statements. It is the unfair sustained emotional plea from the complaining witness.

Mr. Sickels had forcefully and specifically countered all of the foregoing

points in the briefs submitted to the panel. The panel simply adopted the State's arguments in conclusory fashion. The decision did not address any of Mr. Sickels's arguments:

> 1. It is not the client's duty to evaluate and decide whether a certain witness will be destructive. Mr. Sickels testified Mc Conville never asked about Christensen's ability as a witness, or even his own ability. It never occurred to Mr. Sickels to make this evaluation.
>
> 2. If Christensen's statements to Smith that he would not file a charge against Sickels was a co-conspirator's statement, that statement could be conveyed to the jury without playing the entire audio recording. Such recordings were found inadmissible by the Iowa Supreme Court in *State v. Cromer*, 765 N.W. 2d 1, 10 (Iowa 2009) partly because the extended, emotional, accusatory speeches by the complaining witness in the recording was more unfairly prejudicial than probative.
>
> 3. Christensen's value was minimal in corroborating Mr. Sickels's testimony. Even if the jury believed Smith had lifted her shirt for the two men earlier in the evening, that does not translate to consent for a sex act. The Court of Appeals on direct appeal repeatedly referred to Christensen's testimony as evidence of Mr. Sickels's guilt.
>
> 4. Whether or not Christensen would enter a bargain to testify had nothing to do with whether the two were heading into joint or separate trials. (Appellant's Opening Br., pp. 25-31; Reply Br. 3-

7) (Doc No. 7, attachments 11 and 13)
(Application for Further Review, 15-16) (Doc 7,
Attach. # 15)

It is certainly worth noting that the judge who wrote the PCR appeal opinion is not an appellate judge, and never has been. He is a trial court judge on senior status. In his Application for Further Review, Mr. Sickels raised the argument that the state statute allowing a trial court judge to sit on an appellate panel violated the state constitution. The state constitution provides a merit selection process for the appointment of appellate judges and does not provide any exception allowing district judges to sit. District judges are selected in an entirely different process. That argument was never addressed because Further Review was denied.

Granted, some district court judges are qualified and skilled in the adjudication of appeals. This Court engages in that process. The state constitutional argument is not relevant in the instant proceedings. What is relevant, however, is whether this particular senior status trial judge reached an appellate conclusion in a reasonable and rational analysis. Is it reasonable for an appellate judge to dismiss an appellant's claim without addressing any of the arguments advanced in support of the claim?

B.

The Relationship Between Elisa Smith and Larry Will

Preservation of Error in State District Court: In the Application for PCR, Mr. Sickels raised several evidentiary failures in trial counsel's performance at trial. In paragraph 12 of the application, Mr. Sickels pointed out counsel's failure to effectively impeach Larry Will and prove his motivation and history to subject Ms. Smith to domestic abuse based upon his belief she was engaging in "consensual sexual activity with someone connected to the Crestmoor Golf Club." (App. PCR, p. 6; App. 446)

Judge Scott concluded "Applicant's attorney thoroughly examined Mr. Will.... A reasonably competent attorney in McConville's position could not have done more." (Findings and Conclusions, p. 10; App. 732)

State Appellate Conclusions: The panel made only two conclusions on this assignment, both on the performance prong:

> 1. "Counsel hired an investigator, and extensive depositions were taken and offers of proof made." (Slip Op., 3/25/15, p. 7)
>
> 2. "Argument is a matter of strategy, and trial counsel's argument was forceful, exhaustive, and directed to the jury to those facts which supported the defense's strategy." (Slip Op., pp. 7-8)

Deficient Performance: The Statement of the Facts included Attorney Paul Scott's closing argument reference to the relationship between Smith and Will as "tumultuous." That was an understatement.

On PCR, Agent Dales had to admit that the prior conduct of Larry Will in trying "to run a shotgun up her vaginal area" would classify as Sexual Abuse in the Second Degree. (PCR Tr. 35-36, L. 17-1; App.473-474). That reference from the DCI interview of Lesha Clark should have tipped off Attorney McConville that there was a critical aberration in the relationship between Smith and Will at the bottom of her false allegation against Mr. Sickels. After their convictions, Elisa Smith sued Mr. Sickels and Christensen for damages. Discovery conducted in that suit showed Attorney McConville could have found evidence to show the criminal case jury just how desperate Smith's predicament was in her alcoholism and in her co-dependent relationship with Larry Will.

Smith's testimony in the civil deposition revealed Smith's willingness to disclose Will's physical and sexual abuse toward her:

> Q. And it refers in Mr. Jones' assessment of 8/25/08, that you have frequent thoughts of revenge against everyone who has violated you, domestic violence. It says started with Larry and one of your exes beat you badly, raped and sodomized you. And I apologize, ma'am, that I have to ask you about these questions. Do you know what he's talking

about there?

A. One of my exes?

Q. It says in here that one of your exes beat her badly/raped and sodomized her. Then he took care of her for two weeks.

A. That would be Larry, not my ex.

Q. So Larry raped you at one time?

A. That's how I saw it.

Q. Did that happen once or more than once?

A. Just that time.

Q. When did that happen, approximately?

A. I can't remember.

Q. Was it before the incident at the Crestmoor Golf Club in April of '08?

A. Yeah. Yeah, years before. (Ex. "4B", pp. 48-49; App. 551-552)

There may have been legal wrangling over how much detail and the type of details that would be admitted, if counsel had properly investigated the interlocking factual background of the abuse of alcohol and domestic violence between Smith and Will. There is no doubt the defense could have convinced the jury that the trip to Crestmoor in the wee hours of April 18, 2008, that Larry Will

suddenly remembered the week before trial, was a trip Larry completed by going into the Club. Finding an intoxicated Smith, it is no stretch of the imagination that Will was responsible for the condition of the place as Smith was forced to leave it as she "had to leave in a hurry." Those were her own words to her boss. She had to leave in a hurry. (Ex. "4E,", pp. 29-30; App.568-569) With Will's latebreaking admission he drove out to the Club, it is certain he entered the Club. What happened to Elisa from there is anyone's guess.

Would the jealous type be likely to go to sleep after talking to her and a man at ten until two? If she was not home by 4:00, why would he not call her again? If he did try to call her again, why would he not remember that when he talked to the DCI ten days after the fact, or in his deposition seven months later, or at trial? Why would he not remember driving out to the Club and the convenience store until shortly before the March 3, 2009 trial? If he did drive out to the golf club around 4:00 and saw her car there and the light on, why would he not stop to see if she was okay? He told the DCI he considered the club "sort of a dangerous place" for her because it was out on the edge of town. (Ex. 3B, pp. 5-6, 13; App.505-507). That was all fodder for a cross-examination Mc Conville did not conduct.

The real time Will went out there is unknown. It is inconceivable that he would not go in there to see her, however. He did go in to see her. All hell broke

loose. He assaulted her, knocked things over, hustled her out of there, and nobody saw her for a week. She did not get the club cleaned up. She did not get the doors locked. She told Lesha Clark she left in a hurry. (Ex. "4E", pp. 29-30, L. 6-23; App 568-569). That was all fodder for a closing argument Mc Conville failed to make.

In the very little bit of investigation Mr. Sickels's trial attorney conducted into Will's physical abuse of Smith, counsel found out that alcohol, Smith and Will did not mix well together. These questions and answers developed in Will's discovery deposition of December 2, 2008:

> Q. Okay. Ever had occasion where that's come to any kind of a physical involvement between the two of you?
>
> A. Yes
>
> Q. Okay. Can you recall what were the incidents that caused those things to come about?
>
> A. Alcohol.
>
> Q. Okay. And tell me what you mean by how alcohol was involved, or what created that situation?
>
> A. We were both drinking at the time very heavily.
>
> Q. Okay.
>
> A. Drinking brandy. And we both had to quit or it

was going to kill us both, so - -

Q. Okay.

A. -- we quit.

Q. Good.

So that had created some problems with both of you at the time?

A. Correct.

Q. And created problems that resulted in physical violence between you?

A. Correct.

Q. Was there any particular incident that would have sparked the physical violence, other than just the fact you had both been drinking?

A. Just drinking.

Q. Was there ever a disagreement about what somebody could do or shouldn't do, or did do or shouldn't have done, those types of things?

A. No. It was just drinking.

Q. Okay. You'd just both drink and start fighting or -- What was the argument about that created the fight?

A. I couldn't tell you. Who knows?

Q. Was there ever any argument that she was jealous

> of something you were doing or you were jealous of something she was doing when you were drinking, that type of thing?
>
> A. No. (Ex. "4G", pp. 38-39, L. 1-21; App. 593-594)

From that point in the deposition, Will clarified that they both had quit drinking "brandy," a year or year and a half before the December 2008 deposition. He believed Smith had maintained her vow not to drink brandy, but did still drink beer, and "once in awhile, she did drink a Captain and Coke," that is "a rum and Coke." (Ex. "4G", pp. 40-41, L. 11-2; App. 595-596)

Prejudice: The whole fabric of the story counsel for Mr. Sickels needed to tell the jury was wound up in the facts of alcohol abuse and Larry Will's jealousy. Elisa Smith explained in deposition that all day and night on Thursdays "it's men. No women go to the club. It's just men only." (Ex "4A:, p. 9, L. 5-20; App. 536) That jealousy was grounded in the fact Smith was working as the bartender every Thursday night, Men's Night at Crestmoor. Larry Will gave a strong signal to the root of the problem in his interview on the very first day of the DCI investigation when he told the agent: "Thursday nights are men's night, and that's why I'm always concerned she's out there working on men's night. You know, I'm always concerned . . . didn't quite care for that and the place is on the edge of town. . .

Sort of a dangerous place, you know." (Ex. "3B", p. 13; App. 507). It was also in the first part of the investigation that Lesha Clark told Dales that Smith was beaten because Will thought she was having sex with someone else. (Ex. "3D", p. 3, par. 3; App. 514). The truth in an investigation like the instant can usually be seen in the opening stages, and then it can get submerged.

The DCI did submerge the importance of the Smith/Will relationship very early in the investigation, and defense counsel failed to dig it up later. The defense attorney also missed a golden opportunity for devastating cross examination of Agent Dales. The report of the DCI interview with Lesha Clark on May 12, 2008, mentioned some of Will's criminal conduct toward Elisa Smith. The Clark interview was two weeks after the investigation was initiated with the DCI interviews of Smith and Will, and just four days after the follow-up interview of Smith. (Ex's. "3A-3D"; App. 502-520). The interview of Lesha Clark was not recorded, but Agent Mathis did include this note in the summary of the interview he conducted with Agent Dales:

> CLARK got worried thinking maybe something had happened to SMITH when she got home, as LARRY had been abusive to her in the past. CLARK recalled that in the fall of 2007, SMITH had bruises on her arm, a swollen hand, and a black eye. CLARK, being a nurse, has seen the indicators of domestic abuse before. SMITH told her that LARRY did it when they were fighting

> because he told her she wasn't putting out enough at home, so she must be with someone else. LARRY also broke a window or mirror on their van, and also tried to run a shotgun up her vaginal area. (Ex. 3D, p. 3, par. 3; App.514)

On PCR, Dales was questioned as to why the DCI never investigated Will for domestic and sexual abuse perpetrated on Ms. Smith. Agent Dales was the supervising agent on the investigation. Dales testified:

> Q. Do you know that use of a dangerous weapon would make a sexual abuse a second-degree?
>
> A. Yes, that sounds like it would, yes.
>
> Q. Would you agree that if Larry Will had in fact assaulted Elisa Smith with a shotgun in a sexually abusive way, that would have been a sexual abuse in the second-degree?
>
> A. That sounds like it would fit, yes.
>
> Q. You don't recall anyone investigating whether that incident happened? (PCR Tr. 35-36, L. 17-1; App. 473-474)
>
> [OBJECTION OVERRULED]
>
> * * * *
>
> Q. Do you recall ever seeing any questioning done in a report or in any other way as to any agent ever interviewing Elisa Smith about these allegations of domestic and sexual abuse?

A. I don't recall. (PCR Tr. 37, L 11-15; App. 475)

It is difficult to believe the DCI would not have interviewed Ms. Smith about Will's domestic and sexual violence. In his examination on PCR, Dales reviewed and read into the record the paragraph from the Lesha Clark report that is set out above. (PCR Tr. p. 29, L. 10-25; App. 475) After that, Dales testified:

> Q. Did you ever go back and talk to Elisa Smith about the domestic violence that Clark had described in the paragraph you read?
>
> A. I don't remember if we did or not. I wouldn't be surprised if we did not - - or if we did talk to her.
>
> Q. You would be surprised if any of your agents talked to Elisa Smith about the domestic violence at the hands of Larry Will?
>
> A. No. I'd be surprised if we had not talked to her about that.
>
> Q. You don't recall doing that yourself?
>
> A. Sir, this was four or five years ago. I don't recall everything I did in the case. (PCR Tr., 31-32, L. 20-8; App.469-470)

The fact is there is no DCI report stating that either Smith or Will was ever questioned as to the abuse he inflicted upon her. If that investigation were not

pursued, Mr. Sickels's attorney could have exposed that fact on cross-examination, and then argued the DCI was not thorough, objective, and fair in its investigation of the allegations against Mr. Sickels. If Dales answered in the jury trial as quoted above on PCR, then counsel could effectively argue the jury must believe the DCI did talk to Smith about Will's abuse. That fact then shows the DCI concealed what Smith told them about Will and his sexual violence. The agent who concealed it was Dales.

After the interviews with Clark, Stofferhan and Tamerius on May 12 and 13, 2008, there is no evidence the DCI ever followed up with Smith or Will about any of the information developed May 12 and 13. The supervising agent, David Dales, testified on postconviction that he was not aware of any interviews with Will other than the one on April 28. (PCR Tr. , 32-35, L. 9-3; App.470-473). He was not aware of any interview with Smith after he followed up the Christensen and Sickels statements with her in a May 7 interview that was not recorded. (PCR Tr.25-26, L. 6-23; App.463-464). The attorneys for the defense for Christensen and Sickels missed a perfect opportunity to prove the DCI purposely chose to forego investigation on Lesha Clark's initial impression that Larry Will was at the root of what happened to Elisa Smith on the night in question. It was plain that after the DCI finished their initial investigation in May of 2008, Agent Dales

determined the agency must turn a blind eye to any evidence that might present questions as to the credibility of Smith's complaint or the credibility of her chief corrobation witness, Larry Will. It was incumbent upon defense counsel to demonstrate to the jury that the DCI had no interest in investigating the history of Will's domestic abuse toward Smith. It was critical to show the jury Smith left the club in disarray not because she was raped, but because Will assaulted her and removed her from the club before she could get her duties completed.

At trial before the jury, it was established that Dales also declined to look into a pending arrest warrant for Smith for a crime of dishonesty in writing bad checks. Mr. Christensen informed Dales about that warrant in a phone call of May 22, 2008. Dales testified he did not see that he, as a law enforcement officer, had any duty to see that any action should be taken on the pending warrant. (Cr. Tr. , pp. 601-605, L. 18-25; Ex. "4A", pp. 108-109, L. 25-21; PCR Tr., 37-39, L. 16-23; App. 199-203, 475-477, 546-547). As a part of effectively establishing the factual theory that Larry Will was responsible for Smith leaving the club in the condition she did on the night in question, it was critical for defense counsel to show the jury the DCI refused to fully and fairly investigate the relationship between Smith and Will. Counsel failed.

Counsel also failed on a golden opportunity to explore and argue to the jury

that Dales knew more about the abusive relationship between Smith and Will than he would admit. The first agent to interview Elisa Smith on her complaint against Christensen and Sickels was Adam De Camp. He interviewed her April 28, 2008, at the DCI Office at the Osceola State Patrol Post. The interview was fully recorded and transcribed. (Ex. "3A"; App.502) After Sickels and Christensen gave statements to the DCI, which were also fully recorded and transcribed, Dales and Agent Kietzman again interviewed Smith at the Osceola post. The interview was related in a summary report. Dales testified on postconviction that the second Smith interview of almost two hours was not recorded. He testified there was no DCI protocol that directed when an interview should or should not be recorded. It was a decision completely left to the agent's discretion. He had no explanation as to why he did not record the conversation. (PCR Tr., 23-25, L. 5-5; App.461-463) Defense counsel could have quite easily argued there were things in the second Smith interview the DCI did not want to disclose and a decision was made that the interview that actually was recorded, should be "unrecorded." It is likely that at the end of that second recorded interview, Dales and Kietzman were not sure whether they wanted to hang on to the recording of the full interview.

The first question to ask the jury along this line is, "Why would the second interview not be recorded?" The DCI had recorded ***everything*** Smith, Sickels and

Christensen had said up to that point. On the first day of the investigation, agents recorded the interviews of Smith and Will. Those interviews were conducted simultaneously at separate locations by separate agents. (Ex. "3A", Ex. "3B", p. 1; App.502-503). The DCI then recorded phone calls they had Smith place to Christensen and the face-to-face conversation she had with Christensen in the hospital gazebo on May 2, 2008. Agents Kietzman and Dales recorded the separate interviews they conducted with Christensen and Sickels on May 6, 2008. (Cr. Tr. Ex.'s " 1 through 6 "). The next day, Dales and Kietzman went to the Osceola DCI Office, the same place Elisa Smith's interview was recorded by Agent De Camp on April 28, eight days earlier. Why would Dales and Kietzman not have recorded this second interview? This was the *complaining witness*. Case Agent Dales could not tell the PCR court why he would not have recorded the interview. Dales could not have given an explanation to the jury in the criminal trial as to why he did not record it. From that, the logical argument is that Dales and his right-hand man in this investigation decided to get rid of the recording. Then, the question is "Why?"

The last topic on the last page of the summary of Smith's second interview reveals the subject matter of the facts Dales would not want to turn over to the defense in a recorded interview. To use the vernacular, the agents asked Smith

what "dirt" there might be in stories around town in Creston. Smith told Dales and Kietzman about an affair she had with the boyfriend of her best friend. At the time of that affair in 2004, the man was still the boyfriend of her best friend, and Smith was "dating" Larry Will. Smith reported to the DCI that the best friend found out about the affair because the man told her about it. The report does not say whether or not Larry Will ever found out about the affair. (Ex. "3C", p. 4, par 4; App.511). It would be extremely difficult to believe the agents would not have discussed details of Smith's relationship with Larry Will in this interview. Smith volunteered details of Will's domestic and sexual abuse to Lesha Clark previously, and there is every reason to believe she would have volunteered that information to Dales and Kietzman, as well.

Smith and Will had been together nine years in April of 2008, according to Smith's deposition. (Ex. "4A", p.82; App. 543). According to Will's statement to the DCI in April 2008, the couple had been together eleven years. (Ex. "3B", p. 2; App. 504). When Smith had her affair with her best friend's boyfriend in 2004, Smith and Will would have been together at least 5 years and possibly 7. In the initial interviews of the couple, neither agent asked Smith or Will anything about the details or nature of their relationship. Those details certainly would have been discussed with Smith when Dales and Kietzman were asking her about

any “dirt” that might be out there. It is highly likely the agents asked her about her relationship with Larry and that they did not put the information in their summary report. Why would they leave it out? The agents would not want to put any information in the report that documented a claim that Smith said Will had sexually abused her prior to April of 2008. Lesha Clark placed that incident in the fall of 2007. (App. 514). It puts the investigation between a rock and a hard place. If they take that claim to Will, and he denies it ever happened, then the DCI has created a witness for the defense as to Smith’s prior false claim of sexual abuse. If Will admits he did sexually abuse her, then they have to arrest their key corroborating witness in a credibility contest.

The State Panel's Error: The appellate panel's conclusion rests entirely on the performance prong. The panel concludes counsel was working hard enough in use of a private investigator, conducting depositions and "offers of proof ." The deficient performance on the offers of proof is discussed at length in regard to the Downey and Twilight Zone Incidents, below. In all aspects, the question is not whether counsel is working hard. The question is whether counsel is working effectively.

Counsel had resounding clues at the beginning of the investigation that would have led reasonably competent counsel to dig deeper:

1. Club manager, Lesha Clark, told the DCI on **5/12/08** that there was a full 1.75 liters of Crown Royal whiskey missing from the inventory, and unaccounted for, on Smith's shift on the night in question. On the same day, Clark told the DCI smith had been subjected to severe, sexual domestic abuse when Larry Will suspected she was having sex with someone else in the fall of 2007. (App. 512, 514-515). In the same interview, Clark told the DCI that Smith said she was raped when Clark was confronting her about the missing Crown Royal. (App. 515)

2. On **10/28/08**, Curtis Downey told the DCI about Smith's persistent intoxication at work. "DOWNEY advised SMITH drank a lot and was usually the drunkest person in the bar after 10:00 p.m., if there were not a lot of people there." (App. 532)

3. In his discovery deposition of **12/2/08**, Larry Will told McConville that drinking "very heavily" led to domestic violence between Smith and him in the past. (App. 593-594)

4. Larry Will told the DCI on the very first day of the investigation, **4/28/08**, that he did not like the fact Smith always worked on Men's Night and did not like the fact the Club was out on the edge of town. (App. 507)

With those plain and undisputed facts, any reasonably competent criminal defense attorney would deduce that Larry Will would likely be the person responsible for the Club being left in disarray. If Attorney McConville simply did the basic investigation in his deposition of Smith that Mr. Sickels's civil attorney did in Smith's deposition in her lawsuit, he could have put on the defense that was

absolutely critical. Elisa Smith was a severe alcoholic. She had committed herself for alcohol treatment in order to avoid committing suicide *before* she took the job as bartender at the Club. She told the civil attorney that Will had raped her and beaten her so severely in the past that he then took care of her for two weeks. Smith said that only happened once, but who's to say? (App. 551-552). In the very first stages of the investigation, Lesha Clark told the DCI she did not see Smith for a week after the night in question. (App. 514-515)

The appellate panel completely missed the point of all the evidence.

C.

Improper Character Evidence

Preservation of Error in State District Court: In the PCR Application, Mr. Sickels set out in great detail trial counsel's failures to object when prosecutors asked defense witnesses questions about an alleged event referred to in the record as the Twilight Zone incident. The Court of Appeals panel had reserved this question of ineffective assistance for PCR proceedings in the opinion on direct appeal. (App. PCR, pp.2-4; App 442-444). The judge ruled on PCR under the heading, "Character Evidence." First, Judge Scott inexplicably concluded that any objection to the prosecution's questions on subject matter that Judge Gamble had excluded before trial would have been overruled. The judge also approved

McConville's trial strategy in allowing the questions because he knew it would not change the opinions of his character witnesses on the subject of peacefulness and nonviolence. (Findings, pp. 7-8; App.729-730)

State Appellate Conclusions: On the performance prong, the appellate panel simply repeated the district court's PCR conclusions:

> 1. Any objection raised in regard to the prosecution's inquiry as the evidence that had been excluded "would have been overruled. Counsel is not ineffective for failing to make a meritless objection." (Slip Op., 3/25/15, p. 9).
>
> 2. "Trial counsel correctly believed the incident at the Twilight Zone would have no impact on the character witnesses' opinions of Sickels's traits of peacefulness and nonviolence and therefore no reason to object to the question." (Slip Op., pp.9-10)

The appellate panel then added one conclusion to the district court's. That one was on the prejudice prong. The panel decided a stock jury instruction and a limiting instruction cured any error in counsel's failures to object to the prosecutors' questions. The stock instruction explained that "statements, arguments, questions and comments" from counsel were not evidence. The limiting instruction told the jury the "questions and answers about the Twilight Zone incident could only be used to determine if the character witnesses really knew about Sickels's reputation for peacefulness and for no other purpose." The

instruction said the Twilight Zone incident was "not evidence that he committed the crime charged in this case." (Slip Op. 10).

Deficient Performance: Prior to the criminal trial, the State proposed offering testimony from a bartender at a Creston tavern called the Twilight Zone. The bartender would say that on one occasion prior to Smith's accusations Mr. Sickels had been at that tavern and had repeatedly asked the bartender to lift up her shirt. Judge Gamble found the evidence offered prior to trial to be improper character evidence. The trial judge in the criminal case delivered this very simple and straightforward admonition upon his ruling excluding testimony of the Twilight Zone bartender, Beth Becker, and events allegedly occurring at the Twilight Zone tavern:

> Again, the Court does not see how the alleged incident at the Twilight Zone relates to this case except to show that perhaps the defendants are "the type" of people who hustle women at bars. The evidence is clearly the type Rule [5.404(b)] is intended to keep out at trial. The Court is inclined to keep evidence of the Twilight Zone incident out of this trial unless the defendants open the door by introducing evidence of their good characters of peacefulness and nonviolence. If they do so, the [sic] *run the risk* of having this incident introduced as rebuttal. The prosecutors shall alert the court and counsel *before they attempt* to introduce this evidence. (Ruling on Parties' Motions in Limine, 2/26/09; App.39) (emphasis added)

The failure is plain. Prosecutor Goettsch plowed straight into the Twilight Zone incident with defense character witness Sean Smith, and then with Mr. Sickels, in testimony before the jury. (Cr. Tr. 810, 958; App. 249, 281). Goettsch did not ask to approach the bench or otherwise alert the judge or counsel she was going to ask these questions that were based on testimony that had been excluded. Seeing no reason to apply the brakes, Prosecutor Prosser then plowed into the same subject matter with defense witness Thomas Hartsock. (Cr. Tr. 991-992, 996; App. 298-299, 303). Through all this, McConville stood mute. Defense counsel allowed the prosecution to put the cart before the horse, and the cart did just as much damage to Mr. Sickels's defense, as the horse could have. The "cart" was the prosecutors reciting detailed "facts" from the Twilight Zone incident in their questions before getting a ruling that the evidence would be admissible. If the State was going to attempt to reopen Judge Gamble's ruling that excluded the Twilight Zone incident from testimony, the judge's ruling required that attempt be executed prior to any discussion of those allegations before the jury. The State did not bring the Twilight Zone bartender, Beth Becker, into court for an offer of proof until after both Defendants rested. (Cr. Tr. 1117; App. 356) The prosecutors finally presented their "star" witness to Judge Gamble after all the damage had been done with their testimonial questions to the defense

witnesses. Judge Gamble's ruling after hearing Becker's offer of proof was the same as it had been before trial. Becker's testimony was inadmissible. The pretrial ruling did not allow the prosecutor to go into facts about Becker's allegations, and in fact specifically prohibited the questions, unless prosecutors gained prior approval from the judge. By the terms of the pretrial ruling, the prosecutors could not recite their testimonial questions in addressing defense witnesses anymore than they could put on their own witness to recite her allegation. Counsel failed in a basic and essential evidentiary duty. Failure to offer proper evidence or ensure exclusion of improper evidence has been recognized as cause for ineffective assistance of counsel. See: *State v.Hrbek*, 336 N.W. 2nd 431 (Iowa 1983)(Trial attorney's failure to move to exclude involuntary confession); *Millam v. State*, 745N.W. 2d 719, 721-22 (Iowa 2008)(Counsel's failure to offer evidence of complaining witness's prior false complaint of sexual abuse); *State v. Cromer*, 765 N.W. 2d 1 (Iowa 2009) (Counsel's failure to object to admission of improper evidence in recording of conversation between complaining witness and defendant). In the end, a major part of the reason Mr. Sickels's attorney failed is due to the State's failure to put Ms. Becker on the stand for an offer of proof in the pretrial motion proceedings. A simple written offer of proof was submitted. (App. 27). With the prospect of Becker testifying for the jury in rebuttal still looming, on

testimony that had already been excluded before trial, the status of the proffered evidence was somewhat confusing. If Judge Gamble had made his pretrial ruling after hearing the Becker testimony, there would have been no doubt the prosecution's questions were plainly in violation of the ruling. The disorder in the proceedings does not excuse counsel's failure, however.

Prejudice: The unfair prejudice in allowing the prosecutors to discuss Becker's allegations in detail before the jury is that it undoubtedly led the jury to convict Mr. Sickels on an improper basis. It is improper evidence of character that was intended to convince the jury Mr. Sickels was imbued with a lewd disposition. The character evidence is intended to introduce the unmistakable implication that the lewd disposition provides the propensity to commit an act of sexual violence. This prosecutorial ploy has been repeatedly disapproved by the Iowa Supreme Court. See: *State v. Turecek*, 456 N.W. 2d 219, 223 (Iowa 1990) (Defendant's possession of sexually explicit materials not proper character evidence); *State v. Cott*, 283 N.W. 2d 324, 327 (Iowa 1979)(Evidence of lewd disposition is improper character evidence if acts involve someone other than complaining witness). Evidence of other sexual conduct is unfairly prejudicial under Rule 403 balancing if it will lead the jury to a finding of guilt on an improper basis. *State v. Castaneda*, 621 N.W. 2d 435, 440 (Iowa 2001).

The State's theory that Becker's allegations somehow would rebut defense evidence of Mr. Sickels's reputation for a peaceful disposition was a *non sequitur* from the beginning. Judge Gamble ruled before trial and after hearing Becker's offer of proof at trial that the evidence was of low or now probative value and unfairly prejudicial. It was counsel's solemn duty to keep all references to the Becker allegations away from the jury's ears. Counsel allowed the prosecutors themselves to recite every detail of allegations to the jury and to recite the details as facts the prosecutors personally knew. No reasonable strategic consideration could excuse this failure. McConville's explanation on PCR that he allowed the questions because he knew it would not change the witnesses' opinions on *peacefulness* is not in any respect a reasonable strategy. (Slip Op. 3/25/15, pp. 9-10). The irreparable damage done by the prosecutors' testimonial questions was that it introduced the completely improper and highly unfair prejudice of a lewd disposition. If this failure stood alone, it would be a close question as to whether the prejudice should lead to a new trial. In conjunction with other failures, however, the necessity for a new and fair trial is clear.

These are the improper statements about the Twilight Zone incident the prosecutors made to the jury in their testimonial questions:

1. Prosecutor Goettsch asked Sean Smith if he was

> aware that in the past year Mr. Sickels had asked "the bartender" repeatedly to "lift her shirt and flash her breasts at him to the point she had to go home because she was so uncomfortable." McConville only objected to the part of the question referring to the bartender being "uncomfortable' as being based on hearsay. That part was stricken. Actually, the whole question was based on hearsay. Goettsch specifically referred to the "Twilight Zone bar in Creston." Sean Smith testified he was not aware of the accusation and even if it were true, it would not change his opinion Mr. Sickels is nonviolent. (Cr. Tr., pp. 810-811, L. 6-14; App. 249-250)
>
> 2. Goettsch asked Mr. Sickels on cross-examination if he recalled asking "Beth Becker at the Twilight Zone "to lift her shirt to flash her chest. Mr. Sickels did not recall that. (Cr. Tr. 957-958; App. 280-281).
>
> 3. Prosecutor Prosser asked Tom Hartsock, the former police chief, in extensive questioning, if he was aware of Mr. Sickels "acting in inappropriate ways around town," and Hartsock answered "Yes." Prosser then specifically identified Beth Becker as accusing Mr. Sickels of repeatedly asking her to show her breasts. Then Hartsock said if it were true it would not change Mr. Sickels's reputation for peacefulness. Prosser than asked Hartsock if such behavior would be "okay" with him, and Hartsock said, "I don't think it's okay." (Cr. Tr. 991-97; App. 298-304)

The prosecutors are asking witnesses about an event none of the witnesses know anything about. The forms of the questions are implying there was more than one inappropriate incident. In the process, the prosecutors are telling the jury

exactly what Becker's allegations are. The jury naturally infers the prosecutors believe Becker, or they would not be bringing it up. Becker's allegations, if true, go only to verbally lewd conduct that is irrelevant and greatly and unfairly prejudicial. The questions should never have been asked.

The only question this issue raises is whether there was prejudice. As the fighting issue in the jury trial was a credibility contest between Ms. Smith and Mr. Sickels, the improper questioning was highly and unfairly prejudicial. The prejudice is in the prosecutors' repeated reference to a specific person and specific statements made at a specific place where the person worked. The prosecutors very plainly told the jury that they knew Beth Becker alleged John Sickels repeatedly asked her to lift her shirt while she was working as a bartender at the Twilight Zone, and the harassment was so bad Becker was forced to leave and go home. (Tr. 810, 958, 991-992, 996; App. 249, 281, 298-299, 303) The last part was not even a true recital of Becker's allegation. Becker later testified she did not go home because of a fear for her safety from anything Mr. Sickels said. (Cr. Tr. 1120-1121, L. 17-5; App. 359-360). When a prosecutor repeatedly embeds facts otherwise unknown to a jury in questions, it has the same effect as arguing facts to the jury that are not in the record. The prejudice is clear:

> The [prosecutor] is the representative not of an ordinary

> party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. *Berger v. U.S.*, 295 U.S. 78, 88, 55 S. Ct., 629, 633 (1935)

The prosecutors' injection of their "personal knowledge" that Mr. Sickels had engaged in lewd conduct was an introduction of facts to the jury that were completely irrelevant and highly unfair. That prejudice must be considered in close combination with the error in the exclusion of the testimony the defense offered from the Downeys. That testimony was material to Smith's dishonesty in denying her acts in consensual sex acts. The evidence that unfairly impacted upon Mr. Sickels's credibility was allowed before the jury, while the evidence that

properly attacked Smith's credibility was excluded.

The State Panel's Error: On the Twilight Zone Incident, the appellate panel makes several statements in an attempt to approve of trial counsel's performance. These justifications have no logical application to the facts and proceedings in Mr. Sickels's jury trial and that leads to the clear conclusion there is no legitimate excuse for Attorney Mc Conville's failures. These statements from the panel must be quoted and set out separately.

> ***1. "When a character trait is put into evidence, specific incidences [sic] of conduct are admitted on cross-examination." I R. Evid 5.405(a) (Slip Op. 9)***

The rule actually does not say the "specific instances are admitted." The rule says "inquiry is allowable into relevant specific instances of conduct." Ia R. Evid. 5.405 (a). The key word is "relevant." The trial judge addressed Mr. Sickels's pretrial Motion in Limine for that very specific purpose of determining whether the State's allegations in the Twilight Zone would be a relevant instance of conduct. The judge specifically decided he did not see how the incident related to the instant case, except as improper character evidence that is barred by Rule 404 (b) of the Iowa Rules of Evidence. The improper character trait the judge identified was stated in his opinion the evidence would only show the defendants

are "the type" of people who hustle women in bars. Rule 405 (a) does not automatically admit this instance of conduct, and the judge ruled before trial the rule *would not* allow admission of the evidence

> **2. *"The prosecution is only required to show a good faith basis for the incident raised."* (Slip Op., 9)**

There could not be a more clear situation where the prosecutors were proceeding in bad faith. The pretrial ruling specifically said they were not to ask the questions at trial. Additionally, the judge specifically instructed that if the prosecutors wanted the judge to reconsider his ruling at trial they *must approach* the judge *before* asking the questions. The prosecutors directly defied the painfully clear ruling.

> **3. *Counsel is not ineffective for failing to make a meritless objection. . . . As a practical matter counsel cannot anticipate opposing counsel's question and object to it, nor can the court rule on it until it has been verbalized.*** (Slip Op., 9)

Again, these statements are fully inapplicable in relation to what actually happened in the pretrial and trial proceedings. The objection was not "meritless." The judge had already sustained the objection in the pretrial ruling. By the same token, counsel had already "anticipated" the improper question and that is why the pretrial motion in limine was filed. It is among the most basic of duties for the

trial lawyer to be prepared to make sure trial questioning does not run afoul of pretrial evidentiary rulings. Defense counsel was required to jump up, object, and ask to approach the bench the moment that first question started coming out of Prosecutor Goettsch's mouth.

> **4.** ***Trial counsel correctly believed the incident at the Twilight Zone would have no impact on the character witnesses' opinions of Sickels's traits of peacefulness and nonviolence and therefore no reason to object to the question.*** (Slip Op., 9-10)

Then, what was the point of the motion in limine? The point has nothing to do with peacefulness and nonviolence. The point was to keep out of the trial improper character evidence of lewd behavior. Those several questions from the prosecutors imparted to the jury **all** of the factual allegations the prosecutors had heard about Beth Becker's claim, and they imparted to the jury that these were things the prosecutors personally knew, because the witnesses did not know anything about the alleged incident. The prejudice is in the prosecutors telling the jury Mr. Sickels had a lewd disposition. Where was the defense attorney? The foregoing excuses the panel put forth for counsel's deficient performance epitomize the type of defective reasoning to which no reasonable jurist could lend countenance.

The appellate court's conclusion that the limiting instruction would

effectively prevent prejudice from the prosecution's improper questioning discounts the gravity of the prosecutorial misconduct. Mr. Sickels fully set out the analysis of *Berger v. U.S.* as it is set out above. (PCR Appeal Br. , pp. 53-55, Doc 7, attachment # 11). Again, the appellate panel made no mention of the argument Mr. Sickels made for prosecutorial misconduct. The panel noted:

> The [trial] court went on to state that if the prosecutors thought that the door had been opened, they were to advise the court before proceeding with evidence of the Twilight Zone incident. (Slip Op., 8)

The panel then went on to describe in summary fashion the prosecutorial inquiries into the incident with the defense character witnesses on cross-examination. The panel pointed out: "The prosecutor had not requested permission from the court to go into the subject." (Slip Op., 9). Why was it appropriate for the prosecutors "to go into the subject" without the judge's permission? Why was it not worth mentioning in the appellate opinion that the prosecution violated this very simple, straight-forward order from the judge? The panel does not say. Most importantly, the panel failed to acknowledge the extreme prejudice resulting from this kind of misconduct:

> Consequently, improper suggestions, insinuations, and especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. *Berger,* 295 U.S. at 88 55 S. Ct at

633.

Counsel for Co-defendant Christensen could not object to questions posed on cross-examination of Mr. Sickels's witnesses and Mr. Sickels himself. Attorney Scott did see the great damage from this improper questioning on the Twilight Zone Incident, even though the prosecutors made no reference to Mr. Christensen in their questions. The morning after this egregious violation of the ruling on the Motion in Limine, Attorney Scott moved for a mistrial and attempted to persuade the judge the questioning had unfairly prejudiced Mr. Christensen. At that point, Mr. Sickels's lawyer should have been confessing his ineffective assistance in failing to object and joining in the Motion for Mistrial. He did not. The irreparable damage was done. (Tr. 1039-1047)

D.

The Downey Incident

Preservation of Error in State District Court: In the Application, Mr. Sickels claimed, "Applicant's trial counsel failed to effectively frame and argue the admissibility testimony from witnesses named Downey as to a separate incident where the complaining witness made false statements about her sexual conduct." (App. PCR, pp. 5-6; App.445-446). On PCR, Mr. Sickels fully analyzed and explained the applicability of *State v. Alberts* 722 N.W. 2d 402 (Iowa 2006), in

arguing trial counsel's failure to demonstrate that the *Downey* incident evidence was admissible. (Applicant's Closing Argument and Brief, 10/7/13, pp. 27-30, Applicant's Rebuttal, 10/17/13, pp. 8-14; App. 698-701, 716-722). Judge Scott's PCR ruling simply said, "The case at bar is distinguishable from *State v. Alberts*. . . ." The judge would not say how the instant case was distinguishable from *Alberts*. (Findings on PCR, pp. 9-10; App. 731-732). Mr. Sickels filed a post-ruling motion under 1.904, seeking an explanation of how *Alberts* was distinguishable, but the Motion was overruled without explanation. (Motion 10/30/13, pp. 8-9; Ruling, 11/12/13; App. 743-744, 746)

Appellate Court Conclusions: The appellate panel first decided the claim was barred on the ground of *res judicata*. The panel noted an issue regarding the Downey Incident had been decided on direct appeal. (Slip Op., 3/25/15, p. 11). The issue that was raised on direct appeal was not raised as a claim of ineffective assistance of trial counsel. (Slip Op. 11/24/10, pp. 13-14; App. 411-412). On a second point, the panel dismissed the claim of ineffective assistance. In a conclusion that seems to relate to the performance prong, the panel said, "The instant case is easily differentiated from *Albert* [sic] because L.S. never made a false claim that the customer used any physical force to initiate or perpetuate the sexual activity." (Slip Op. 3/25/15, pp. 11-12)

Deficient Performance: Counsel's failures in proffering the Downey evidence are failures in practice and procedure in the application of the Rules of Evidence and case law. Counsel had attempted to get the Downey testimony into evidence at the trial, but failed due to deficient performance. There is **no** strategic consideration that might have excused counsel's failures in motion practice. The aim in proffering the evidence was obviously to get it into evidence before the jury. Any technical failure in that process is failure on an essential duty. The defense attorney failed to properly and effectively frame the argument to inform Judge Gamble why Smith's denial of any consensual activity with Mr. Downey was highly probative to Mr. Sickels's defense and would be admissible under a proper balancing contemplated under Rule 5.412, Ia. R. Evid. The defense failed to effectively emphasize the following explanation from the Iowa Supreme Court. Because counsel failed to properly frame and preserve the issue in the trial court, the appellate lawyer could not properly argue it on appeal. The appellate lawyer did not raise a claim of ineffective assistance of counsel on the issue. These passages should have been the framework for trial counsel's proffer of the Downey testimony:

> The rape-shield law calls upon the trial judge to sort through proffered evidence of a victim's prior sexual activity and, on a case-by-case basis, to weigh whether it

> would yield more in the truth-finding process than it would cost in devastating the victim's reputation and right to privacy. The rule presupposes that much evidence which the accused wishes to place before a jury will be excluded. This is the cost the legislature has determined must be paid in order to accord evenhanded justice, not only to the accused, but also the accuser. *State v. Baker*, 679 N.W. 2d 7, 11 (Iowa 2004).
>
> * * * *
>
> Applying the principles of these authorities to the case before us, we conclude that, while the complaining witness might have been embarrassed by being shown to be a boaster, or even a liar, about a previous sexual experience, this is not the kind of unfair prejudice that will outweigh the probative value of clearly relevant evidence. This is especially so when, as in this case, the countervailing right of a defendant to present a defense to a criminal charge is at stake. *Baker,* 679 N.W. 2d at 12.

In the *Baker* case, a teenage girl had told friends she had engaged in consensual sex acts with a neighbor. She did so in boasting fashion in an apparent attempt to demonstrate how worldly she was. The girl later denied such sex sexual encounter had ever happened. When she later made allegations against Mr. Baker, the defense proffered the fact of the prior false story involving the neighbor, the fact she had recanted that story, and testimony from the neighbor that it had never happened. The Court determined the plainly false prior story was not evidence of prior sexual activity because no activity of any kind had actually

occurred. The "evidence" was solely that of a false claim. The prior false claim should have been admitted to show the jury the girl may have also made a false claim against Mr. Baker. It is the ruling that evolved from *Baker* in a subsequent Iowa Supreme Court case that should have led reasonably competent counsel to effectively argue the Downey incident and gain leave to get the testimony admitted at trial.

In *State v. Alberts*, 722 N.W. 2d 402 (Iowa 2006), the Rule 412 question was whether a prior "skinny-dipping" incident the complaining witness had instigated should be considered by the jury to show the complaining witness would lie about her prior sexual activity if she had motivation to do so. The factual scenario in *Alberts* was strikingly similar to the instant case.

The complaining witness in *Alberts* had been involved in a previous incident at a Fourth of July party out by the Cedar River. The complaining witness was identified as R. M. While drawing a beer at the keg around midnight, she asked a young man if he wanted to go swimming. She then went with him to the river, took off her clothes, and encouraged him to do the same. They went into the river. The brother of R. M.'s boyfriend saw her out in the river with her arms around the young man. The brother said he "busted them" because R. M. was supposed to be dating his brother. When he called out, R. M. came out of the

river crying and told the brother, “Thank God you saw me. I didn’t know what to do out there. . . I couldn’t get away from him. I didn’t know what to do.” She also explained nothing sexual had happened between the two.

The young man who was in the river with R. M. was prepared to testify for Mr. Alberts that R. M. invited him out to swim, took off all her clothes first, told him to do the same, and went into the river with him. In the river, she put her arms around his shoulders but declined when he asked permission to kiss her. He did not kiss her but “the two of them continued to have their arms around each other for another five minutes “until the brother interrupted them." R. M. confirmed in a deposition that she had declined the request for a kiss. The Supreme Court determined the event was previous sexual activity to which Rule 412 analysis would apply. The Court overturned the trial court’s unexplained exclusion of the previous sexual activity from the jury’s consideration. The key to success for Mr. Sickels on the Downey evidence was to explain to Judge Gamble that R. M. did not accuse her skinny-dipping partner of sexual abuse. In fact, she immediately said nothing sexual happened. 722 N.W. 2d at 405.

Mr. Sickels’s attorney did not point out this absolutely critical analysis from *Alberts* in regard to R. M.’s statements denying any participation in previous consensual sexual activity:

> First, they reflect on her credibility as a witness. Second, the alleged statements may reveal a motive to lie. If a fact finder were to conclude she made untruthful statements to preserve her boyfriend's perception of her virtue when she was discovered skinny-dipping with another man, the fact finder might reasonably conclude she's also untruthful with respect to her allegations that Alberts raped her for the same reason. 722 N.W. 2d at 411

In the instant case the situation was identical. Smith did not accuse Curtis Downey of sexual abuse. Her false statements were in the denial of engaging in any consensual sexual activity with him. Like R. M., she got caught in the act by Mr. Downey's wife. Even though Curtis testified he was drinking in the bar with Smith after hours, and she initiated contact by climbing onto his lap and kissing him, Smith denied she was participating in anything with him. She said he was all over her. (Cr. Tr. pp. 714-730) (Ex. "3C", p. 2, par. 5) (Ex. "3L")(Ex. "4E", pp 50-57) (Ex. "4A", pp. 116-117, L. 13-5) (App. 208-224, 509, 531-532, 548-549, 571-578)

Smith's motivation for lying to Clark about the Downey incident was the same for lying about her conduct with Mr. Sickels. She wanted to keep her job. Also, like R. M. in the *Alberts* case, she did not want Larry Will to find out she was initiating and engaging in sexual conduct with Mr. Downey. As in *Alberts*, Mr. Sickels had the right to show Smith's motivation and lack of credibility.

Defense counsel failed to get the evidence admitted because he failed in his duty to effectively investigate the case law and effectively explain it to the trial judge. Again, the Court's confidence in the outcome must be undermined.

The State Panel's Error: As stated above, Attorney Mc Conville had seen the *Alberts* case, but he knew nothing about it. (App. 25E-25G). The foregoing analysis shows *Alberts* was the key to bringing the Downey Incident before the jury. The appellate panel's attempt to distinguish *Alberts,* and diminish the damage of counsel's failure is a meager effort, at best. The panel said:

> The instant case is easily differentiated from *Albert* [sic] because [Smith] never made a false claim that [Mr. Downey] used any physical force to initiate or perpetuate the sexual activity. (Slip Op. 12)

The panel missed the importance of the complaining witness's *false statements* about her prior consensual sexual activity in *Alberts*. That case was not decided on the element of physical force. It was founded on prior false statement. The next three paragraphs that follow here are directly from Mr. Sickels's PCR appeal reply brief at pages 28-29 (Doc 7, Attach. # 13). The text demonstrates how the importance of *Alberts* was not in any claim of use of force. The importance was on the central issue of credibility. The panel ignored Mr. Sickels's argument that follows.

Prejudice: It was critical for the defense to get Smith's false statements into evidence. It was particularly probative that Curtis Downey was the last man at Men's Night, that he and Smith drank and got drunk together, that she initiated sexual contact with him, and that she then falsely denied her conduct. The *Alberts* court pointed to the same drinking, sexual conduct, and false denial connection between the prior incident and the allegations against Mr. Alberts. The evidence of the prior conduct was relevant to credibility, and it was relevant to her motive to lie. "If a fact finder might reasonably conclude she made untruthful statements to preserve her boyfriend's perception of her virtue when she was discovered skinny-dipping with another man, the fact finder might reasonably conclude she's also untruthful with respect to her allegations that Alberts raped her for the same reason." *Alberts*, 722 N.W. 2d at 411.

On the issue of prejudice, the *Alberts* court emphasized the credibility contest between the accuser and Mr. Alberts as to whether their sex act was consensual "was the key to the conviction." For that reason, the failure to get the prior conduct evidence before the jury "may have unduly prejudiced Alberts' defense and therefore requires us to remand the case." 722 N.W. 2d at 412.

The Downey incident and the false allegations against Sickels and Christensen show remarkably similar circumstances and the motive was the same.

Smith denied making her advance on Downey because she wanted to keep her job. She blurted out her accusation of rape against Mr. Sickels to her supervisor, Lesha Clark, to abruptly change the subject from the missing bottle of whiskey and the way she left the club. She wanted to keep her job.

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CONCLUSION

The Court must consider all of the assignments of ineffective assistance of counsel for their combined effect. Additionally, the Court must consider the effect on the right to a fair trial the denial of effective assistance of counsel caused in conjunction with the prosecutorial misconduct in closing arguments previously identified by Judge Gamble and on direct appeal. (Ruling on New Trial, 5/19/09; App.401-411). While that misconduct did not rise to the level of an unfair trial on its own, it should be weighed in conjunction with the ineffective assistance to undermine the Court's confidence in the outcome.

Extreme Malfunction

The question the Supreme Court would ask is whether Mr. Sickels suffered an "extreme malfunction" in the state criminal justice system. *Green v. Fisher,* 132 S. Ct 38, 43 (2011). It is incumbent upon this Court to listen to the audio

statements of Elisa Smith and James Christensen in Criminal Trial Exhibits "1" through "4," to fully evaluate the hearsay audio and video statements that would have been excluded from a separate trial for Mr. Sickels. The Court must review all of Christensen's testimony in that same trial and the Iowa Court of Appeals opinion on Mr. Sickels's direct appeal. The Court must fully review all of that record to gain a thorough understanding of the extreme malfunction created by counsel's failure to seek and gain a separate trial.

As stated above, the key factual investigation and litigation task for a criminal defense attorney facing a false claim of sexual abuse is to demonstrate for the jury the complainant's motive for making the false statements. It is clear a reasonably competent attorney could have plainly shown Smith's motives were wrapped up on her dire needs to sustain the irresistible cravings of her severe alcoholism and to preserve her safety in the desperate depths of her co-dependency with Larry Will. Counsel completely failed to demonstrate Smith's motive, and that malfunction was extreme.

The Rules of Evidence are the trial attorney's operator's manual. The case law is his bible. Counsel's failures in legal investigation and litigation on the Twilight Zone and Downey evidence was devastating to the defense that was facing a head-to-head credibility contest. To allow the improper character

evidence for a lewd disposition and fail to introduce evidence of Smith's highly material false denials of prior consensual conduct is inexcusable. That is why the appellate panel could not find a valid excuse for the failures.

Each of the four assignments for ineffective assistance of counsel sets out a monumental failure on basic, but critical duties. Each one is an extreme malfunction in the process required for a fair trial. In combined prejudice, the damage counsel did to his own efforts in the defense astounding. Whether the Court considers the prejudice in the failures separately or in combination, the Court's confidence in the outcome must be undermined. The conviction must be vacated.

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