IN THE SUPREME COURT OF IOWA

19-1297

KENNETH LEE DOSS

V.

STATE OF IOWA

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
HONORABLE JUDGE RICHARD B. CLOGG.

APPLICANT-APPELLANT'S APPLICATION FOR FURTHER REVIEW COURT OF APPEALS DECISION FILED JULY 22, 2020

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QUESTION PRESENTED FOR REVIEW

I. WHETHER THE APPELLATE COURT ERRED IN FINDING APPELLANT'S SEX-OFFENDER-TREATMENT RULES ARE COLLATERAL

II. WHETHER THE APPELLATE COURT ERRED IN FINDING APPELLANT WAS PROPERLY INFORMED OF HIS SEX-OFFENDER-TREATMENT RULES, EVEN IF COLLATERAL

III. WHETHER THE APPELLATE COURT ERRED IN FINDING APPELLANT DID NOT PRESERVE HIS CONSTITUTIONAL CHALLENGE TO THE TOTAL BAN ON HIS USE OF THE INTERNET

IV. WHETHER THE APPELLATE COURT ERRED IN CONCLUDING THAT THE RULES BANNING DATING, CHURCH ATTENDANCE, COUNSELING, AND ASSOCIATION WITH PEOPLE OF HIS CHOICE DO NOT VIOLATE HIS FIRST AMENDMENT RIGHTS TO ASSOCIATION, AND HIS RIGHTS UNDER ARTICLE 1, SECTION 7, OF THE IOWA CONSTITUTION

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of August, 2020, I did serve two copies of the Application for Further Review within on the parties listed below, by mailing a copy thereof to the following:

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I further certify that on August 11, 2020, I will file this document by submitting the Appellant's Application for Further Review via electronic filing with the Clerk of the Supreme Court. Participants in the case who are registered with the EDMS will be served by EDMS.

/s/Raya D. Dimitrova
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STATEMENT SUPPORTING FURTHER REVIEW

The Iowa Court of Appeals in *State v. Hallock*, 764 N.W.2d 598 (Iowa Ct. App. 2012), determined Iowa Code section 903B.2 ten-year parole provision was a direct consequence of a guilty plea. As such, the defendant in the case needed to be informed of the ten-year special sentence before he could knowingly enter a guilty plea on the charge. *Id.* at 605. Importantly, the court found the provision could subject Hallock to "additional imprisonment in excess of the maximum imprisonment to which he was sentenced for the underlying crime." *Id.* The Iowa Court of Appeals incorrectly correctly applied this standard to Appellant's case when determining his special sentence was merely collateral.

Furthermore, the Iowa Court of Appeals erroneously decided Appellant received competent information from his trial attorney. Appellant was misinformed even if this was a collateral consequence of the guilty plea and Appellant was entitled to accurate information. *Meier v. State*, 337 N.W.2d 204, 207 (Iowa 1983) (finding *misinformation* about collateral consequences raises issues to whether a plea was entered into knowingly and voluntarily). The Iowa Court of Appeals in Appellant's case erroneously decided it was impossible for Appellant to be told: 1) he would be okay if he followed the "actual" law; 2) and that there was no conversation with trial counsel about the rules or provisions of

the special sentence he would have to follow. The two are not mutually exclusive and the testimony establishes Appellant was misinformed.

Next, the Iowa Court of Appeals erred in finding Appellant failed to preserve the issue of whether the total ban on his use of the interest was constitutional. Appellant preserved err on the record, and the court ruled on those issues. Thus, the Iowa Court of Appeals should have decided this issue for Appellant.

Finally, the Iowa Court of Appeals erred when it concluded the rules of Appellant's special sentence restricting or banning his dating, church attendance, obtaining counseling, and restriction on who he can associate with unnecessarily violate his First Amendment Rights to Association and his rights under article I, section 7 of the Iowa Constitution. The Fifth Circuit has previously found a restriction that prevented an offender convicted of possession of child pornography from dating a woman with children under the age of 18 was found to violate the First Amendment of the United States Constitution. *United States v. Caravayo*, 809 F.3d 267 (5th Cir. 2015).

Accordingly, these issues present a substantial question of constitutional law or question of law that has not or should be settled by the Iowa Supreme Court. Iowa R. App. Pro. 6.1103(a)(b)(2). Moreover, the Iowa Court of Appeals ruled on

issues of important questions of changing legal principles. Iowa R. App. Pro. 6.1103(a)(b)(3). Finally, this case presents issues of broad public importance the Iowa Supreme Court should ultimately determine. Iowa R. App. Pro. 6.1103(a)(b)(4).

BRIEF IN SUPPORT OF REQUEST FOR FURTHER REVIEW

Course of Proceedings: On March 21, 2017, Appellant filed an Application for Postconviction Relief. (Application for PCR) (App. p. 6). The Application asked to eliminate the unconstitutional conditions of his special sentence and remand for entry of a sentence without the unconstitutional conditions, or in the alternative, reverse his conviction and remand his case for a new trial. (Application for PCR) (App. p. 6). Appellant filed a pro se letter with the district court, asking it to reconsider or correct his special sentence. (Motion to Reconsider) (App. p. 6). The district court denied the motion and stated Appellant's complaints will be addressed in the postconviction relief trial. (Order Denying Motion to Reconsider) (App. p. 18). Attorney Angela Campbell was appointed to represent Appellant in his PCR trial. (Appearance) (App. p. 11).

A non-jury trial was held on May 24, 2019. (Trial Held Order) (App. p. 20). On July 29, 2019, the district court found Appellant's trial counsel was not ineffective, that the court had no duty to inform him of the rules of his special parole sentence, Appellant had not suffered prejudice, and the rules of his special sentence are constitutional. (Order Denying PCR) (App. p. 60). Appellant filed a timely Notice of Appeal on August 2, 2019. (Notice of Appeal) (App. p. 69). On July 22, 2020, the appellate court affirmed the ruling of the district court. (Court of Appeals Ruling) (Attachment).

Facts: The necessary factual history can be found in *Doss v. State*, No. 19-1285, 2020 Iowa App. LEXIS 687 (Iowa Ct App. July 22, 2020).

The appellate court erred in concluding Appellant's sex-offender-treatment rules were collateral rather than a direct consequence. Additionally, the court erred in finding that even if the rules are collateral, Appellant was properly informed. Next, the court erred in finding Appellant did not properly preserve error on his total ban from the internet. Finally, the court erred in concluding that the rules banning dating, church attendance, counseling, and association with people of his choice do not violate his First Amendment Rights to Association, and his rights under article 1, section 7, of the Iowa Constitution. For the following reasons, this Court should overturn the ruling of the appellate court and grant Applicant relief as requested.

ARGUMENT

I. THE APPELLATE COURT ERRED IN FINDING APPELLANT'S SEX-OFFENDER-TREATMENT RULES ARE COLLATERAL

A defendant waives several constitutional rights upon entering a guilty plea. *State v. Boone*, 298 N.W.2d 335, 337 (Iowa 1980). For this waiver to be valid, there must be an intentional relinquishment of known rights. *Id.* Due process requires defendants enter a guilty plea both voluntarily and intelligently. *Id.* To enter a guilty plea voluntarily and intelligently, a defendant must have a full understanding of the consequences of the plea. *Id.* The United States Supreme Court has stated, defendants have a constitutional right to be informed of the

consequences of their plea, especially ones "intimately related to the criminal process." *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010).

Iowa Courts must ensure defendants understand "the direct consequences of the plea including the possible maximum sentence, as well as any mandatory minimum punishment." *State v. Carney*, 584 N.W.2d 907, 908 (Iowa 1998). A court does not have to ensure however, the defendant is informed of all indirect and collateral consequences of a guilty plea. *Id.* A consequence is neither indirect or collateral if it "represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." *State v. Warner*, 229 N.W.2d 776, 782 (Iowa 1975) *overruled on other grounds by State v. Morrison*, 323 N.W.2d 254, 256 (Iowa 1982).

The Iowa Court of Appeals was faced with this issue in *State v. Hallock*, 764 N.W.2d 598 (Iowa Ct. App. 2012). In *Hallock*, the Court had to determine whether the mandatory Iowa Code section 903B.2 ten-year parole provision was a direct consequence of the plea. *Id.* at 604-05. Iowa Code Section 903B.2 states:

> A person convicted of a misdemeanor or a class "D" felony offense under chapter 709…shall also be sentenced in addition to any other punishment provided by law, to a special sentence committing the person into the custody of the director of the Iowa Department of Corrections for a period of ten years, with eligibility for parole as provided in chapter 906. The special sentence imposed under this section shall commence upon completion of the sentence imposed under any applicable criminal sentencing provisions for the underlying criminal offense and the person shall begin the sentence under supervision as if on parole.

The defendant in *Hallock* claimed his plea was not made knowingly and voluntarily. *Id.* at 604. Specifically, the defendant claimed he was never informed of this provision and argued he was not informed of the maximum possible punishment that might result from his plea as required by Iowa Rule of Criminal Procedure 2.8(2)(b)(2). *Id.* The State countered by stating section 903B.2 is merely a collateral consequence and the court had no obligation to inform him of this special sentencing provision. *Id.* at 605.

The Iowa Court of Appeals agreed with the defendant in this situation. *Id.* The court found section 903B.2 to be a sentencing provision. *Id.* Specifically, the court found the title – "Special Sentence," as well as the subchapter entitled "special sentencing" to be instructive. *Id.* The Court went on to say, "[t]he provision's language includes 'sentenced' and 'special sentence.' It is the court, not the parole board or the Iowa Department of Corrections, that imposes this special sentence." *Id.* at 605; *see also State v. Kress*, 636 N.W.2d 12, 20-21 (Iowa 2001). Lastly, the Court found that application of this section could subject Hallock to "additional imprisonment in excess of the maximum imprisonment to which he was sentenced for the underlying crime." *Id.* at 605.

Here, the appellate court incorrectly found the rules of Applicant's special sentence were merely collateral and offered no reason to support the conclusion. In fairness however, many consequences of guilty pleas have been held to be

collateral: limitations on parole eligibility[1], deportation[2], prohibition of carrying a firearm upon conviction of third-degree theft[3], ineligibility for a deferred judgement or suspended sentence and probation due to prior convictions[4], penal consequences of companion charge or effect of instant charge on the strength of the prosecutions proof in companion case[5], and the effect of a conviction upon future convictions.[6]

Importantly, the special sentence is lifetime probation, non-negotiable, and automatic upon entering his plea and being released from custody. Further, Appellant can violate a rule of his special sentence without necessarily violating the law, effecting the range of his punishment. Hence, Appellant could be imprisoned for searching local churches on the internet so he can attend with his girlfriend. (Exhibit 2) (App. p. 25). This is a direct consequence of entering his plea and would violate many of the rules in his special sentence. Moreover, the rules in Appellant's special sentence are significantly more intrusive than the effect of future convictions, parole eligibility and ability to lawfully carry a firearm as listed above. Given the circumstances, this Court should find that the rules of Applicant's special sentence were a direct consequence of entering his plea and

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[1] *Kinnersly v. State*, 494 N.W.2d 698, 700 (Iowa 1993).
[2] *Mott v. State*, 407 N.W.2d 581, 583 (Iowa 1987).
[3] *Saadiq v. State*, 387 N.W.2d 315, 325 (Iowa 1986).
[4] *State v. Woolsey*, 240 N.W.2d 651, 653-54 (Iowa 1976).
[5] *State v. Warner*, 229 N.W.2d 776, 782 (Iowa 1975).
[6] *State v. Christensen*, 201 N.W.2d 457, 459 (Iowa 1972).

trial counsel and the appellate court failed to advise him of the rules. Without being advised of the rules of his special sentence, Appellant entered a guilty plea unknowingly and involuntarily. *See Hallock*, 764 N.W.2d at 604. Thus, Appellant's plea is invalid.

II. THE APPELLATE COURT ERRED IN FINDING APPELLANT WAS PROPERLY INFORMED OF HIS SEX-OFFENDER-TREATMENT RULES, EVEN IF COLLATERAL

Even if this Court determines rules of Appellant's special sentence were "collateral," Appellant's trial counsel was ineffective for misinforming him. Specifically, the Supreme Court of Iowa has stated "there is no constitutional requirement that a judge provide advice relating to parole or the possibility of sentence deferral." *Meier v. State*, 337 N.W.2d 204, 207 (Iowa 1983). However, "that does not leave a court, or *an attorney*, to misinform a defendant regarding collateral consequences of his plea." *Id.* (emphasis added). The Second Circuit Court of Appeals found misstatements by defense counsel defeats a defendant's opportunity to enter a guilty plea knowingly and voluntarily. *Strader v. Garrison*, 611 F.2d 61, 65 (2d Cir. 1979). The Court in *Meier* quoted *Strader* saying:

> One would not suppose that the collateral consequence rule [under which information regarding parole eligibility is not initially required]…would apply in a situation in which defendant's guilty plea was induced by actual misadvise respecting some collateral consequence when the consequence was of substantial importance to the defendant.
> 611 F.2d at 63.

In this case, Appellant was misinformed of the consequences of his plea, contrary to the holding in *Meier*. Mr. Bennett represented Appellant at the trial court level. Mr. Bennett testified he has no independent recollection of representing Appellant. (Tr. p. 21, lines 13-20). Mr. Bennett testified he cannot remember what he told Appellant prior to the plea about the special sentence and the rules of the special sentences. (Tr. p. 25, lines 8-11). Further, Mr. Bennett stated he does not believe he would have retrieved a copy of the special sentence rules from the probation and parole office prior to someone's plea to review it with the client. (Tr. p. 23, lines 4-8).

When specifically asked whether he would have had an understanding of what was going to be required of Appellant on the special sentence prior to the plea, Mr. Bennett testified he would merely have "some knowledge." (Tr. p. 23, lines 9-14). When asked whether it was possible he did not know Appellant would not be allowed to attend church, Mr. Bennett responded, "[i]t certainly is." (Tr. p. 23, lines 17-25). Mr. Bennett also testified it is possible he did not know Appellant would be required to obtain permission prior to having a girlfriend. (Tr. p. 23, lines 1-6).

Similar to Mr. Bennett, Appellant did not know the rules of his special sentence prior to his plea. In support of this conclusion, Appellant stated he had not seen a copy of any rules for his special sentence of the rules for the sex offender treatment

program prior to his plea. (Tr. p. 32, lines 1-25; p. 33, lines 1-12). Appellant additionally testified Mr. Bennett told him as long as he followed the "actual law" he would be okay. (Tr. p. 33, lines 13-19). Appellant was misinformed by counsel he could violate a rule of his special sentence – sending him back to prison, that was not a violation of the law. (Tr. p. 34, lines 1-8).

Thus, the holding in *Meier* renders Mr. Bennett ineffective for misinforming Appellant regarding the consequences of his plea, regardless of whether they are collateral. *See Meier*, 337 N.W.2d at 207. Additionally, misadvise as to the consequence of a plea does not involve trial tactics or strategies, and places counsel below the range of normal competency. *Kress*, 636 N.W.2d at 21-22. This Court should find Mr. Bennett breached an essential duty to Appellant by misinforming him of the conditions of his special sentence and Appellant entered his plea unknowingly and involuntarily. *See Hallock*, 764 N.W.2d at 604.

III. THE APPELLATE COURT ERRED IN FINDING APPELLANT DID NOT PRESERVE HIS CONSTITUTIONAL CHALLENGE TO THE TOTAL BAN ON HIS USE OF THE INTERNET

A. The Issue was Preserved for Appeal

The appellate court incorrectly found Appellant did not preserve this issue in the district court for appeal. (Court of Appeals Decision) (Attachment); *Meier v. Senecaut*, 641 N.W.2d 532 (Iowa 2002) (finding issues must ordinarily be raised and decided by the district court). Contrary to this, is the fact the district court

stated, "[T]he court finds that these rules not violate his rights under the United States or Iowa Constitutions." (District Court Ruling) (App. p. x). Appellant's use of internet implicated the First Amendment right to association, which is exactly what the court ruled on. (District Court Ruling) (App. p. x). Appellant's PCR counsel specifically argued "the rules and requirements of Appellant's special sentence parole are unconstitutional and illegal as applied to him." (Petitioner's Pre-Trial Brief) (Attachment). Additionally, "the dating and association conditions imposed upon him unnecessarily violate his First Amendment rights to association…" (Petitioner's Pre-Trial Brief) (Attachment). Finally, the court noted Appellant argued "the restriction on dating, attending church, seeking counseling, and *associating with people of his choice*, are unconstitutional and illegal as applied to him." (emphasis added) (District Court Ruling) (Attachment).

B. The Total Ban on Appellant's Use of the Internet Violates his First Amendment Rights

The rules of Appellant's special sentence places a total ban on Appellant's use of the internet. (Exhibit 2) (App. p. 25). The rule reads, "I will not view, access or use the Internet through any means." (Exhibit 2) (App. p. 25). This claim is subject to intermediate scrutiny. *State v. Aschbrenner*, 926 N.W.2d 240, 251-52 (Iowa 2019). "In order to survive intermediate scrutiny, a law must be 'narrowly tailored to serve a significant government interest.'" *Packingham v. North Carolina*, 137 S.Ct. 1730, 1736 (2017). "To satisfy [intermediate scrutiny], a

regulation need not be the least speech-restrictive means of advancing the Government's interests." *Turner Broad. Sys., Inc., v. F.C.C.,* 512 U.S. 622, 662, 114 S.Ct. 2445, 2459 (1994). The Court must consider whether "the means chosen…'burden substantially more speech than is necessary to further the governments legitimate interests.'" *Id.*

In today's world, "one of the most important forums for people to share ideas is the internet." *Aschbrenner*, 926 N.W.2d at 250. In *Packingham*, a North Carolina statute was found unconstitutional because it was a felony for a sex offender to access any social media site "where the sex offender knows that the site permits minor children to become members or to create or maintain personal web pages." *Packingham*,137 S.Ct. at 1733-38. Further, a Nebraska statute was found in violation of the First Amendment where it banned sex offenders from using social networking sites. *Doe v. Nebraska*, 898 F.Supp.2d 1086, 1107-22 (D. Neb. 2012).

Similar to *Packingham* and *Doe*, Appellant is challenging the total ban on his use of the internet. *See Aschbrenner*, 926 N.W.2d at 250. Here, the State has a legitimate interest in protecting children, minors, and others from sex offenders. However, the means are not substantially related. An outright ban on the use of the internet has already been held unconstitutional by the United States Supreme Court as it is over-intrusive. *Packingham*, 137 S.Ct. at 1736. Further, Appellant's ban

on his use of the internet is for *any website*, not just one allowing minor to become members as in *Packingham*. *See id.* Thus, the Court should find this rule of Appellant's special sentence, unconstitutional.

IV. THE APPELLATE COURT ERRED IN CONCLUDING THAT THE RULES BANNING DATING, CHURCH ATTENDANCE, COUNSELING, AND ASSOCIATION WITH PEOPLE OF HIS CHOICE DO NOT VIOLATE HIS FIRST AMENDMENT RIGHTS TO ASSOCIATION, AND HIS RIGHTS UNDER ARTICLE 1, SECTION 7, OF THE IOWA CONSTITUTION.

The rules of Appellant's special sentence restricting or banning his dating, church attendance, obtaining counseling, and restriction on who he can associate with unnecessarily violate his First Amendment Rights to Association and his rights under article I, section 7 of the Iowa Constitution. *See United States v. Behren*, 65 F.Supp.3d 1140 (Dist. Colo. 2014). In *Behren*, the Court noted a ban on dating may constitute a greater restriction on liberty than is necessary or may violate the First Amendment right to association. *Id.* Restrictions on dating may be allowable if they are reasonably related to Appellant's characteristics, however, even moderate restrictions may violate the First Amendment. *See United States v. Caravayo*, 809 F.3d 269 (5th Cir. 2015) (restriction that prevented offender convicted of possession child pornography from dating a woman with children under the age of 18 found to violate the First Amendment).

Here, the rules of the special sentence apply to every person discharged from prison who is being required to take, or retake, the sex offender treatment program.

(Tr. p. 10, lines 17-25; p. 11, lines 1-7). "Typically, those rules are intact for a time period until evaluations and assessments and decisions have been made by the psychologist for further programming or not further programming and some type of staffing can be done regarding the individual." (Tr. p. 11, lines 13-21). Appellant never experienced such individualized assessment.

Further, Appellant violated rules of this special sentence that are not crimes. (Tr. p. 14, lines 3-25; p. 15, lines 1-9). Appellant's parole officer, Mr. Swaim, testified the rules in the special sentence do not change unless he get's permission to change the rules. (Tr. p. 15, lines 4-14). As such, there has not been an individualized finding that Appellant should not have a girlfriend, not be able to attend church, not be allowed to travel outside the country to visit his family, or not be able to seek his own counseling and mental health services. All of these rules apply to everyone in the sex offender program and no individualized finding has been made that Appellant needs such restrictions. Hence, these rules violate his First Amendment rights to association and his rights under article I, section 7 of the Iowa Constitution. To the extent this Court determines the federal constitution does not make these rules unconstitutional, Iowa's constitution should be read to do so.

The rules of Appellant's special sentence have prevented him from being fully rehabilitated. Any person who has served their full sentence should be

allowed to date adult women and have unrestricted access to his family.[7] Appellant should not be restricted from attending church where he can be a leader of change, an inspiration, and a law-abiding follower of Christ. Appellant should be able to engage in romantic relationships with adult women. Further, Appellant should be allowed to seek mental health counseling services without restrictions. Likewise, Appellant should be allowed to see his preferred licensed counselor as he is the one dealing with mental health issues, not the State.

All of these rules unreasonably restrict his right to association. There is no rational basis for not allowing a man, who has completed his term of incarceration, to be restricted from activities normally thought to be admirable. Appellant should not feel as if he has more restrictions now as he did in jail, thus, this Court should find the rules of Applicant's special sentence violate his right to association under the First Amendment and article I, section 7 of the Iowa Constitution.

These provisions not only violate the Appellant's right to association. The challenged rules also individually, and collectively, violate Appellant's right to be free from cruel and unusual punishment, in violation of the Eighth Amendment and article I, section 17 of the Iowa Constitution. Appellant further urges this Court to find the challenged rules violate his right under the Fifth and Fourteenth

[7] Appellant does not argue that if a no contact order or some other unusual circumstance exists that he should be able to have unrestricted access. Rather, he argues he should not be restricted under his circumstances.

Amendments, as well as article I, section 9 of the Iowa Constitution as they deprive him of liberty and property without due process of law and are unreasonable, arbitrary, and capricious.

CONCLUSION

For the reasons stated above, this Court should vacate the Appellate Court Ruling as outlined above.

RESPECTFULLY SUBMITTED,

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Attachment: Court of Appeals Ruling

ATTORNEY'S COST CERTIFICATE

I hereby certify that the cost of printing the foregoing Appellant's Brief and Argument was the sum of $_____.

_____

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This Application complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) and 6.1103(4) because:

[ ] this Application contains 4,413 words, excluding the parts of the Application exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This Application complies with the typeface requirements of Iowa. R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because:

[ ] this Application has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen (14) point Times New Roman.

_____ _____

Signature Date