

**IN THE SUPREME COURT OF IOWA**

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**No. 19-1721**

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**RONNY FORTUNE,**

Appellant,

v.

**STATE OF IOWA,**

Appellee.

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**ON APPEAL FROM THE IOWA DISTRICT COURT  
IN AND FOR HUMBOLT COUNTY  
HONORABLE KURT STOEBE, JUDGE**

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**APPELLANT'S FINAL REPLY BRIEF**

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## CERTIFICATE OF SERVICE

On September 23, 2020, the undersigned certifies that a true copy of the foregoing instrument was served upon the Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to:

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**STATEMENT OF ISSUES PRESENTED FOR REVIEW**

**THE DISTRICT COURT'S DENIAL OF MODIFICATION WAS AN ABUSE OF DISCRETION**

In the interest of A.J.M., 847 N.W.2d 601 (Iowa 2014)

State v. Gonzalez, 582 N.W.2d 515, 517 (Iowa 1998)

State v. Messer 306 N.W.2d 731, 733 (Iowa 1981)

629A.128

692A.128

## **Purposes of a Reply Brief**

In any reply brief, it is appropriate to do three things. First, the brief can update the case law if there have been any changes in the time since the original brief. There is no such new law.

But see Chapman case from 10-19-20- Judge Appel's opinion

Second, the brief can reply to specific statements by the State in its brief.

Finally, the brief can point out the places in the State's brief where there is an agreement as to certain points, perhaps because the matter was not contested.

## STATEMENT OF THE CASE

### Course of Proceeding:

#### **Specific Responses to statements in the brief**

The State wrote at page 12 of its Brief that Fortune had submitted, “the results of multiple Sex Offender Risk Assessments conducted by the Second Judicial District”.

Response: Fortune submitted a risk assessment on August 6, 2018, which had been conducted on April 23, 2018 by the Department of Correctional Services. The case was originally scheduled for a hearing on April 4, 2019. The case was continued at that time because preparation for the hearing of that date showed that the STATIC-99-R score from that original report was incorrect. A new assessment was submitted on August 14, 2019, with the corrected score. The corrected assessment submitted was Applicant’s Exhibit 3. Appx. 6.

## STATEMENT OF FACTS

#### **Specific Responses to statements in the brief**

1. There was a fair amount of attention paid by the Court and the State in its brief, to the fact that Fortune had two criminal convictions in the ten years after his release from prison. See Ruling page 3, Appx. p. 12. Brief starting at page 23.

Response: The sentence for the sex offender registration violation in 2017 was the minimum that could be imposed. It was a fine of \$625 plus surcharge and cost. See State's Exhibit V; Appx. 10.

There was also the disorderly conduct charge from 2013. The County Attorney at the hearing presented no documentation with regard to that offense. It was only part of the record because there was a reference to that offense in the report prepared by the assessor.

2. The State at page 10 of its brief, in its discussion of the facts, said that Fortune entered an Alfred Plea to the criminal charges. The State then said that Fortune told the evaluating professional conducting the assessment that he had done certain things with the victim. The suggestion by reference to the Alfred Plea is that Fortune was not accepting responsibility for his offense.

Response: Fortune participated in sex treatment successfully, both while he was in prison and while he was on supervised release. Acceptance of responsibility is a significant prerequisite for any kind of successful completion of treatment.

There was no suggestion by the State in its resistance that Fortune had not successfully completed treatment.

## ARGUMENT

### THE DISTRICT COURT'S DENIAL OF MODIFICATION WAS AN ABUSE OF DISCRETION.

#### **Standard of Review and Preservation of Error:**

**There is no disagreement on this matter.**

#### **Points of Agreement:**

There are several points of general agreement about the case.

1. There is general agreement that Ron Fortune was overall a low risk to reoffend, satisfying the criteria set out in the statute for modification. See State's statement at p. 12 that the report, "generally found him to be at low risk to re-offend". See also State's statement at p. 18 that, "Fortune has demonstrated each of the applicable pre-conditions for seeking modification".

It is true that scoring of the STATIC-99-R instrument showed him to be an "average" risk. That score itself was indicative of a quite low risk of reoffending. The evaluator testified that the risk range for this score was 4-8%. Lappe testimony, Hearing testimony p. 10, lines 19-20. That score was subject to a 50% reduction for being out of prison without a new sex offense. Lappe testimony, Hearing testimony p. 13, lines 11-14. Moreover, when that score was combined with the ISORA and the STABLE, the resulting validated combined scores was

low. Ms. Lappe testified that the combined score was the more accurate measure. .  
Lappe testimony, Hearing testimony p. 12, lines 9-12.

2. There is also no disagreement with Fortune's assertion that "low risk" in fact is an incredibly low risk. The risk is not just single digits here. The risks as measure by the scores, and as testified by the assessor, were down in the zero to 2-3% range.

3. The parties also agree that the purpose of the registration statute is to protect society and the concern for public safety. The registry is not intended to increase punishment. See State's Brief p. 16.

4. The parties also are in agreement that the central part of the District Court's decision was the, "need to protect the public from the offense of the type that Fortune committed". See State's Brief p. 12. District Court Ruling p. 5. Appx. 14.

### **Response to specific statements**

1. Fortune argues that the reviewing Court should look to a case regarding a Juvenile Court's waiver of registration to analyze the discretion to be used under 692A.128. In the interest of A.J.M., 847 N.W.2d 601 (Iowa 2014).

Both the District Court and the State appear to have missed the point of this argument. The State, in its brief, said that Fortune wanted to "apply the modification structure applicable to juvenile offenders to adult offenders like himself." Brief at page 20. Ruling at page 4. The District Court disagreed that "the

Court should adopt the empirically driven model utilized in determining whether juvenile offenders should remain on the registry." Decree at p. 4; Appx. p. 13

Response: Fortune cited the case of In the interest of A.J.M., 847 N.W.2d 601 (Iowa 2014). That was a case where the Iowa Supreme Court discussed the way in which a Juvenile Court should approach the question of waving all or part of the registration requirements of juvenile offenders.

The case is analogous in that both the Juvenile Court and the District Court under 692A.128 have some level of discretion in waving or modifying the registration requirements.

In A.J.M., the Court said essentially three things. First, the Court noted that “the absence of statutory guidelines would not permit the discretion to be based on an erroneous interpretation or application of the statute.” 847 N.W.2d at 605.

Second, the Court found that the waiver provision in the Juvenile Code had as its purpose “relieving juveniles who were not likely to reoffend of the requirement to register as a sex offender.” 847 N.W.2d at 606.

Finally, the Court concluded that the legal standard for waiver should be guided by the general principle of public protection...which was all about risk.

Here is the language used by the court:

Accordingly, the legal standard for waiver under the statute is guided by public protection. Waiver is available when the juvenile court “finds” in its discretion that the eligible juvenile is not likely to reoffend. If an eligible juvenile is not initially

granted a waiver under this standard, the juvenile may then move to modify or suspend to obtain relief from the consequences of registration. *See id.* 692A.103(5). In this way, juveniles who must register can still minimize or alleviate some of the consequences of registration.

In re A.J.M., 847 N.W.2d 601, 606 (Iowa,2014)

The Court went to explain:

In applying these standards, it is important to recognize it is possible for any juvenile sex offender to reoffend. Yet, the mere possibility of reoffending does not preclude waiver or subsequent modification. The standard intended by our legislature is built on a likelihood of reoffending. This means the risk of reoffending would be “probable or reasonably to be expected.” *Cf. In re Foster*, 426 N.W.2d 374, 377 (Iowa 1988) (considering the word “likely” in a statute to mean “probable or reasonably to be expected”). While the standard is not exact, neither is the protection registration affords the public. Registration does not eliminate the risk for an offender to reoffend. There is much at stake for both the juvenile and the public in the analysis, which explains the discretion \*607 given to juvenile courts to make the decision by balancing all considerations.

In re A.J.M., 847 N.W.2d 601, 606–07 (Iowa,2014)

A.J.M. case is applicable to determining the proper scope of discretion under 692A.128 in any number of respects.

The adult modification statute does not particularly have guidelines. Actually, 692A.128 has more guidelines than appear in the Juvenile Code.

Arguably the guidelines found in 692A.128 provide more guidance in exercising discretion.

Moreover there should not be any contest that the purpose of the modification statute is to “relieve adults who are not likely to reoffend of the requirement to register as a sex offender”.

It is not necessary to an Applicant to show that there is no risk.

Finally the conclusion Fortune wishes to draw is that the discretion of the Court should be all about public protection, which is all about the determination of risk.

2. The State, like the District Court, placed great weight on Fortune’s registration violation in 2017 (see State’s brief starting at page 23).

Response: The State suggested that Fortune did not consider the registration violation 'serious'. It was not just Fortune. The prosecutor recommended, and the judge gave as the punishment for that violation, the minimum sentence.

There was no suggestion that the registration violation was related to sexual reoffending. Moreover, if one looks at the methods of measuring sexual reoffending, which is what the registry is about, offenses committed since the release from prison or while on supervision do not materially affect risk. The only effect is to somewhat reduce the amount of time free reduction.

3. The State suggests that Fortune wants to be automatically entitled to modification if he satisfies the prerequisites set out in the statute (see State's brief page 18).

Response: Fortune argues that given the importance of analyzing risk, there should be essentially a presumption of modification established by the satisfaction of the prerequisites. This particularly includes the determination that Fortune is an overall a low risk to reoffend.

**The risk factors relied upon by the judge should be rejected.**

1. The judge and the State point to the fact that Fortune scored average on the STATIC-99-R test.

Response: "Average" on the STATIC is, in fact, quite low. It is reduced by time free behavior by at least 50%. When combines with his other low scores, the more accurate combined score is low.

The State and the judge conceded that Fortune, overall, was low risk to reoffend. Moreover, "low risk" to reoffend is an incredibly small number.

2. The State and the judge pointed to Fortune's registration violation.

Response: The sentence for that violation was the minimum sentence. It had no affect on the scores, other than to reduce the time free adjustment. The registration violation was not related to sexual reoffending.

3. The judge and the State criticized Fortune's decision to get married.

(See State's brief at page 24 and Decree at page 5; (Appx. p. 14)

Response: Fortune consulted with a lawyer and was informed that a legal way to avoid the child endangerment automatic prescription was to get married. He got married and has been married ever since. No evidence was presented of any continuing Department of Human Services issue. The original issue had to do with the fact that Fortune could possibly have supervision over minors who were not his children.

4. Then, of course, there is the fact that the judge seemed horrified by the nature of Fortune's original crime. The State does not particularly defend this position by the judge. Rather, the State suggests that Fortune's crime was different from someone who did a single act of indecent exposure. (See brief page 25).

Response: The nature of the offense is simply not a significant factor in analyzing risk. The details of the crime make a difference only as to certain characteristics of the victim. Fortune got a point for having a male victim on the STATIC, but not the ISORA.

Particularly, in light of the clear recognition that the registry is not punishment, the court should reject this factor.

### **What Should Be the Remedy?**

The court should find that, based on the record made in the report filed with other evidence, that there was an abuse of discretion.

Fortune has established that he should have been modified.

If the Court is unable to go that far, the court can still find that there was an abuse of discretion as to individual factors. Sentencing cases would seem to provide some guidance on what to do when there is abuse of discretion as to some factors. If, for example, the court determining the sentence judge considered an improper factor, resentencing is required. (see State v. Gonzalez, 582 N.W.2d 515, 517 (Iowa 1998). see also State v. Messer 306 N.W.2d 731, 733 (Iowa 1981)) (The appellate court "cannot speculate about the weight trial court mentally assigned" an improper factor.)

This Court should return the matter to the District Court for consideration of only proper facts.

## **CONCLUSION**

The record below established that Ronny Fortune satisfied the requirements, as set out in 692A.128 for modification off the registry. The record shows, and appears to be conceded by the State that overall, Fortune is low risk to reoffend.

"Low risk" to reoffend is an incredibly small number. Fortune's risk, as measured by the tests that are validated by the Department, is somewhere less than 2%. The State does not particularly contest this conclusion.

The District Court announced that he had almost complete discretion to reject the application.

This court should review the District Court use of that discretion and find it was abused. The record was sufficient to require modification off the registry.

RESPECTFULLY SUBMITTED,

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**ATTORNEY'S CERTIFICATE OF COSTS**

I, Philip B. Mears, Attorney for the Appellant, hereby certify that the cost of preparing the foregoing Appellant's Final Reply Brief was \$ 2.00.

RESPECTFULLY SUBMITTED,

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**CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS  
AND TYPE-VOLUME LIMITATION**

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(f)(1) or (2) because:

this brief has been prepared in a proportionally spaced typeface using Times New Roman in size 14 and contains 2,333 words, excluding the parts of the brief exempted by Iowa Rs. App. P. 6.903(1)(f)(1)

/s/ Philip B. Mears  
Signature

9-9-2020  
Date