IN THE SUPREME COURT OF IOWA

JOHN HRBEK, Applicant-Appellant, vs. STATE OF IOWA, Respondent-Appellee.	Sup. Ct. No. 19-1571 **RESISTANCE TO DEFENDANT'S REQUEST TO FILE *PRO SE* BRIEF**

COMES NOW the State of Iowa and resists defendant's *pro se* request to file a supplemental brief in this appeal. In support of this resistance, the State notes:

1. Applicant-appellant is represented by counsel.

2. Iowa Rule of Appellate Procedure 6.901 (2) permits filing of pro se supplemental briefs in appeals brought by unsuccessful applicants for postconviction relief, even when represented by counsel. Yet, in 2019 the Iowa legislature enacted new legislation to preclude that procedure. The statute applicable in postconviction cases provides as follows: "An applicant seeking relief under section 822.2 who is currently represented by counsel shall not file any pro se document, including an application, brief, reply brief, or motion in any Iowa court. The court shall not consider, and opposing counsel shall not respond, to such pro se filings." Iowa Code

section 822.3B (1) (codifying 2019 Iowa Acts ch. 140, S.F. 589, section 35). The State submits section 822.3B(1) applies to all pending postconviction appeals and does not offend the due process.

3. In *James v. State*, 475 N.W.2d 287 (Iowa 1991), this Court notes that "unless the legislature clearly indicates otherwise, 'statutes controlling appeals are those that were in effect at the time the judgment or order appeal from was rendered.'" *Id.* at 290 (quoting *Ontjes v. McNider*, 224 Iowa 115, 118, 275 N.W.2d 328, 330 (1937)). The applicant has not filed his pro se supplemental brief and it is now May 26, 2020, well after July 1, 2019, the effective date of the act. The discretionary review challenging the application of the statute in the district court was not granted until after that date as well. Though discretionary review was granted on the issue of whether the act could constitutionally apply in the district court, the question still arises whether section 822.3B should be given effect in the appellate court.

4. While it is true that criminal defendants at trial enjoy a right to counsel or to act *pro se*, U.S. Const. amend. VI, XIV, Iowa Const. art. I, § 10; *see generally Faretta v. California*, 422 U.S. 806, 819 (1975); *State v. Rater*, 568 N.W.2d 655, 657-58 (Iowa 1997), they do not have a right to

both. *State v. Hutchison*, 341 N.W.2d 33, 41-42 (Iowa 1983). And a criminal defendant has no constitutional right to self-representation or hybrid representation on appeal. *Martinez v. Court of Appeal of California, Fourth App. Dist.*, 528 U.S. 152, 163 (2000). States are free to prohibit hybrid representation, at trial or on appeal. *See*, *e.g.*, *Commonwealth v. Jette*, 23 A.3d 1032, 1036 (Pa. 2011) (citing *Commonwealth v. Reid*, 642 A.2d 453, 462 (Pa. 1994) *cert. denied* 513 U.S. 904 (1994)). Most states bar hybrid representation by case law, rule, or statute. *See*, *e.g.*, 201 Pa. Code § 65.24; Okla. R. App. P. 3.4(E); *Dagostino v. State*, 675 So.2d 194, 195 (Fla. Dist. Ct. App. 1996); *State v. Minkner*, 957 N.E.2d 829, 832 (Ohio Ct. App. 2011). Thus, the Legislature may preclude pro se supplemental briefs. Indeed, the authority to preclude pro se supplemental briefs in postconviction cases can only be strengthened by the fact there is no constitutional right to counsel in postconviction cases. *See Allison v. State*, 914 N.W.2d 866, 871 (Iowa 2018). This review was not sought until well after the effective date of the statute precluding *pro se* participation

5. State government powers are divided among the legislative, executive, and judicial departments, "and no person charged with the

exercise of powers properly belonging to one of these departments shall exercise any function appertaining to any of the others." Iowa Const. art. III, § 1 (departments of government). "The judicial power shall be vested in a supreme court, district courts, and such other courts … as the general assembly may … establish." Iowa Const. art. V, § 1. The judicial power includes the power to promulgate the common law – "a body of law that develops and derives through judicial decisions, as distinguished from legislative enactments." Black's Law Dictionary 276 (6th ed. 1990).

Under the Iowa Constitution the Iowa Supreme Court shall have appellate jurisdiction in "chancery" cases. Iowa Const. art. V, sec. 4. It is also "a court for the correction of errors at law." *Id.* But for either type of case, the court may only act "under such restrictions as the general assembly may, by law, prescribe." *Id.*

As such, the legislature has the power to and has enacted a variety of rules governing how the Supreme Court conducts its business. For example, it has proscribed who may directly appeal and who must seek discretionary review. Iowa Code secs. 814.5, 814.6. It has conferred its own power on the Court to adopt additional rules governing discretionary review. *Id.* sec. 814.1(2). Further, it has compelled the appellate courts to

place criminal cases ahead of civil cases, and has cut off the jurisdiction of the court once *procedendo* issues. *Id*. secs. 814.15, 814.25.

In the absence of a legislative or constitutional provision, the court may exercise whatever inherent powers it had at common law to make rules of procedure. *Iowa Civil Liberties Union v. Critelli*, 244 N.W.2d 564, 568-69 (Iowa 1978). When the legislature prohibits a practice by statute, that provision controls. *Id*. When it comes to rules of procedure, "[i]f the general assembly enacts a bill changing a rule or form, the general assembly's enactment supersedes a conflicting provision in the rule or form as submitted by the supreme court." Iowa Code sec. 602.4202(4); *Root v. Toney*, 841 N.W.2d 83, 90 (Iowa 2013) (concluding Iowa Code section 4.1(34) for timeliness of filings controlled over Court's supervisory order governing closure of clerks' offices). The legislature has excused the Supreme Court from the necessity of submitting some rules of appellate practice to the legislative council. Iowa Code sec. 602.4201 (3)(d). But the general rule pertains that a statute controls over any conflicting rule. Sec. 602.4202 (4). Here, Iowa Rule of Appellate Procedure 6.901(2) heretofore permitted pro se supplemental briefing. The legislature abrogated that rule.

6. Hrbek claims that applying section 822.3B to him denies him due process. He does not identify whether he believes procedural or substantive due process is violated. But, in any event, all "statutes are cloaked with a presumption of constitutionality." *State v. Hernandez-Lopez*, 639 N.W.2d 226, 233 (Iowa 2002). To invalidate a statute, the "challenger bears a heavy burden" and "must prove the unconstitutionality beyond a reasonable doubt." *Id.* Specifically, Hrbek "must refute every reasonable basis upon which the statute could be found to be constitutional." *Id.* (internal citation and quotation marks omitted). Under the Iowa or Federal Constitution, the analysis is the same. *Hernandez-Lopez*, 639 N.W.2d at 237. "The federal and state Due Process Clauses are nearly identical in scope, import and purpose, and our analysis in this case applies to both claims." *Id.* "[A] State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all." *Griffin v. Illinois*, 351 U.S. 12, 18 (1956); *State v. Olsen*, 162 N.W. 781, 782 (Iowa 1917). "In all cases, civil and criminal appeal procedures are the creatures of the constitution or statutes within the jurisdiction, and where civil appeals are permitted, due process and equal protection of the law require only that the right to lodge such an appeal be available to all

parties to any given controversy." *State ex rel. Caulk v. Nichols*, 267 A.2d 610, 612 (Del. Super. Ct. 1970), *aff'd,* 281 A.2d 24 (Del. 1971). Due process does not require a State to provide an appellate system. *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973). Further, the due process clause does not guarantee to the citizen of a state any particular form or method of state procedure. W*einer v. State Dep't of Roads*, 179 Neb. 297, 299, 137 N.W.2d 852, 854 (1965).

This court has recognized in Iowa the right of appeal is statutory and not constitutional: "The right of appeal is not an inherent or constitutional right. The Legislature may give or take it away at its pleasure. In other words, the permission to appeal is a gratuity, and the Legislature has the right to say upon what terms and conditions it will grant this right." *Van Der Burg v. Bailey*, 207 Iowa 797, 223 N.W. 515, 516 (1929). Hrbek has no due process right to appeal at all and the right he has been given by statute is subject to the condition that he cannot file a supplemental brief when he is represented by counsel. Counsel can challenge the statute; the *pro se* brief is unnecessary.

WHEREFORE, the State requests that this court deny Hrbek the permission to file a supplemental *pro se* brief.

Respectfully submitted,

THOMAS J. MILLER
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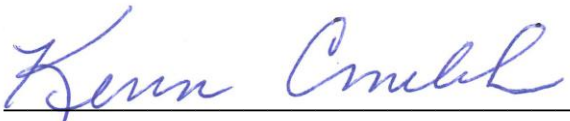

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Proof of Service

The undersigned certifies that the foregoing instrument was served upon each of the persons identified as receiving a copy by delivery in the following manner on May 26, 2020.

☒ U.S. Mail ☐ Fax
☐ Hand Delivery ☐ Overnight Courtier
☐ Federal Express ☐ Other
☐ Electronically via CM/ECF

Signature: