IN THE SUPREME COURT OF IOWA
Supreme Court No. 17-0431

TROY A. WILLIAMS,
Applicant–Appellant,

vs.

STATE OF IOWA,
Respondent–Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY
THE HONORABLE PAUL A. MACEK, JUDGE

APPLICATION FOR FURTHER REVIEW
(Decision Date: April 4, 2018)

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QUESTIONS PRESENTED FOR REVIEW

Does Iowa law recognize a new type of structural error related to specific errors committed by attorneys?

Does the functional equivalent of having no lawyer occur when a lawyer is appointed, reviews the case file, writes and files legal pleadings, and questions multiple witnesses in a nearly-day-long contested trial?

TABLE OF CONTENTS

STATEMENT SUPPORTING FURTHER REVIEW

The Court of Appeals has recognized a new type of structural error, beyond anything previously recognized by this Court or the United States Supreme Court. *See Williams v. State*, No. 17-0431, slip op. (Iowa Ct. App. April 3, 2017) [hereinafter, "slip op."]. In this case, postconviction counsel successfully prevented dismissal of the action, checked out the underlying file, represented the applicant at a contested trial, questioned two witnesses, and filed pleadings. *See generally* PCR tr. Nonetheless, the Court of Appeals relied on *Lado* to conclude that the applicant was automatically entitled to a new PCR trial without showing prejudice. *See* slip op. at *9–19. The scope of structural error has become a source of confusion in the Court of Appeals. This Court should grant the application for further review to clarify the distinction between *Strickland* and *Lado* for four reasons.

First, the Court of Appeals decision conflicts with or substantially modifies this Court's decision in *Lado v. State*, 804 N.W.2d 428, 252 (Iowa 2011). *See* Iowa R. App. P. 6.1103(1)(b)(1), (2). There are three types of structural errors related to lawyering: (1) when counsel is actually or constructively denied; (2) when criminal-

defense counsel does not subject the "prosecution's case" to meaningful adversarial testing; and (3) when surrounding circumstances would prevent any counsel from being effective, such as the conflicted representation of codefendants. *Lado*, 804 N.W.2d at 252. None of these occurred here. The Court of Appeals instead recognized a novel form of structural error contrary to this Court's decision in *Lado* and federal case law. *See* slip op. at *3 (acknowledging the factual circumstances in this case do not align with *Lado*); *see also State v. Eichler,* 83 N.W.2d 576, 578 (Iowa 1957) ("If our previous holdings are to be overruled, we should ordinarily prefer to do it ourselves.").

Second, this case presents an issue of changing legal principles. Iowa R. App. P. 6.1103(1)(b)(3). When this Court decided *Lado*, it observed that "[t]he Iowa case law on 'structural error' [wa]s minimal" and "our case law provide[d] few applications of structural error." *Lado*, 804 N.W.2d at 252 n.1. Since *Lado* was decided, claims of structural error have exploded in Iowa appellate decisions.[1] Given this proliferation, guidance is needed. This case provides an

[1] Before *Lado*, the term "structural error" appeared in a handful of Iowa cases with little explanation; in the nearly seven years since *Lado*, the term appears 58 times in Iowa appellate decisions—almost exclusively unpublished court of appeals opinions.

opportunity for the Court to clarify the holding of *Lado* in light of new litigation in Iowa and elsewhere.

Third, even if this Court were inclined to consider expanding the structural-error doctrine, the facts of this case do not rise to the level of structural error. At its core, the concept of structural error protects defendants from lawyers that are so bad that counsel is functionally absent. *See Lado*, 804 N.W.2d at 252–53 (counsel standing mute while case is dismissed for want of prosecution). The applicant's lawyer in this case may not have supplied perfect representation, but his lawyering was not so bad that the applicant functionally had no lawyer: PCR counsel prevented a dismissal, obtained the underlying criminal record, filed legal pleadings, and questioned witnesses at a contested trial that took most of a day and lasted 137 transcript pages. The applicant may have preferred a more aggressive advocate, but he was not constructively without counsel. His claims should have been decided under the familiar framework of *Strickland v. Washinton,* 466 U.S. 668, 689 (1984).

Finally, further review is warranted because the Court of Appeals improperly relied on an issue that was not raised and on arguments that were not advanced on appeal. *See* Division I.A

(waiver section). The Court of Appeals relied on *Gamble v. State*, 723 N.W.2d 443, 445 (Iowa 2006) to reverse. *See* slip op. at *6–7, 11. Yet neither party asserted an issue related to *Gamble* in the briefing. *See* Appellant's Br; Appellee's Br. Raising issues and arguments for the first time in a judicial opinion does not comport with the adversarial nature of our criminal-justice system, and this Court should say so.

This Court should grant the application for further review, clarify the scope of Iowa's structural-error doctrine, and affirm the denial of postconviction relief.

STATEMENT OF THE CASE

Nature of the Case

The State seeks further review of a decision of the Court of Appeals. Iowa R. App. P. 6.1103.

Course of Proceedings & Relevant Facts

In 2012, the applicant engaged in a conspiracy to rob an exotic dancer. *See State v. Williams*, No. 13-0801, 2014 WL 2600276, at *1–2 (Iowa Ct. App. June 11, 2014). The Court of Appeals affirmed his conviction on direct appeal and this Court denied further review. *See id.*

In 2015, the applicant sought postconviction relief. *See* PCR Ruling, p. 1; App. 31. The first lawyer appointed to the case withdrew after the applicant complained. *See* 11/16/2015 Letter; App. 2. New counsel was appointed in early 2016. 2/12/2016 Order Appointing New Counsel; App. 2.

New PCR counsel (the lawyer whose performance is at issue in this appeal) checked out the underlying criminal file, obtained the criminal-trial transcripts, and successfully filed a motion to avoid a pending Rule-1.944 dismissal (triggered before his appointment). *See* 2/24/2016 Motion; 3/5/2016 Motion; App. 5; 3/7/2016 Order; 3/14/2016 Order; 1/25/2017 Order. Before trial, PCR counsel

subpoenaed criminal-trial counsel. *See* 12/8/2016 Return of Service. At a contested bench trial—that stretched 137 transcript pages and took most of a court day—PCR counsel questioned criminal-trial counsel and the applicant under oath. *See generally* PCR trial tr. After that, counsel filed two legal pleadings, attempting to put a legal and factual summary to the issues presented. The first pleading was 16 pages, the second 18 pages. *See* 2/2/2017 Response to Court Order; 3/7/2017 Supplement; App. 13–30. The postconviction court denied the application, primarily because the applicant was unable to demonstrate the reasonable probability of a different outcome for his claims. *See* PCR Ruling; App. 31–41. PCR counsel timely filed a notice of appeal. Notice of Appeal; App. 1.

ARGUMENT

I. Iowa Law Does Not Recognize a Fourth Category of Structural Errors for "Less than Zealous" Advocacy by Counsel. The Court of Appeals Also Improperly Relied on an Unbriefed *Gamble* Issue.

Waiver

The applicant's appellate brief does not cite or otherwise reference *Gamble v. State*, 723 N.W.2d 443, 445 (Iowa 2006) (holding a trial court may not "require appointed counsel to evaluate their clients' cases"). *See* Appellant's Br. Nor did the State's brief.

See Appellee's Br. Despite this, the Court of Appeals relied on *Gamble* to reverse. Slip op. at *6–7, 11. No *Gamble* issue is part of this appeal and the Court of Appeals should not have considered it.

An appellate court does not serve as "a roving commission that offers instinctual legal reactions to interesting issues that have not been raised or briefed by the parties[.]" *City of Davenport v. Seymour*, 755 N.W.2d 533, 545 (Iowa 2008). Nor may a court "speculate on the arguments [the parties] might have made and then search for legal authority and comb the record for facts to support such arguments." *Hyler v. Garner*, 548 N.W.2d 864, 876 (Iowa 1996).

It undermines confidence in the courts when judges resort to issues or theories that were not raised by the parties. *See, e.g.*, E. King Poor & James E. Goldschmidt, *But No One Argued That: Sua Sponte Decisions on Appeal*, 57 NO. 10 DRI FOR DEF. 62 (Oct. 2015); Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245 (2002).

When a party advances arguments or theories in briefing, the party's opponent is able to respond. Arguments delivered outside the

window for response are routinely stricken and cannot be considered. *See, e.g.*, *Phoenix Mut. Ins. Co. v. Galloway Farms, Inc.*, 415 N.W.2d 640, 642 (Iowa 1987); *accord* State *v. Schultz*, 245 N.W.2d 316, 318 (Iowa 1976); *Gate v. Brooks*, 6 N.W. 595, 595–596 (Iowa 1882).

Litigants have no remedy when arguments are crafted by the court and advanced for the first time in a judicial opinion. That is what happened here, when the Court of Appeals improperly assumed a partisan role and decided an unbriefed *Gamble* issue. *See Inghram v. Dairyland Mut. Ins. Co.*, 215 N.W.2d 239, 240 (Iowa 1974) ("To reach the merits of this case would require us to assume a partisan role and undertake the appellant's research and advocacy. This role is one we refuse to assume."). This Court should excise the *Gamble* issue from this appeal, as it was not briefed.

Standard of Review

The performance of counsel is reviewed de novo, though the denial of postconviction relief is reviewed for correction of errors at law. *Lado v. State*, 804 N.W.2d 248, 250 (Iowa 2011).

Merits

The Court of Appeals incorrectly expanded this Court's precedent by conflating allegations of ineffective assistance (specific

errors committed by an attorney) with structural errors (the functional absence of an attorney). Iowa law does not recognize a fourth category of structural error for a "less than zealous" advocate. Instead, this case presented a routine allegation of ineffective assistance that should have been resolved under *Strickland*.

Iowa law recognizes three narrow[2] scenarios in which a "structural" error may occur due to lawyering: (1) when "counsel is completely denied, actually or constructively, at a crucial stage of the proceeding;" (2) when "counsel does not place the prosecution's case against meaningful adversarial testing;" or (3) when "surrounding circumstances justify a presumption of ineffectiveness," like when "counsel has an actual conflict of interest in jointly representing

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[2] Other state courts, including the United States Supreme Court, agree that the circumstances that trigger structural-error review are limited. *See, e.g.*, *Florida v. Nixon*, 543 U.S. 175, 190 (2004) (describing structural error as a "narrow exception to *Strickland*'s" prejudice requirement); *Johnson v. United States*, 520 U.S. 461, 468 (1997) ("We have found structural errors only in a very limited class of cases."); *State v. Collins*, 342 P.3d 789, 800 (Utah 2014) ("[T]he class of errors constituting structural error is narrow."); *Lehnert v. People*, 244 P.3d 1180, 1186 (Colo. 2010) ("the narrow category of structural errors"); *Walker v. State*, 868 A.2d 898, 913 (Md. App. 2005) ("Structural error is a very narrow doctrine[.]"), *aff'd* 892 A.2d 547 (2006); *Sheikh v. Buckingham Corr. Ctr.*, 570 S.E.2d 785, 788 (Va. 2002) ("three very limited circumstances").

multiple defendants." *Lado v. State*, 804 N.W.2d 248, 251 (Iowa 2011). None of those errors occurred here.

The first type of structural error, when counsel is constructively or actually denied, was at issue in *Lado*. There, this Court found an applicant was "constructively without counsel" when his attorney stood mute and did nothing to prevent an imminent dismissal for failure to prosecute the case. *Lado*, 804 N.W.2d at 252–53. The first kind of structural error did not occur in this case: PCR counsel acted to prevent dismissal of the case, called and questioned witnesses, and filed legal pleadings arguing the applicant was entitled to a new trial in the criminal case. *See generally* PCR tr.

The second type of structural error occurs when criminal-defense "counsel does not place the prosecution's case against meaningful adversarial testing." *Lado*, 804 N.W.2d at 251. In its opinion in *Cronic*, the United States Supreme Court provided a single example of this type of error: *Davis v. Alaska*, a Confrontation Clause case in which counsel was deprived of his right to meaningfully cross-examine a State's eyewitness. *See United States v. Cronic*, 466 U.S. 648, 659 (1984) (citing *Davis v. Alaska*, 415 U.S. 308 (1974)). This kind of structural error did not occur here, for two reasons. First,

there is no "prosecution's case" to test in a postconviction matter: it is a civil action. *See* Iowa Code Ch. 822 (2015). Second, there is no Confrontation right in a civil case and there is no colorable argument that the applicant was not permitted to cross-examine a material witness at the postconviction trial. *See In Interest of L.K.S.*, 451 N.W.2d 819, 822 (Iowa 1990) ("[I]t is clear that the confrontation clause applies *only* in criminal cases." (emphasis original)); PCR trial tr. This type of error is not at issue.

The third and final type of structural error occurs when "counsel is called upon to render assistance under circumstances where competent counsel very likely could not" possibly perform effectively. *Bell v. Cone*, 535 U.S. 685, 696 (2002); *accord Lado*, 804 N.W.2d at 251. The United States and Iowa Supreme Courts have only supplied two examples for the type of errors in this third basket: actually-conflicted representation of co-defendants and a last-minute appointment to represent a capital defendant in an unfamiliar jurisdiction with no preparation. *Bell*, 535 U.S. at 696; *Cronic*, 466 U.S. at 660; *Lado*, 804 N.W.2d at 251. Neither is at issue here.

An actual conflict of interest occurs when counsel's performance is adversely affected, such as when a single attorney

represents multiple co-conspirators and it appears one client (a lower-level drug dealer) would likely testify against another client (the "kingpin"). *See Wheat v. United States*, 486 U.S. 153, 164 (1988); *accord Cronic*, 466 U.S. at 661 n. 28. This kind of structural error did not occur here: there is no suggestion that PCR counsel was conflicted.

Powell v. Alabama, 287 U.S. 45, 53 (1932), is the only other case cited by the United States Supreme Court for circumstances that indicate counsel could not possibly perform adequately. *See Bell*, 535 U.S. at 696; *Cronic*, 466 U.S. at 660. The facts of *Powell* are remarkable in light of modern sensibilities. In 1930s-Alabama, a trial was scheduled six days after return of an indictment alleging that two black defendants had raped two white girls. *Powell*, 287 U.S. at 49. The judge appointed "all the members of the [local] bar" as counsel for the defendants. *Id.* at 53. The morning of trial, no members of the local bar appeared as counsel. *Id.* A lawyer from Tennessee said he was there on behalf of persons "interested" in the defendants, but was not prepared to try the case or familiar with local procedures. *Id.* at 53. The trial court appointed the Tennessee lawyer as counsel of record, with unspecified "help" from the local bar. *Id.* at 53–54. The

Supreme Court held that, under these circumstances—when, among other things, counsel is appointed the morning of trial with no preparation nor familiarity with local procedures—the resulting error is structural and not amenable to a prejudice analysis. *See id.* at 57–58. The State has no quibble with *Powell*. But that kind of structural error did not occur here, in a case where there was no mob-justice, rushed trial, last-time appointment, or 1930s racial unrest.

The Court of Appeals' complaints about trial counsel here do not fall within the structural-error doctrine: the opinion does not assert that counsel was absent, that counsel did nothing, or that it was impossible for counsel to perform competently. *See* slip op. Instead, the opinion levies a variety of specific complaints about counsel's performance: that "counsel faltered in his duty to … his client" and "was less than a zealous advocate in his examination of [criminal-] trial counsel." Slip op. at *3–4. It identifies "leading questions" and "fail[ing]" to exploit … potential impeachment issues" Slip. op at *4–6. It Monday-morning-quarterbacks the format of direct examination. *See* Slip op. at *3–6. These are the kinds of specific attorney errors that the United States Supreme Court holds are

correctly evaluated under the traditional *Strickland* formulation of prejudice—not structural error.

This is not the first time an intermediate appellate court has confused routine ineffective-assistance claims (under *Strickland*) with structural errors (under cases like *Lado* or *Cronic).* The United States Supreme Court drilled down on this confusion in *Bell*, explaining that any alleged failure to test the prosecution's case "must be complete" to constitute structural error. *Bell v. Cone*, 535 U.S. 685, 697 (2002). There, the U.S. Supreme Court held the defendant's complaint—that counsel failed to adduce mitigating evidence or give a closing argument—alleged failures at "specific points" of the proceedings, rather than a failure "to oppose the prosecution throughout the sentencing proceeding as a whole." *Id.* at 697. The Court held these errors fell squarely under *Strickland*, finding they were "plainly of the same ilk" as any other claim evaluated under "*Strickland's* performance and prejudice components." *Bell*, 535 U.S.at 697–98.

So too here. The complaints levied by the Court of Appeals are about specific actions an attorney did or did not take. *See* slip op. at

*3–6. This is a *Strickland* ineffective-assistance inquiry, not a structural error. *See Bell*, 535 U.S.at 697–98.

In the end, it seems the Court of Appeals feels the applicant deserved better representation—a claim routinely decided within the *Strickland* framework. But because the applicant admits he could not prove *Strickland* prejudice on this record, *see* Appellant's Final Br. at 11, any *Strickland* claim was doomed to fail. While counsel's performance may have been underwhelming, crafting a new type of structural error as an end-run around *Strickland* is not a tolerable solution. The law already supplies avenues for the applicant to obtain relief: he could have filed a second application for postconviction relief or he may now pursue an actual-innocence claim (if there is any evidence of innocence) under *Schmidt v. State*, No. 15-1408, 2018 WL 1440111 (Iowa Mar. 23, 2018). The Court of Appeals opinion improperly conflates *Strickland* and *Lado* because it does not respect the distinction between ineffective assistance and structural error, and the application for further review should be granted.

CONCLUSION

This Court should grant the application for further review and conclude that, because there is no prejudice regarding any of the

ineffective-assistance claims litigated below, the denial of postconviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.1103(4) because:

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