IN THE SUPREME COURT OF IOWA
Supreme Court No. 17–0007

CATHRYN ANN LINN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR MUSCATINE COUNTY
THE HON. NANCY S. TABOR, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

The State agrees with the applicant's routing statement: the issues raised here can be resolved through the application of settled legal principles. *See* App's Br. at 4. This case should be transferred to the Iowa Court of Appeals. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

A jury convicted Cathryn Ann Linn of first-degree murder, a Class A felony, in violation of Iowa Code sections 707.1 and 707.2 (2007), for shooting and killing Barry Blanchard. Her conviction was affirmed on direct appeal. *See State v. Linn*, No. 07–1984, 2009 WL 605968 (Iowa Ct. App. Mar. 11, 2009).

Linn filed a PCR application; one of her claims was that her trial counsel was ineffective for failing to introduce evidence pertaining to battered women's syndrome (BWS) to bolster her justification defense. *See* PCR Application (8/24/09); Amended PCR Application (3/5/10); App. 10, 13. The State moved for summary disposition. Linn resisted. *See* Motion for Summary Disposition (9/19/16); Resistance (12/1/16); App. 23, 814. The PCR court granted the State's motion and dismissed Linn's PCR action in its entirety. *See* Order (12/9/16); App. 1.

On appeal from that order granting summary disposition, Linn argues (1) the PCR court erred in determining that her trial counsel was not ineffective and dismissing Linn's PCR claim about BWS; and (2) her PCR counsel provided ineffective assistance by failing to file a statement of disputed facts and failing to retain an expert on BWS.

Course of Proceedings

The State generally accepts the applicant's description of the course of proceedings. *See* Iowa R. App. P. 6.903(3).

Statement of Facts

The Iowa Court of Appeals set out the underlying facts:

> Muscatine police officers were dispatched to Linn's residence in the early morning hours of February 7, 2007, after Linn called 911 to report she had shot someone. Several officers arrived at the residence brandishing weapons. Linn appeared at the door, yelling and screaming, and was told to show her hands. Upon determining Linn was unarmed, the officers entered the residence and discovered the body of Barry Blanchard in the bedroom. An M–1 carbine rifle and gun case were on the bed.
>
> While the officers were investigating inside of the house, Officer Jason Williams stayed on the porch with Linn. She was only wearing a nightgown, so another officer located a pair of boots and coat inside the home for Linn. While Linn was sitting on the steps, an officer yelled out of the house and asked, "Is she saying she shot him?" In turn, Williams asked her, "Did you shoot him?" to which Linn replied, "Yes." Linn also stated, "I only had one gun and one bullet, and I shot him because he was not being nice to me."

Linn was informed she needed to go to the Public Safety Building and speak with a detective. Officer Williams transported Linn in the backseat of his squad car. Linn was informed she was not under arrest. She was not handcuffed and Officer Williams did not attempt to question her. Linn asked Officer Williams if Blanchard had died and Williams replied that he did not know. Linn also stated, "My life has ended up as [a] murder."

Detective Mark Lawrence was asked to interview Linn upon her arrival at the station. Detective Lawrence was told Linn was not under arrest. However, he decided to advise her of her Miranda rights because she was confined to an investigation room, believing it to be the prudent thing to do. Linn asked, "Did I kill him?" and "Did he die?" Detective Lawrence told Linn that before he could answer her questions, he had to read the Miranda form to her. He also told her he did not know if Blanchard was dead. Linn signed the waiver. An analysis of Linn's urine shows her blood alcohol concentration at the time was .181.

During the police interview, Linn admitted to threatening Blanchard with the rifle. She also stated that she told Blanchard no one was going to tell her what to do in her house and that the shooting occurred after Blanchard dared her to shoot him.

[. . .]

A jury trial was held in September 2007. Linn testified and relied on a defense of intoxication and justification. The evidence presented shows Linn and Blanchard had been involved in a romantic relationship and were living together. Before the shooting, the couple agreed their relationship was not working and Blanchard planned to move out of the house. However, he was unable to find a place to stay and Linn agreed to allow him to sleep on her couch. Both Blanchard and Linn consumed alcohol on the night of the shooting.

According to Linn's trial testimony the following occurred: at some point in the evening, Blanchard slapped

her and asked her, "How many marks do you want in the morning, bitch?" Linn told Blanchard he was not going to tell her what to do in her house. Blanchard followed Linn into the bedroom and told her he would "fuck [her] dead or alive" and undressed. Blanchard choked her and she was frightened he was going to rape her. The rifle was retrieved from the closet and both Linn and Blanchard handled the weapon while screaming at each other. The gun discharged and "[t]he next thing I knew, he was on the floor, and I had then realized that he had been the victim of the discharge of the weapon." She denied having any intention of killing Blanchard.

Contrasting statements by Linn to the 911 operator and the police officers were presented to the jury. She told the 911 operator she shot Blanchard and they were fighting and drinking. The officers testified to the statements she made on the steps when they arrived and how in the squad car on the way to the police station she stated, "My life has to end up as [a] murder." Linn also told officers Blanchard had dared her to shoot him and she shot him because she was angry.

Linn, 2009 WL 605968, at *1–2.

Additional facts will be discussed when relevant.

ARGUMENT

I. The PCR Court's Order Granting Summary Disposition Was Proper Because Linn Did Not Provide Anything to Generate a Material Fact Issue on Her BWS Claim.

Preservation of Error

The PCR court considered and rejected Linn's claim that her trial counsel was ineffective for failing to develop/present evidence regarding BWS. *See* Order (12/9/16) at 3; App. 3. That order also denied Linn's motion to retain a BWS expert at state expense. *See id.* at 4; App. 4. Error was preserved to renew those claims on appeal. *See Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

Standard of Review

Claims of ineffective assistance of counsel are reviewed de novo. *State v. Thorndike*, 860 N.W.2d 316, 319 (Iowa 2015) (citing *State v. Clay*, 824 N.W.2d 488, 494 (Iowa 2012)).

Linn also challenges the denial of her application for an expert to assist in developing PCR claims. *See* App's Br. at 14–18. That ruling would be reviewed for abuse of discretion. *See, e.g.*, *Penwell v. State*, 09–1820, 2011 WL 238196, at *5 (Iowa Ct. App. Jan. 20, 2011) (citing *State v. Leutfaimany*, 585 N.W.2d 200, 207 (Iowa 1998)).

Merits

To establish ineffective assistance of counsel, "a defendant must typically show that (1) counsel failed to perform an essential duty and (2) prejudice resulted." *State v. Keller*, 760 N.W.2d 451, 452 (Iowa 2009) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Both elements must be proven, and failure to prove a single element is fatal to the claim. "If the claim lacks prejudice, it can be decided on that ground alone without deciding whether the attorney performed deficiently." *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001).

The PCR court addressed Linn's BWS claim with this analysis:

> Linn's claim that trial counsel was ineffective for failing to raise Battered Women's Syndrome fails. She provides no information as to what facts were available to her trial counsel to support such a claim. She provides no expert witness testimony by affidavit to explain how a jury might have been told that the syndrome was relevant. And, more importantly, the State of Iowa correctly notes that such syndrome evidence would have been inconsistent with her trial testimony about the nature of the shooting. Linn cannot demonstrate that her trial counsel's performance was deficient and there is no evidence of resulting prejudice.

Order (12/9/16) at 3–4; App. 3–4.

Linn takes issue with the PCR court for failing to appoint an expert to help develop her BWS claim. *See* App's Br. at 14–18; *cf.* Application to Retain Expert (10/8/15); App. 826. Linn's original

application cited Iowa Rule of Criminal Procedure 19(4)—now labeled Rule 2.20(4)—and *State v. McGhee*, 220 N.W.2d 908 (Iowa 1974) as authority that could enable the PCR court to appoint an expert. *See id.* at 2; App. 827. But both of those apply in *criminal* cases, and this PCR is a civil case—and there is no right to an appointed expert here.

Linn's brief, like her original application, focuses extensively on showing that an expert could have offered BWS testimony that would have been admissible at trial and potentially helpful to Linn's case. *See* App's Br. at 15–18. That is debatable, and will be addressed later. Linn's only attempt to show she was *entitled* to an appointed expert appears in her argument from *McGhee*, and her claim that "to ensure due process, a hearing shall be permitted on an indigent's request for funds to retain an expert." *See* App's Br. at 17 (citing *McGhee*, 220 N.W.2d at 913). But *McGhee*, its predecessors, and its progeny are all concerned with the rights of criminal defendants, not PCR applicants.

The right to an appointed expert in a criminal prosecution stems from the Sixth Amendment right to counsel and to a fair trial. *See State v. Leutfaimany*, 585 N.W.2d 200, 207 (Iowa 1998). There is no constitutional right to PCR that could serve as the foundation for an analogous right to appointed experts. *See Dunbar v. State*, 515

N.W.2d 12, 14 (Iowa 1994) (citing *Fuhrmann v. State*, 433 N.W.2d 720, 722 (Iowa 1988)); *see also Leonard v. State*, 461 N.W.2d 465, 486 (Iowa 1990) ("[T]he sixth amendment applies only to criminal prosecutions and so has no application to postconviction relief proceedings."); *cf. Coleman v. Thompson*, 501 U.S. 722, 752 (1991) (reiterating "[t]here is no constitutional right to an attorney in state post-conviction proceedings"). Linn was not entitled to an expert.

Also, no statute authorizes PCR courts to appoint experts for applicants at state expense. Iowa Code section 815.4 does authorize appointment of experts at state expense when requested under the Rule 2.20—but that is a rule of *criminal* procedure. *See generally* Iowa R. Crim. P. 2.1(1) ("The rules in this section provide procedures applicable to indictable offenses."). The Iowa Rules of Civil Procedure, which govern PCR actions, contain no similarly broad authorization—and if they did, appointments pursuant to that rule would have been logically prohibited by the legislature's choice to reference Rule 2.20 in section 815.4's appointment/compensation language, without any mention of analogous rules of civil procedure. *See* Iowa Code § 815.4; *see also Staff Mgmt. v. Jimenez*, 839 N.W.2d 640, 649 (Iowa 2013) (quoting *Meinders v. Dunkerton Cmty. Sch. Dist.*, 645 N.W.2d 632,

637 (Iowa 2002)) (discussing principle of *expressio unius est exlusio alterius*—"legislative intent is expressed by omission as well as by inclusion, and the express mention of one thing implies the exclusion of others not so mentioned"). And chapter 822 contains no provision that mirrors section 815.4 or cross-references language authorizing appointment/compensation of experts. Moreover, the legislature's intent to foreclose assertions of courts' boundless authority to appoint experts at state expense is made clear by the careful limiting language used to authorize appointment of experts in other contexts. *See, e.g.*, Iowa Code § 600B.41 (authorizing appointment of neutral expert to perform genetic testing in proceedings to establish paternity); Iowa R. Civ. P. 1.515 (authorizing appointment of a health care practitioner when "mental or physican condition" of a person "is in controversy," and "only on motion for good cause shown"); *cf.* Iowa R. Evid. 5.706(c) (providing that experts appointed by the court under Rule 5.706 must be paid, and "the compensation is then charged like other costs").

In sum, Linn had no constitutional/statutory right to an expert appointed at state expense, and no statute would have authorized such an appointment. Her application for an appointed BWS expert was wholly without merit, regardless of the facts in play in this case.

Even in criminal cases, "[a]n indigent defendant bears the burden to demonstrate a reasonable need for [appointed] services." *State v. Dahl*, 874 N.W.2d 348, 352 (Iowa 2016) (citing *State v. Coker*, 412 N.W.2d 589, 593 (Iowa 1987)); *see also McGhee*, 220 N.W.2d at 914 (upholding denial of application for an expert because the request "dealt in conclusory allegations rather than factual statements which might have aided trial court in objectively effecting a decision"). Linn argues that she made that showing through her trial testimony about her prior relationship history and her relationship with Blanchard, and through citations to Iowa cases where testimony about BWS has been used to support self-defense claims. *See* App's Br. at 12–15; Application to Retain Expert (10/8/15) at 1–2; App. 826–27.

All of that information and caselaw would have been available to Linn's trial counsel. *Cf.* Amended PCR Application (7/21/16) at 3; App. 19 (noting Linn's claim that she specifically mentioned BWS to her trial counsel as a potential defense). Not having a BWS expert would impact Linn's ability to demonstrate prejudice for her claim—but it could not have undermined her ability to demonstrate breach, because the decision to seek (or not to seek) assistance from an expert is always made *ex ante*, without that expert's assistance.

The PCR court emphasized its finding that "such syndrome evidence would have been inconsistent with her trial testimony about the nature of the shooting." *See* Order (12/9/16) at 3; App. 3. This pertains to both breach and prejudice—it means Linn's trial counsel had no duty to seek out an expert whose testimony would be mooted by Linn's account of the killing, and it means presenting testimony on an inapplicable potential explanation would not be reasonably likely to affect the ultimate outcome. *See, e.g.*, *Dunbar*, 515 N.W.2d at 15 (rejecting PCR claim alleging failure to investigate because "Dunbar does not propose what an investigation would have revealed or how anything discovered would have affected the result obtained below").

Linn's brief recounts favorable evidence that *was presented* at her murder trial, which would have impacted any analysis of the objective/subjective reasonableness of any asserted belief that Linn needed to use lethal force to defend herself. *See* App's Br. at 12–13; *see also* Application to Retain Expert (10/8/15) at 1–2; App. 826–27. Because this evidence was presented at trial, it cannot help show any need for a BWS expert—the jury could already consider that evidence, and Linn's trial counsel urged them to do so in his closing argument.

See, e.g., TrialTr. p.729,ln.25–p.731,ln.15; TrialTr. p.736,ln.22–p.740,ln.16; TrialTr. p.749,ln.15–p.751,ln.20.

To the degree that Linn's argument is that some BWS-specific component of the defense was underdeveloped, note that this is *not* a BWS case—Linn described an ongoing physical confrontation as the incident that made her fear for her life and led to the fatal shooting. *See* TrialTr. p.654,ln.17–p.674,ln.22. This makes BWS far less relevant; this was a run-of-the-mill self-defense claim that ultimately hinged upon reasonableness. *See, e.g.*, Christine M. Belew, Comment, *Killing One's Abuser: Premeditation or Pathology?*, 59 EMORY L.J. 769, 70 (2010) (contrasting BWS cases from normal self-defense cases where killings "occur during an actual physical confrontation" and which "can proceed under normal self-defense rules"); Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 437 (1991) ("In the majority of jurisdictions, it is not the definition of self-defense jurisprudence that prevents battered women from receiving fair trials. Rather, the failure of trial judges to apply the generally applicable standards of self-defense jurisprudence in cases where the defendants are battered women is to blame.").

Linn cites *State v. Frei*, but misses its substantive holding: while "an appropriately specific reasonableness inquiry might consider objective facts about the batterer, any history of violence, any failed attempts to escape abuse, and any other facts relevant under the circumstances," *Frei* expressly disavowed the notion that BWS evidence could limit the self-defense inquiry to "a specific defendant's actual, subjective beliefs regarding the surrounding circumstances." *See State v. Frei*, 831 N.W.2d 70, 75 (Iowa 2013). Thus, while BWS evidence would likely have been admissible, it would not have changed the underlying framework for justification: "The actor must actually believe that he is in danger and that belief must be a reasonable one." *See id.* at 74 (quoting *State v. Elam*, 328 N.W.2d 314, 317 (Iowa 1982)). Linn's trial counsel would never have had reason to believe that BWS expert testimony would be necessary or helpful, given that expert testimony could not have provided any additional *facts* about the relationship between Linn and Blanchard that would help to establish that Linn reasonably feared for her life, especially in the context of *this specific altercation*, which had already escalated to physical violence (in the version Linn presented at trial). *But see* TrialTr. p.674,ln.23–p.680,ln.12; p.716,ln.16–p.720,ln.13.

At its core, this resembles a failure-to-investigate claim. Generally, "[c]ounsel is required to conduct a reasonable investigation or make reasonable decisions that make a particular investigation unnecessary." *See Ledezma*, 626 N.W.2d at 145. Linn's claim is best construed as an argument that her trial counsel was ineffective for failing to determine what a BWS expert would say, if called at trial. *See* App's Br. at 11–19. However, "[t]here is no need to investigate a particular matter, for example, if the defendant has given counsel a reason to believe the investigation would be fruitless or unwarranted." *Ledezma*, 626 N.W.2d at 145 (citing *Strickland*, 466 U.S. at 691). While Linn testified that she fully intended to defend herself, she specifically denied that she intended to shoot/kill Blanchard—and she even denied that she intentionally retrieved her firearm out of fear that she might need to use it in self-defense. *See* TrialTr. p.655,ln.14–p.674,ln.22. This means BWS evidence and BWS expert testimony would have added nothing—it could have helped to establish Linn acted reasonably if she *did* shoot Blanchard intentionally, but it could never help establish that she was telling the truth when she testified that she shot him accidentally. *See In re Walker*, 54 Cal. Rptr. 3d 411, 418 (Ct. App. 2007) ("[T]he decision to forgo expert testimony on the

psychological effects of intimate partner battering was an inherently tactical one, prompted by Walker's claim the shooting had been an accident."). And while Linn is correct that defendants may choose to pursue alternative/inconsistent defenses, that does not establish that Linn's trial counsel acted unreasonably in determining that it would be counterproductive to develop evidence that would tend to discredit Linn's testimony that she shot Blanchard *accidentally*, rather than as a deliberate choice made by an abused partner with no other way out. *See, e.g.*, *State v. Williams*, No. 13–1144, 2014 WL 3747691, at *8 (Iowa Ct. App. July 30, 2014) ("Williams' defense was that he was not in the Jeep or even present. If Williams also argued the lack of specific defense, his defenses would have been inconsistent. Counsel may have made a strategic decision to forego inconsistent defenses[.]"); *State v. Washburne*, No. 03–0186, 2004 WL 893929, at *4 (Iowa Ct. App. Apr. 28, 2004) ("[W]e conclude it was a reasonable trial strategy to portray Hooper as the murderer, and to claim that Washburne was not involved. Any claim that his culpability was lessened due to his drug and alcohol ingestion, or that he was somehow mentally impaired, would have detracted from, and been inconsistent with, that theory of defense."); *State v. Williams*, No. 01–2005, 2003 WL

554392, at *1 (Iowa Ct. App. Feb. 28, 2003) ("We believe trial counsel had no duty to raise the issue of consent because that theory was inconsistent with William's testimony that he 'never had sex with that lady, never.'"); *State v. Moore*, No. 98–1038, 1999 WL 1136569, at *3 (Iowa Ct. App. Dec. 13, 1999) (finding new evidence "probably would not have changed the result of trial" because it was "inconsistent with Moore's self-defense theory"). Thus, declining to investigate/present BWS evidence was a reasonable strategic decision given the facts as Linn presented them to her trial counsel and to the jury at trial.

This case strongly resembles *State v. Sallie*:

> In Sallie's case, trial counsel could have reasonably concluded expert testimony about battered woman syndrome was unnecessary and irrelevant. Sallie consistently maintained the shooting was accidental—that she did not intentionally pull the trigger. . . . Because Sallie did not claim she shot Brown in self-defense, evidence that she may have suffered from battered woman syndrome was immaterial. We agree with the court of appeals that trial counsel might reasonably have determined evidence explaining and rationalizing why Sallie might intentionally shoot Brown would appear inconsistent with the theory of accident, thereby diminishing Sallie's credibility.

State v. Sallie, 693 N.E.2d 267, 270 (Ohio 1998). The same logic applied here, strongly enough to support the PCR court's ruling that granted summary disposition on the breach element of this claim.

Beyond that, Linn cannot show prejudice because the evidence established Linn was not trapped in a relationship with an abuser, as BWS defendants typically are—Blanchard was already moving out, and was staying for one more night at Linn's insistence. *See* TrialTr. p.608,ln.8–p.617,ln.9; TrialTr. p.685,ln.1–p.686,ln.3. And Kim's account of her conversation with Linn after the shooting established that Linn's trial testimony was demonstrably false—she attempted to make arrangments to dispose of Blanchard's body without involving police (and without seeking medical attention for Blanchard), which contradicted her attempts to characterize this as a tragic accident. *See* TrialTr. p.277,ln.8–p.278,ln.25; TrialTr. p.673,ln.24–p.675,ln.10. And overwhelmingly strong evidence showed this killing was intentional:

> The defendant is telling us how she committed this murder. "Quit mouthing off to me. Quit." And then she imitates Barry, "Do it. Do it." Not a smart thing for him to have done, to dare her to pull that trigger.
>
> And you know what, she called his bluff, didn't she? And she makes the sound of the gun going off, "Pewh." "Do it, do it, do it, do it. Pewh." That's an opportunity to deliberate.
>
> [. . .]
>
> (A portion of the interview was played)
>
> "What are you going to do about it," Barry says, and then the defendant says, "Yes, there was a weapon in my house." That's what she was going to do about it. She was going to go back and get that weapon and get in the last word.

> Specific intent to kill means being aware of doing an act and doing it voluntarily, but in addition, doing it with a specific purpose in mind. Pulling the trigger, meaning to kill somebody. Look at where she shot him. Can we think of any better evidence of specific intent to kill? A shot right to the heart at close range, an inch away. Specific intent to kill.

See TrialTr. p.702,ln.10–p.703,ln.7; *see also* TrialTr. p.443,ln.17–p.448,ln.17 (discussing autopsy evidence). No BWS expert could have provided an opinion that could overcome that overwhelmingly strong evidence and create a substantial probability of a different verdict. *See King v. State*, 797 N.W.2d 565, 572 (Iowa 2011) (citing *Strickland*, 466 U.S. at 694) ("The likelihood of a different result need not be more probable than not, but it must be substantial, not just conceivable."). Therefore, summary disposition was proper on prejudice as well.

Linn has established that BWS evidence would likely have been admissible and potentially relevant to bolster a justification defense. But that is not enough to create "a material issue of fact" on this ineffective-assistance-of-counsel claim. *See* Iowa Code § 822.6. Because the record made clear that Linn could not show trial counsel breached any duty by failing to develop/present evidence that would have undermined her testimony (and that doing so *still* would not have changed the ultimate outcome), summary disposition was proper here.

II. Linn's PCR Counsel Was Not Ineffective.

Preservation of Error

"If postconviction counsel is ineffective, the applicant may raise an ineffective-assistance claim in an appeal from the postconviction court's denial of his application for relief." *See Allard v. State*, No. 11–1641, 2013 WL 1227352, at *1 (Iowa Ct. App. Mar. 27, 2013) (quoting *Dunbar*, 515 N.W.2d at 16). Iowa appellate courts are permitted to address these claims on PCR appeal "when the record is sufficient to permit a ruling." *See State v. Wills*, 696 N.W.2d 20, 22 (Iowa 2005).

Standard of Review

The ineffective-assistance claim presented on appeal is couched in a statutory right to counsel in PCR proceedings. Any ruling on that claim would be reviewed de novo. *See Lado v. State*, 804 N.W.2d 248, 250 (Iowa 2011) (citing *Dunbar*, 515 N.W.2d at 14–15).

Merits

The standard ineffective-assistance framework still applies. "[T]o succeed on a claim of ineffective assistance of counsel—whether attributable to trial counsel or PCR counsel—a defendant must prove counsel breached a duty and prejudice resulted." *Dockery v. State*, No. 13–2067, 2016 WL 351251, at *3 (Iowa Ct. App. Jan. 27, 2016) (citing *Ledezma*, 626 N.W.2d at 141).

Linn argues her PCR counsel was "ineffective for failing to comply with Iowa Rule of Civil Procedure 1.981 in resisting the State's motion for summary judgment." *See* App's Br. at 20–22. This case bears an exceedingly strong resemblance to *Rickey v. State*—indeed, Linn's trial counsel took every action that Rickey's PCR counsel took:

> On appeal, Rickey complains his PCR counsel rendered ineffective assistance in failing to file a statement of disputed facts and a memorandum of authorities in support of his resistance to the State's motion for summary disposition.
>
> [. . .]
>
> Unlike *Lado*, in which counsel took no action at all, Rickey was not completely denied counsel, actually or constructively, at any point in the proceeding. Rickey's PCR counsel filed an amended application for PCR, assisted Rickey in responding to the State's interrogatories, and requested additional time to respond to the State's discovery request. After the State filed a motion to dismiss, Rickey's PCR counsel filed a resistance.
>
> Rickey has not alleged any facts in dispute nor has he identified any legal authority his PCR counsel should have included in support of his resistance. . . . We conclude Rickey's PCR counsel did not commit structural error in failing to submit a statement of disputed facts and a memorandum of authorities in support of his resistance to the State's motion for summary disposition.

Rickey v. State, No. 16–1212, 2017 WL 2461560, at *1–3 (Iowa Ct. App. June 7, 2017); *see also* Amended PCR Application (7/21/16); App. 18; Resistance (12/1/16); App. 814; Answers to Interrogatories (9/19/16); App. 28. There is no possibility of structural error here.

As such, Linn's ineffective-assistance-of-PCR-counsel claim should have started by identifying disputed facts that PCR counsel failed to highlight in response to the State's motion for summary disposition—and Linn's failure to do that automatically forecloses any chance of establishing breach or prejudice. A similar PCR appeal was resolved in *Pendleton v. State*, where an applicant's complaint about PCR counsel's performance failed because he did not offer something his PCR counsel could have done differently, and he did not establish that his PCR claim could have succeeded with competent counsel.

> [W]e find Pendleton has failed to show he was prejudiced by his postconviction counsel's conduct. Pendleton does not demonstrate what a record on the hearing on the motion to dismiss might have shown that would now help him, does not state what argument should have been made at the dismissal hearing, and does not articulate what issues or claims should have been raised in an amended or substituted application.

Pendleton v. State, No. 11–1786, 2012 WL 3027143, at *1 (Iowa Ct. App. July 25, 2012); *see also Jones v. State*, No. 15–1715, 2016 WL 4384142, at *2–3 (Iowa Ct. App. Aug. 17, 2016) ("Ultimately, Jones has failed to prove how any action by his PCR counsel would have made the result of the proceeding different. Accordingly, we affirm the PCR court's dismissal of Jones's application."); *Munoz v. State*, No. 12–1368, 2014 WL 69519, at *6 (Iowa Ct. App. Jan. 9, 2014)

("[The applicant] has not carried his burden to prove what additional evidence should have been introduced but was not. We reject Munoz's attempt to have us find trial and PCR counsel ineffective for failing to find and offer evidence that may not even exist."); *Allard v. State*, No. 11–1641, 2013 WL 1227352, at *3 (Iowa Ct. App. Mar. 27, 2013) ("[H]e identifies no meritorious claim that postconviction counsel should have raised or raised more effectively. Perhaps Allard would have liked a more zealous advocate, but he was not constructively without counsel."). Just like in *Pendleton*, *Jones*, *Munoz*, and *Allard*, Linn has failed to identify any facts that PCR counsel could have used to give her claim any realistic chance of surviving the State's motion.

The closest that Linn comes to that threshold is her argument that "PCR counsel allowed the motion for summary judgment to go to the court without [a BWS] expert." *See* App's Br. at 21–22. Note that Linn's PCR counsel renewed the request for an appointed BWS expert before resisting to the State's motion for summary disposition. *See* Motion for Expert Fees (11/10/16); App. 829. Linn criticizes her PCR counsel for "fail[ing] to insist on a hearing"—but there is nothing to indicate that "insisting" would cause the PCR court to grant a hearing, or cause it to issue a different ruling on Linn's request for an expert.

The PCR court noted the gaps in Linn's attempts to prove that her trial counsel should have determined that a BWS expert's help would be necessary and/or that a BWS expert would have contributed to her defense in some meaningful way—but after that, the court said: "more importantly, the State of Iowa correctly notes that such syndrome evidence would have been inconsistent with [Linn's] trial testimony about the nature of the shooting." *See* Order (12/9/16) at 3; App. 3. This means that even if Linn's PCR counsel had succeeded in retaining a BWS expert and had offered that expert's testimony to establish that Linn suffered from BWS, it *still* would not have helped Linn's claim withstand the State's motion for summary disposition because presenting such evidence at trial would have undermined Linn's credibility. Declining to do so was good strategy (not a breach) and not a factor that led the jury to convict her (not prejudicial)—and no amount of BWS testimony in this PCR action could change that.

In the end, Linn has failed to establish that either attorney breached an essential duty in the course of their representation, and the overwhelmingly strong evidence of her guilt would foreclose any real possibility of demonstrating prejudice. As such, this Court should affirm the PCR court's order that dismissed her PCR action.

CONCLUSION

The State respectfully requests this Court affirm the PCR court's ruling granting summary disposition to the State and dismissing Linn's PCR application in its entirety.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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Dated: August 28, 2017

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