The Nuts and Bolts of a Post-conviction
Iowa Bar Association Continuing Education
April 22, 2011

I. Introduction

The post-conviction remedy is for all intents and purposes the last substantive remedy available to persons seeking to vacate their convictions. While the applicant will have one final round of review in federal court under Section 2254, evidentiary hearings are rarely granted. The state post-conviction remedy provides the last opportunity to develop the factual basis for your claims. All too often, this powerful remedy is not properly utilized and issues are not properly raised. It is incumbent upon every post-conviction attorney, whether appointed, or privately retained, to fully utilize this remedy, and insure all these issues are properly preserved for subsequent review. This requires an understanding of the discovery tools available, the pertinent statute of limitations and a basic understanding of error preservation.

II. When to file - Goldilocks and Three Bears

Like the children's tale of "Goldilocks and the Three Bears," it is important that you do not file too early, or too late. If the former, your post-conviction may be dismissed. If too late, the statute of limitation will bar your state post-conviction claim as well as your right to file a federal habeas petition under 28 U.S.C. Section 2254. You want to file at just the right time, which in most cases is within one year of the conclusion of direct appeal. Every post-conviction practitioner must know the relationship between the state statute of limitations and the federal statute of limitations for filing Section 2254 federal habeas petitions. They are connected, and a failure to understand these will result in having the state post-conviction dismissed, and perhaps your federal habeas petition as well.

A. "The Clock" - when it starts

There are two limitations to keep in mind: a state limitation and a federal limitation. They have different starting points. So it is important that you know when each starts.

First, the state post-conviction applicant has three years from the later of "the date the conviction or decision is final or, in the event of an appeal, from the date the writ of procedendo is issued." Iowa Code § 822.3. In the case of no appeal, the state clock will begin to run 30 days after your client is sentenced. However, "this limitation does not apply to a ground of fact or law that could not have been raised within the applicable time period." Iowa Code § 822.3.[1] This exception will most commonly apply to claims brought under Brady v. Maryland, new evidence, or to new cases involving new judicial interpretations of statutes, or the Constitution.

[1] For an excellent discussion on exceptions to the three year statute of limitations, consult, State v. Harrington, 659 N.W.2d 509 (Iowa 2003)

Secondly, Applicants have one year to file for federal habeas review. Federal law requires persons seeking to attack their state conviction to file for relief within one year of "the latest of — (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244 (d) (1) (A)[2]. The phrases "direct review" or "expiration for seeking such review" include the 90 day period to seek certiorari, or if certiorari is sought, the date on which certiorari is denied. Smith v. Bowersox, 159 F.3d 345, 348 (8th Cir.1998), cert. denied, 525 U.S. 1187, 119 S.Ct. 1133, 143 L.Ed.2d 126 (1999). There is one important exception. If further review is not sought to the Iowa Supreme Court, the time for seeking certiorari is not included since the US Supreme Court cannot take cases directly from intermediate appellate courts. Riddle v. Kemna, 523 F.3d 850, 853 (8th Cir. 2008). Thus, the state limitation begins when procedendo is issued. The federal limitations begin 90 days following the last ruling from the Iowa Supreme Court. To play it safe, I strongly recommend just using the date procendendo is issued and file within one year of that date.

B. A "Properly Filed" state post-conviction stops the one year habeas limitation.

Congress, of course, realized that it was not practical, or a judicious use of resources to have two collateral attacks, one federal and the other state, pending at the same time. Thus, the federal clock stops upon a "properly filed" application for state collateral review. 28 U.S.C. § 2244 (d) (2). The Courts have broadly construed the term "properly filed." It will generally include any attempt to raise issues attacking the conviction on the merits. See Woodford v. Garceau, 538 U.S. 202, 207 (2003). However, a "properly filed" application does not include a request for post-conviction counsel standing alone without any substantive claim of error. See Beery v. Ault, 312 F.3d 948, 950 (8th Cir.2002) (rejecting a request for post-conviction counsel as a "properly filed" application.

C. The federal clock begins to run upon the conclusion of collateral review.

The clock will remain stopped until the post-conviction relief proceeding is final, which in most cases will be when the Iowa Supreme Court issues its procedendo order on the post-conviction appeal. 28 U.S.C. 2244 (d) (2), and See Paynev. Kemna, 441 F.3d 570, 571-72 (8th Cir.2006) (Missouri post-conviction relief proceedings are pending under AEDPA until mandate issues). In contrast to direct appeal, the 90-day period to seek certiorari is not part of the time period in which the collateral review is "pending." See Lawrence v. Florida, 549 U.S. 327, 127 (2007) ("application for state postconviction review is therefore not 'pending' after the state court's postconviction review is complete, and § 2244(d) (2) does not toll the 1-year limitations period during the pendency of a petition for certiorari").

D. The federal habeas petition also does not stop the clock.

[2] There are four other starting points for the statute of limitation 28 U.S.C. § 2244 (d) (1) (B)-(D); however, they rarely come into play.

There is one important consideration for understanding the one-year statute of limitations as it relates to state post-convictions: the federal habeas petition does not stop the one-year statute of limitation under Section 2244. See Duncan v. Walker, 533 U.S. 167 (2001). Absent compelling circumstances, federal courts will generally not consider a federal claim unless it has been "exhausted" in the state courts, ie that the petitioner has utilized every "available" state post-conviction remedy prior to raising it in federal court. In some cases, the federal court will allow the habeas petitioner do dismiss the federal habeas petition, and return to exhaust state remedies. If the federal statute of limitation expires after the federal petition is filed, make sure that you ask the court to retain jurisdiction of the federal petition while you exhaust state remedies. See Rhines v. Weber, 544 U.S. 269 (2005). If the Court is unwilling to do so, then you should not dismiss the case, and pursue your exhausted claims in federal court.

III. How to file

The state post-conviction is a civil action. Hence, it is some respects similar to filing a civil complain; however, there are some key differences.

A proceeding is commenced by "filing an application verified by the applicant with the clerk of the district court in which the conviction or sentence took place." Iowa Code § 822.3. A cover page should be attached; however, no filing fee is required. See 822.2 (1). ("Any person who has been convicted of, or sentenced for, a public offense ... may institute, **without paying a filing fee**, a proceeding [for post-conviction relief]"). I have found it helpful to print out this subsection when filing with the clerk as they will often ask for prepayment of the filing fee, or if filing remotely, you should include this provision in a cover letter to the clerk of court. Upon receipt, the clerk should "docket the application upon its receipt and promptly bring it to the attention of the court and deliver a copy to the county attorney and the attorney general." Id. Do not rely upon the clerk to do this. Make sure you send a copy to the local county attorney. This will get the process started.

Secondly, the Code requires that all "facts be within the personal knowledge of the applicant shall be set forth separately from other allegations of facts and shall be verified as provided in section 822.3." Id. In addition, you should attach "[a]ffidavits, records, or other evidence supporting [the post-conviction application's] allegations" to the application, or "explain why they are not attached." Iowa Code Section 822.4. As I practical matter, I have often indicated in the application that the contents of the original criminal court file are too voluminous to file and consequently that I am not attaching them for that reason. The State nor the Courts have too strictly enforced this requirement as along as the exhibits are subsequently provided to the state prior to the ultimate resolution of the case. Following the Application's submission, the State must file its Answer. Iowa Code Section 822.6. In most counties, this will then trigger the trial setting conference, and the case will be scheduled, as any civil trial would be, including most

importantly, the requirement of timely prosecution under Iowa R. Civ. Proc. 1.944. Make sure you keep track of that deadline, or your case will be dismissed.

IV. Summary disposition

The State will often try to dismiss the post-conviction application as soon as possible via the mechanism of summary disposition, and in many cases, prior to filing an Answer, or immediately thereafter. However, a plain reading of the statute will prevent such a motion until discovery is completed. Section 822.6 provides two methods for disposition of post-conviction relief applications without a trial on the merits.

The first method, found in paragraph two, allows for such disposition on the court's initiative, and entitles the applicant to notice of the court's intention to dismiss the application and its reasons for dismissal. Hines v. State, 288 N.W.2d 344, 346 (Iowa 1980). The Court will generally only utilize this provision if there is a repeat filer, or if there is a clear statute of limitations issue.

The second method, found in paragraph three of section 822.6, allows for such disposition on the motion of either party. Id. Disposition under paragraph three is "analogous to the summary judgment procedure" in Iowa Rules of Civil Procedure 1.981-1.983). Summage v. State, 579 N.W.2d 821, 822 (Iowa 1998). The language in paragraph three of section 822.6 is comparable to Iowa Rule of Civil Procedure 1.981. The goal here "is to provide a method of disposition **once the case has been fully developed by both sides, but before an actual trial**." Manning v. State, 654 N.W.2d 555, 559 (Iowa 2002) (my emphasis). In Manning and in several other unpublished decisions, the Iowa Supreme Court has reversed and remanded where summary disposition was granted prior to allowing both sides full discovery. Assuming you have no statute of limitation issue, citation to Manning should overcome any early motion for summary disposition prior to conducting discovery.

V. Legal Grounds

This is obviously the most important aspect to your case. Why does your client deserve a new trial? This is also an area in which conflict often erupts between attorney and the client about which issues to raise. These conflicts can be avoided by taking simple steps, and in cases where the client cannot agree with counsel, the Iowa Supreme Court has identified an important mechanism to address conflicts between attorneys and clients about which issues to raise.

A. Preliminary steps

The first is to listen to your client. Listen to their story first. Let them tell you what happened. Then discuss what issues that they would like to develop. In my experience, I have seen countless post-convictions end unsuccessfully simply because the lawyer refused to listen to the client, or appeared more intent in showing their own erudition to

the client rather than listening to the issues that the client would like to raise. A personal visit will go a long way to establishing your own credibility and starting off strong with your client. More often than not, the client actually is very helpful in narrowing down issues and identifying important issues to raise, but you cannot gain that information without listening.

The second step is to see where the file is, and trial transcripts are. In cases involving a direct appeal, the appeal lawyer will usually have the entire transcript, and in most cases, the trial court file. You may need to order the file from storage, or seeking authorization for transcript preparation at state expense. The Code specifically authorizes transcript preparation if the Applicant is not able to pay. Iowa Code Section 822.5. As a matter of course, you should also seek an order authorizing transcript preparation and depositions at state expense at the outset.

Third, call the prior appeal and trial lawyers. This is a step that is often overlooked. Iowa has a strong tradition of zealous advocacy at the trial and appellate level. Few Class A felonies, or other felonies are tried by lawyers right out of law school. They are experienced lawyers, and will often give valuable input about what evidentiary battles they lost, or possible mistakes they made. Yes, believe it, or not, they will often candidly admit mistakes. On the other hand, if they had a tactical reason for not pursuing a particular strategy, their explanation may save you valuable time, and resources in pursuing an alternative ground of post-conviction relief.

B. Identifying your grounds.

Once you have talked with your client, gathered the record, and talked with previous counsel, you are now ready to analyze the record for possible legal grounds. This involves three areas: (1) issues raised, but rejected at the trial level; (2) issues raised on appeal, but which have been preserved for post-conviction review due to an inadequate record; and (3) issues that were not raised by either trial, or appellate counsel. The third usually involved a claim of ineffective counsel.

First, look at issues that have been raised, and rejected at the trial court level. This will usually involve looking at three parts of the record: (1) motion in limine, (2) where offers of proof are made by trial counsel; and (3) where objections are raised, but overruled at trial. The first two bear special consideration. If trial counsel made an effort to draft a motion *in limine*, he or she obviously felt those issues were important. Give careful consideration to those issues. Perhaps, more importantly, if a trial counsel takes time out of trial to make an offer of proof on an excluded witness, give very close consideration to that issue, and find out why the proposed witnesses testimony was excluded. Did trial counsel miss a deadline? Did he or she articulate the correct ground of admissibility? After you have conducted this review, check the appeal record to see whether direct appeal counsel raised this issue]. If the direct appeal counsel raised those issues on direct appeal, res judicata bars review on the state post-conviction application. See Iowa Code § 822.8 (“Any ground finally adjudicated or not raised ... in any other proceeding the

applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.); and Osborn v. State, 573 N.W.2d 917, 921 (Iowa 1998) (A postconviction proceeding may not be used as a means to relitigate claims which "were or should have been properly presented on direct appeal.")[3] If direct appeal failed to raise the issue, then you should likely raise it as a claim of ineffective assistance of appeal counsel.

Secondly, consult the direct appeal decision to determine is issue was raised on appeal, but preserved for post-conviction review. In most cases involving a claim of ineffective counsel on direct appeal, the appellate court will determine that the record is inadequate. They will then preserve those claims for post-conviction relief. In addition, look at issues that may have been raised but ignored by the appellate court. This does happen. If it does, you can argue that res judicata does not bar the claim for further post-conviction review.

Thirdly, the post-conviction lawyer will focus upon what the trial counsel failed to do. This, of course, can yield a large number of potential issues; however, four areas tend to be particularly fruitful: (1) failure to obtain an expert; (2) failure to investigate, or call a favorable witness; (3) failure to objecting during the course of trial to otherwise inadmissible evidence; and (4) failure to submit, or object to erroneous jury instructions.

If the State relied upon any scientific testimony to convict your client, check to see whether trial counsel obtained an expert either to assist in cross-examination of the State's expert, or to call as an independent expert. This is a particularly propitious time to develop a claim such as this. In February of 2009, the National Science Foundation issued a report called, "Strengthening Forensic Science in the United States: A Path Forward." The Report outlines a number of deficiencies in state crime labs, and outlines several areas that require further study before they can be considered reliable science including forensic applications such as arson, fingerprinting, tool mark/ballistics, bloods spatter, forensic odontology, impression evidence, i.e., shoe marks, tire tracks etc.. The National Science Foundation (NSF) is an independent federal agency created by Congress in 1950 "to promote the progress of science; to advance the national health, prosperity, and welfare; to secure the national defense…")[4] To find an expert, check with National Association for Criminal Defense Lawyers, or the ISBA Criminal Law list serve. This will serve as an excellent starting point to begin developing your claim. Given its announcement in February in 2009, it may also provide grounds to argue that the NAS Report is a ground of fact that was not otherwise available during the three year statute of limitation.

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[3] There is one exception. If the State appeal lawyer raised the issue only under State law, and not as a federal constitutional claim, you may wish to reassert your claim as an ineffective assistance of appellate counsel claim based upon a failure to raise the issue as a federal constitutional issue. This will allow you a stronger change of raising the issue in federal habeas since federal courts will only consider federal constitutional claims.

[4] "The National Science Foundation (NSF) is an independent federal agency created by Congress in 1950 'to promote the progress of science; to advance the national health, prosperity, and welfare; to secure the national defense…'") http://www.nsf.gov/about/

Secondly, the failure to investigate witnesses seems to be the most frequent issue raised by clients. Your client will most likely identify this during one of your first consults. Strickland identified the lawyer's duty to investigate as one of the lawyer's most basic functions. See Strickland v. Washington, 466 U.S. 668, 690-691 (1984). The decision to investigation in large part depends upon the information available to the lawyer including whether the client notified him about the favorable testimony. See id. ("Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant.") Once the witness is identified, retain a private investigator to talk with the witness, and to secure a statement outlining what the witness would have testified to.[5] This will prevent you from becoming a witness yourself in the event the witness changes testimony.

Third, look at possible evidentiary objections the lawyer may have missed. This also can be extremely large number of possible issues; however, I have identified two that seem to pop up with some frequency. The first is a failure to object to a Graves issue. State v. Graves, 668 N.W.2d 860 (Iowa 2003). Graves condemned two practices that prosecutors use with some frequency. First, it condemned the State's frequent referral to a Defendant as a "liar" during closing argument. See State v. Graves, 668 N.W.2d 860, 876 (Iowa 2003). Most refer to that as the Graves rule. However, the first holding is even more important, ie prosecutors cannot ask a witness whether another witness is lying. State v. Graves, 668 N.W.2d 860, 873 (Iowa 2003) ("We also think the use of this tactic-asking the defendant whether another witness is lying-is incompatible with the duties of a prosecutor."). Most prosecutors have absorbed the "you can't call the Defendant a liar" rule. However, they cannot help themselves on this second holding. It is too tempting to ask the witness whether the officer is lying. Look closely at whether that may have been violated. Secondly, assess whether the trial attorney failed to object under the testimonial hearsay rule. Testimonial hearsay is not admissible if the Defendant cannot cross-examine the declarant. Crawford v. Washington, 541 U.S. 36 (2004)[6]. Although Crawford has been on the books for seven years, I have yet to see a state Trial Information where the State's Minutes do not contain some sort damaging testimonial hearsay. Look closely at whether trial counsel properly objected to this sort of hearsay either prior to, or during trial.

Finally, look closely at jury instructions. This is another fertile area for review. Again, this is another large topic, but two jury instruction issues arise quite frequently: (1) failure to seek an accomplice instruction and (2) failure to instruct in a lesser included offense. Do not rest upon the assumption that the Iowa Uniform Instructions were used. They can be wrong![7]

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[5] Of course, if this witness was represented during trial, consult your ethical rules on contact with a represented person. See Iowa Rule of Professional Conduct 32:4.2. I usually contact counsel first to clarify whether he still represent co-defendant for purposes of rule.

[6] This is a complicated area beyond the scope of this presentation. There are some exceptions, and the case law continues to develop on what is "testimonial" hearsay.

[7] For example, in State v. Smith, the Iowa Supreme Court stated that the then stock uniform instruction did not properly incorporate the elements of joint criminal conduct. See State v. Smith, 739 N.W.2d 289, 295 (Iowa 2007) ("In the future if a court is going

In addition, a lawyer failing to object to an erroneous instruction, the more common scenario is where the lawyer fails to affirmatively request an instruction. For example, Iowa Rule of Criminal Procedure 2.21(3) provides that "A conviction cannot be had upon the testimony of an accomplice or a solicited person, unless corroborated by other evidence which shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." Did the lawyer request an accomplice instruction? Secondly, did the lawyer seek an instruction on a lesser included offense? The trial court has a duty to instruct on all lesser included offenses. Trial courts routinely instruct on lower degree of offenses such as robbery, or burglary; however, certain lesser included crimes are not so obvious. For example, a person cannot commit burglary without trespassing. Did the trial court instruct on trespass? Carefully assess the marshalling instruction and consider whether there are any lesser included offenses on which the court failed to instruct.

This is a brief summary of possible issues. There are other important areas such as Brady v. Maryland and new evidence that also should be explored as well. This outline is intended to get you thinking about how to construct arguments for post-conviction review.

VI. Litigating your case

A post-conviction is a civil trial! It is not an operating while intoxicated administrative DOT hearing. I am amazed at the number of times the lawyer will have a ½ hour hearing, take notice of the record, and then ask an open ended question such as, "Mr. Smith, what should have your lawyer done differently?" They then let the client stammer, stumble, and attempt to articulate a claim. A post-conviction is every bit as complicated as a personal injury case. Even in a bench trial, can anyone imagine calling a personal injury attorney asking the plaintiff, "Ms. Jones, why should the court award you money?" That is what happens all too often in post-conviction relief hearings.

The post-conviction statute provides that "[a]ll rules and statutes applicable in civil proceedings including pretrial and discovery procedures are available to the parties." Iowa Code Section 822.7. Make the state work. Submit interrogatories. Ask for depositions. Submit requests for productions. Yes, they will likely respond of requests of their own, but that enhance your own preparation. Welcome that opportunity. I have enclosed an order from a post-conviction case called, Koncel v. State, PCCV025423. It provides the extent to which discovery is available and shows how post-conviction counsel should develop the factual basis of his, or her claims[8].

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to instruct the jury on the theory of joint criminal conduct, it should incorporate the elements of joint criminal conduct as set forth in this opinion, rather than instructing the jury with the general language of section 703.2.")

[8] In this case Attorney Brian Farrell represented Applicant.

VII. Miscellaneous Issues

There are three areas where I often see ineffective assistance of post-conviction counsel, and I would like to see eliminated amongst post-conviction practitioners.

First, if the post-conviction court does not address an issue in the post-conviction, you must file a motion to enlarge findings pursuant to Iowa Rule of Civil Procedure 1.904. If you do not receive a ruling, your issue will be waived on appeal. See Starling v. State, 328 N.W.2d 338, 342 (Iowa Ct.App.1982) ("[A] party must move under rule 179 (b) [now 1.904] to enlarge the findings and conclusions of the court in its postconviction proceeding in order to preserve error on its claim that the court failed to make such findings and conclusions sufficiently specific."). Analyze the decision, and consider whether each and every issue has been addressed. If not, and you would like to raise it on appeal, make sure you file the motion to enlarge findings.

Secondly, if you and your client cannot agree as to the issues which should be presented, the Iowa Supreme Court has encouraged a hybrid set of claims by the PCR applicant as well as counsel. Leonard v. State, 461 N.W.2d 465, 468 (Iowa 1990) ("A postconviction relief applicant may file applications, briefs, resistances, motions, and all other documents the applicant deems appropriate in addition to what the applicant's counsel files. This qualification should give the applicant assurance that all matters the applicant wants raised before the district court will be considered.").

Third, and most importantly, do not seek leave to withdraw. Especially on cases involving a trial, there are few cases in which the record presents *no* viable issues for development. Be agnostic about whether a frivolous appeal even exists, especially on the first round of direct appeal and post-conviction review. I recently worked on a case where direct appeal lawyer withdrew and multiple prior post-convictions lawyers withdrew on the grounds that the clients jury instruction argument was frivolous. I listened to him and we almost obtained a new trial on first degree murder conviction.

> "The jury instruction in this case is improper because it did not permit the jury to consider Shelton's state of mind at the time he aided and abetted Swigart ... The central issue of the case was whether or not Shelton was acting in self-defense. This central issue was never submitted to the jury because the jury was instructed to determine only if Swigart was justified.

Shelton v. State, WL 441932, 4 -5 (Iowa App. 2011). The Court ultimately denied on account of lack of prejudice, but I believe he has a strong claim as habeas since the Court of Appeals stated that the instruction erroneously instructed on a "central issue" in his case. I deserve little if any credit for that argument. I simply listened and kept an open mind. While unsuccessful, Mr. Shelton established beyond all doubt his previous appeal and post-conviction counsel too quickly gave up on him.

If you are going to give up on your client, do it the right way. Prior to filing your motion, notify the client ahead of time. Give him an opportunity to persuade you about the merits of his case. Whether on appeal, or before district court, your letter should at a minimum explain the following:

> a. If the client agrees with counsel's decision and does not desire to proceed further with the appeal, the client shall within 30 days from service of the motion and brief clearly and expressly communicate such desire, in writing, to the supreme court.
>
> b. If the client desires to proceed with the appeal, the client shall within 30 days communicate that fact to the supreme court, raising any issues the client wants to pursue.
>
> c. If the client fails to file a response with the supreme court, such failure could result in the waiver of the client's claims in any subsequent postconviction action.

Iowa R. App. Proc. 6.1005 (3). You should also explain that if he does not file any objection, or resistance, he will likely waive any future chance to challenge his conviction, and obtain a new trial.

VIII. Conclusion

Post-conviction relief is a powerful remedy. It is the Charles Atlas of post-trial remedies, but it is too often treated as the 98 pound weakling. It is the often the only meaningful remedy standing between the client and a life time in prison. It is their last chance. You owe it to the client to utilize all available resources to give your client his, or her last chance at freedom.

IN THE IOWA DISTRICT COURT FOR JACKSON COUNTY

FILED
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CLERK DISTRICT COURT
JACKSON COUNTY, IA

BRIAN M. KONCEL,	)	
	)	
Applicant,	)	NO. PCCV025423
	)	
vs.	)	**RULING ON MOTION TO COMPEL DISCOVERY**
	)	
STATE OF IOWA,	)	
	)	
Respondent.	)	

A contested hearing was held on the applicant's motion to compel discovery, resisted by respondent. The applicant appeared by his attorney, Brian Farrell. The State of Iowa appeared by Assistant Attorney General James E. Kivi.

The Court has reviewed the record and finds the parties have made a good-faith but unsuccessful effort to resolve this dispute without Court intervention, and enters the following ruling.

BACKGROUND FACTS

Applicant Brian M. Koncel was convicted of First Degree Murder and First Degree Kidnapping following a jury trial held in December 1997. The Murder conviction was reversed on direct appeal and the state elected to forego a new trial on that charge. He is presently incarcerated by the Iowa Department of Corrections, serving a life sentence for Kidnapping.

In this application for postconviction relief, Koncel alleges in pertinent part that his trial counsel was ineffective for failing to properly investigate, cross-examine, and impeach Dr. Thomas Bennett, the State Medical Examiner and an expert witness for the state at Koncel's trial. Dr. Bennett testified that in his opinion, the victim remained alive for up to 30 or 40

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minutes after being beaten by Koncel's co-defendant brother, a fact critical to Koncel's Kidnapping conviction. The defense expert, Dr. Peter Stephens, a former Deputy State Medical Examiner, testified the victim likely suffered death at the conclusion of the beating and was, therefore, deceased prior to being moved, a fact that would have mitigated against a finding of guilt on the Kidnapping charge.

In his motion to compel discovery in this action, Koncel notes that between the time Dr. Bennett was deposed in August 1997 in the underlying criminal case and the time he testified at trial, he resigned as Iowa's State Medical Examiner. He resigned on October 16, 1997, pursuant to a written agreement with the Department of Public Safety during an internal investigation of his office. At trial, Dr. Bennett was a Deputy State Medical Examiner. Koncel argues Dr. Bennett's credibility and objectivity were the subject of growing scrutiny in the months before trial.

In its answers to Koncel's interrogatories in this action, the State acknowledges the existence of three reports generated as a result of the Department of Public Safety's investigation of the State Medical Examiner's Office during Dr. Bennett's tenure. The State has also acknowledged the existence of the written agreement that effectuated Dr. Bennett's resignation in October 1997. Koncel has requested the production of these reports, the resignation agreement, and Dr. Bennett's personnel file. The

State has refused, alleging the documents are (1) confidential pursuant to Iowa Code §22.7(11) and (2) are not reasonably calculated to lead to the discovery of admissible evidence.

RULING

To resolve this dispute, the Court must first determine whether the documents sought by Koncel are confidential under Iowa Code §22.7(11). The documents generated through the investigation of Dr. Bennett, including the resignation agreement, constitute "public records". Iowa Code §22.1(3) in part defines "public records" to include "all records, documents or other information of or belonging to this state". Section 22.2 provides in part: "Every person shall have the right to examine and copy a public record." However, §22.7 provides in part that certain records shall be kept confidential unless otherwise ordered by a court. Included in such records are "personal information in confidential personnel records of public bodies. . .". Iowa Code §22.7(11). The State Department of Public Safety is a "public body" and the Court finds the documents generated through the investigation of Dr. Bennett, the agreement that facilitated his resignation, and his personnel file are prima facie exempt from production as personal information in confidential personnel records. See State v. Garrison, 711 N.W.2d 732 (Table), 2006 WL 138280 (Iowa App.)(essentially in-house, job performance documents are prima facie exempt from disclosure as personal information in

confidential personnel records, even when contained in an investigation file).

Nonetheless, the records sought by Koncel are confidential "unless otherwise ordered by the court". Iowa Code §22.7. The statute does not automatically dictate absolute protection of information sought through discovery in litigation. See Mediacom Iowa v. City of Spencer, 682 N.W.2d 62, 69 (Iowa 2004). The Court must determine whether the documents sought should be produced, and if so, under what circumstances.

The State argues disclosure of the documents will not lead to the discovery of admissible evidence. In the context of an action for postconviction relief, the issue is whether the documents are relevant to the applicant's claim of ineffective assistance of counsel. Koncel argues his trial attorney should have investigated the circumstances of Dr. Bennett's resignation, seeking information that might have been used to challenge Dr. Bennett's credibility and objectivity. Media coverage at the time of the resignation referred to an ongoing investigation into the administration of Dr. Bennett's office.

Trial counsel has a duty to conduct a thorough investigation of facts that is reasonable under the circumstances of the case. See Ledezma v. State, 626 N.W.2d 134, 143 (Iowa 2001). Koncel suggests his trial counsel could have demanded discovery of the documents now in dispute, which would have at least resulted in their *in camera* review by the Court to determine admissibility

during Dr. Bennett's cross-examination.

The Court finds the documents in question should be produced to the Court for review *in camera*, to determine whether they include any information relevant to the applicant's claim of ineffective assistance of counsel. Such production shall be accomplished within 30 days of the filing of this order.

It is so **ORDERED**.

Dated this 17th day of June, 2008.

David H. Sivright, Jr.
JUDGE OF THE SEVENTH JUDICIAL
DISTRICT OF THE STATE OF IOWA