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**IN THE SUPREME COURT OF IOWA**

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**19-1285**

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**KENNETH LEE DOSS**

**V.**

**STATE OF IOWA**

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

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**PETITIONER-APPELLANT'S SUPPLEMENTAL BRIEF IN RESPONSE  
TO AMICUS BRIEF FILED BY IOWA BOARD OF PAROLE, ACLU, AND  
IOWA ASSOCIATION FOR JUSTICE**

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**PROOF OF SERVICE**

I hereby certify that on the 11<sup>th</sup> day of January, 2021, I did serve the within Appellant’s Supplemental Brief on the parties listed below, by mailing a copy thereof to the following:

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**CERTIFICATE OF FILING**

I, the undersigned, hereby certify that on January 11, 2021, I will file this document by submitting the document 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 OF ISSUES

- I. THE IOWA BOARD OF PAROLE DOES NOT IDENTIFY AN APPROPRIATE TEST FOR PAROLE CONDITIONS INFIRNGING ON PROTECTED FREE SPEECH, RELIIGION, OR ASSOCIATIONAL RIGHTS UNDER THE U.S. OR IOWA CONSTITUTIONS.**

**Authorities:**

State v. King, 867 N.W.2d 106 (Iowa 2015)

State v. Ochoa, 792 N.W.2d 260 (Iowa 2010)

- II. THIS COURT HAS HELD THAT POST CONVICTION RELIEF IS THE REQUIRED PROCEDURAL PATHWAY TO CHALLENGE ONGOING CONFINEMENT, INCLUDING AS A RESULT OF PROBATION OR PAROLE VIOLATION.**

**Authorities:**

In re M.W., 876 N.W.2d at 221

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- III. IOWA BOARD OF PAROLE FAILS TO IDENTIFY A REASON THAT APPELLANT'S PAROLE WAS REVOKED UNRELATED TO THE FIRST AMENDMENT VIOLATIONS.**

## STATEMENT OF THE CASE

This is an appeal by the Appellant, Kenneth Doss (hereinafter “Appellant”), from the Order Denying Postconviction Relief in the District Court for Warren County, Iowa, before the Honorable Richard B. Clogg, presiding.

## STATEMENT OF THE FACTS

### **Course of Proceedings and Disposition in District Court:**

Appellant submits and relies on the same course of proceedings and disposition in district court and facts as they appear in Appellant’s Final Brief, filed on April 1, 2020.

## **ARGUMENT**

### **I. THE IOWA BOARD OF PAROLE DOES NOT IDENTIFY AN APPROPRIATE TEST FOR PAROLE CONDITIONS INFIRNGING ON PROTECTED FRFE SPEECH, RELIGION, OR ASSOCIATIONAL RIGHTS UNDER THE U.S. OR IOWA CONSTITUTIONS.**

The Iowa Board of Parole (IBOP) argues in their Amicus Brief that IBOP may constitutionally impose any condition upon parole supervision that reasonably relates to a parolee’s offense or other identifiable need. (IBOP Br. pp. 6-9). While they present the Court with a standard for imposing conditions on special sentence parolees, it is not supported by the caselaw they cite. Notably, the IBOP relies on *State v. King* in an attempt to support their proposed standard for imposing special sentences. 867 N.W.2d 106 (Iowa 2015).

However, the IBOP does not address that the Court in *King* specifically acknowledged that the need for restrictions on liberty to “depend[] on the needs of that particular case.” *Id.* at 121. Therefore, contrary to the IBOP position, the *King* case is consistent with the notion of using a narrowly tailored standard when allowing government intrusion at the expense of expectation of privacy held by parolees. *Id.* at 126-27.

As argued in ACLU’s Amicus brief, there is no basis in the caselaw to distinguish a parolee’s retention of the right of free association from their right to be free from unreasonable searches and seizures. (ACLU br. p. 34). Moreover, it stands to reason that the State’s interest in preventing re-offenders is arguably more closely aligned with the ability to search parolees than with its ability to restrict their speech, association, and religious exercise. (ACLU br. pp. 34-35). In Doss’s case, the terms and conditions of his special sentence parole were standard and were applicable to every single parolee who is about begin serving their special sentence. (Tr. p. 10, lines 22-25). Therefore, the analysis in *King* is in direct contradiction with the IBOP’s position that the terms and conditions as applied to Appellant did not violate his First Amendment rights. There is simply no evidence supporting the notion that these rules were narrowly tailored to Doss’ specific needs to be able to reintegrate in society while ensuring ongoing protection of the public from him re-offending. Furthermore, there is a clear factual difference

between *King* and this case in the nature of the violation as King actually violated the law by being in possession of illegal substances while the Appellant has not been charged or cited with any new criminal matters. The basis for his violation, which rendered him in prison, is violation of unconstitutional terms and conditions as applied to him.

The ACLU in its Amicus Brief to the Court goes over the legal standard for when parole conditions may intrude on First Amendment rights. Specifically, it requires at a minimum an individualized finding of fact regarding the parolee and his offense and a tailoring requirement that the government's purpose in imposing the restriction on First Amendment freedoms cannot be more intrusive than reasonably necessary. (ACLU Amicus 20-32). Appellant agrees and supports the analysis and argument presented in ACLU's amicus. The IBOP's brief also does not address the long line of cases supporting the retention of constitutional rights by parolees. *State v. Ochoa*, 792 N.W.2d 260, 281-86, 287-91, (Iowa 2010) See ACLU Amicus Br. at 33-36; IAJ Amicus Br. at 16, 48-50. Absent a showing that Appellant's nature and circumstances are such to require a restriction on his constitutional rights under the First Amendment, this Court should find that the terms and conditions challenged are unconstitutional as applied to him.

The IBOP argues that Doss's terms and conditions meet the reasonably-related test they suggest and support. (IBOP Br. p. 10). However, their entire



analysis is broad and general and is not supported by the caselaw cited or the facts of this case. The IBOP does not contest the testimony of Mr. Swaim, Appellant's parole officer, that his challenged parole conditions were imposed without any individualized finding of fact and without a tailoring consideration of whether the conditions invaded his First Amendment freedoms more than reasonably necessary to actually achieve the government's interest in preventing his re-offense. (Tr. p. 10, lines 22-25); See, e.g., ACLU amicus br. at 28-29. For example, the nature and circumstances of his underlying offense have nothing to do with the use of internet, having a girlfriend, going to church or choosing his own counseling. Therefore, the argument that somehow these terms and conditions are reasonably related to the offense fails. Their brief is also void of any support that these conditions may be reasonably related to an identified need. Moreover, Mr. Swaim's testimony is clear that Mr. Doss, just as any other parolee in his position, would be subject to the same rules and conditions unless changed. (Tr. p. 8, lines 23-25, p. 9, lines 11-20).

The IBOP also argues that no parole condition placed on the Appellant is absolute and immutable. (IBOP Br. p.11) However, Mr. Swaim's testimony sets forth that Mr. Doss had to sign and agree to these conditions in order to be released from prison. (Tr. p. 8 lines 11-14). In addition, the only way to potentially amend the rules and conditions is with the approval of the parole officer, Board of Parole (when required) and SOTP team. (App. p. 26). Appellant argues that he does not

hold much, if any, bargaining power against his parole officer, the IBOP and the SOTP team.

The IBOP does not analyze the individual conditions challenged, such as the restriction on dating, going to church, use of internet and the use of counseling. Nor does the IBOP seriously consider each challenged parole condition and its intrusion into Appellant's First Amendment freedoms in its argument. (IBOP Amicus Br at 10). For example, the IBOP does not argue his crimes involved church participation, the use of the internet, dating, or that its goals could not be achieved through the imposition of the parole condition, not challenged by Doss, that he does not have unsupervised contact with children. See ACLU of Iowa Br. at 29-30.

Therefore, while the IBOP suggests a standard for imposing terms and conditions on special sentence parolees, they do not identify an appropriate test to properly impose these conditions that infringe on parolee's First Amendment rights as applied.

**II. THIS COURT HAS HELD THAT POST CONVICTION RELIEF IS THE REQUIRED PROCEDURAL PATHWAY TO CHALLENGE ONGOING CONFINEMENT, INCLUDING AS A RESULT OF PROBATION OR PAROLE VIOLATION.**

The IBOP argues that Iowa Code Chapter 17A provides parolees their exclusive means to challenge the facial validity of their parole conditions. (IBOP

Br. p. 12) This argument of the IBOP brief is not before this Court, because it was not preserved on appeal. *Doss v. State*, No. 19-1285, 2020 WL 4201002 at 2 (Iowa Ct. App., 2020). While an appellee may argue for a lower court’s decision to be upheld on alternative grounds than that ruled upon by the district court, it still must have presented that argument to the district court below in order to argue it on appeal. *In re M.W.*, 876 N.W.2d at 221 (quoting *Duck Creek Tire Serv., Inc. v. Goodyear Corners, L.C.*, 796 N.W.2d 886, 893 (Iowa 2011)); *Moyer v. City of Des Moines*, 505 N.W.2d 191, 193 (Iowa 1993); see also App. 853–61. Here, as the State concedes, it did not make this argument before the district court. (Ct. of Appeals decision at 5) (“The State acknowledges that it failed to bring this “impediment to the [district] court’s authority” to the district court’s attention.”). As a result, it is not properly before this court.

Even if the Court considers the issue to be preserved for appeal, the IBOP’s argument still fails as Doss challenged his parole conditions specifically as applied to him, not on their face. (App. p. 57) The Iowa Code specifically provides that post-conviction relief action is the appropriate vehicle to challenge ongoing incarceration as the result of parole revocation. Iowa Code section 822.2(1)(e) (providing a PCR may be initiated when “The person’s sentence has expired, or probation, parole, or conditional release has been unlawfully revoked, or the person is otherwise unlawfully held in custody or other restraint.”) This court has

recognized that a post-conviction relief action is the appropriate vehicle to challenge ongoing incarceration, even as it relates to denial of parole by the parole board, in addition to ongoing incarceration as a result of revocation of parole, as here. See e.g. *Bonilla v. Iowa Bd. of Parole*, 930 NW2d 751, 786 (Iowa 2019); *Maghee v. State*, 773 N.W.2d 228, 235 (Iowa 2009); *Fassett v. State*, 885 N.W.2d 441 (Iowa Ct. App. 2016) (unpublished).

In *Maghee*, the defendant filed an application for postconviction relief under what is now section 822.2(1)(e) contesting the revocation of his work release and his transfer back to prison. *Maghee v. State*, 773 N.W.2d at 230. The district court had dismissed the PCR, ruling Maghee should have contested the revocation of his work release as an administrative appeal to the Iowa Board of Parole under Iowa's Administrative Procedures Act, found in Iowa Code chapter 17A, rather than as a postconviction action under chapter 822. *Id.* at 230, 235. This Court reversed, concluding “a postconviction-relief action is the proper vehicle to challenge the revocation of work release and resulting transfer to a secure facility.” *Id.* at 235.

Here, because Doss is not challenging the facial validity of any IBOP policies, but rather, his ongoing incarceration as a result of revocation of parole, PCR is the appropriate procedural mechanism, and the IBOP’s argument that he

should have been required to pursue an administrative action under Iowa Code Chapter 17A is meritless.

**III. IOWA BOARD OF PAROLE FAILS TO IDENTIFY A REASON THAT APPELLANT’S PAROLE WAS REVOKED UNRELATED TO THE FIRST AMENDMENT VIOLATIONS.**

The IBOP argues that this Court should refrain from addressing Doss’ constitutional challenge to his parole conditions because his special sentence parole was legally revoked for alternative reasons. (IBOP Br. p. 14). Although they argue “numerous parole violations” existed, they only provide one example – unexcused absence from SOTP group treatment. *Id.* Additionally, they do not point to any evidence from the record that the reason that his parole was revoked was actually as a result of that unexcused absence without consideration of his “having a girlfriend and the Internet.” (App. p. 54). Absent a clear record that Doss’ parole would have been revoked unrelated to his violation of the challenged parole conditions at issue in this case, his challenge to their constitutionality as the basis of his incarceration is ripe for adjudication and should be considered by this Court.

For these reasons, this Court should remove the challenged rules of Appellant’s special sentence and order he be released from prison for the violations of the unconstitutional rules of his special sentence.

**CONCLUSION**

For the reasons stated above, this Court should (1) remand the district court holding with direction to grant Appellant's application for post-conviction relief and (2) eliminate the unconstitutional conditions of his special sentence and for entry of a sentence without the unconstitutional conditions.

**ATTORNEY'S COST CERTIFICATE**

I hereby certify that the cost of printing the foregoing Appellant's Supplemental Brief was the sum of \$ 0.00.

/s/ Raya D. Dimitrova  
Raya D. Dimitrova

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME  
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE  
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1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

this brief contains 2,609 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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/s/ Raya D. Dimitrova  
Raya D. Dimitrova

1/11/2021  
Date