

**IN THE SUPREME COURT OF IOWA**

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**NO. 16-1171**

**Union County No. PCCV017906**

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**KEVIN KEL FRANKLIN, JR.,**

**Applicant - Appellant,**

**vs.**

**STATE OF IOWA,**

**Respondent - Appellee.**

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**APPEAL FROM THE IOWA DISTRICT COURT  
IN AND FOR UNION COUNTY**

**Honorable John D. Lloyd, Presiding**

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**APPELLANT'S BRIEF  
AND  
REQUEST FOR ORAL ARGUMENT**

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## **CERTIFICATE OF FILING AND SERVICE**

I, Jill Moomey, do hereby certify that on March 22, 2017, I electronically filed this document with the Clerk of the Supreme Court using the EDMS system which will send notification to the Attorney General of Iowa. I further certify that I will mail a copy of this document to the Appellant via U.S. mail this date.

/s/ Jill Moomey  
Jill Moomey

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## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- I. **WHETHER THE DISTRICT COURT ERRED WHEN IT CONCLUDED THAT IT LACKED SUBJECT MATTER JURISDICTION TO CONSIDER THE APPLICANT'S CLAIM UNDER IOWA CODE § 822.2(1)(e).**<sup>1</sup>

### AUTHORITIES

#### CASES

*Castro v. State*, 795 N.W.2d 789 (Iowa 2011)

*Dunbar v. State*, 515 N.W.2d 12 (Iowa 1994)

*Maghee v. State*, 773 N.W.2d 228 (Iowa 2008)

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*State v. Webber*, 885 N.W.2d 829, 2016 WL 4035239 (Iowa Ct. App. 2016)

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<sup>1</sup> The Applicant is not appealing the district court ruling denying his Motion to Correct Illegal Sentence.

## **STATUTES AND RULES**

Iowa Admin. Code R. 201-1.8(5)

Iowa Admin. Code R. 201-40.1(905)

Iowa Code § 822.2(1)(e)

Iowa Code § 903A.1

Iowa Code § 903A.2(a)(1)(d)

Iowa Code § 903A.2(1)(a)(2)

Iowa Code § 903A.3(1)

Iowa Code § 903A.4

Iowa Code § 904.102

Rule R. Civil Procedure 1.904(2)

## **ROUTING STATEMENT**

This case involves a substantial question as to whether an Applicant states a permissible claim under Iowa Code § 822.2(1)(e) when he has been denied the opportunity to immediately participate in the Sex Offender Treatment Program based on the policy of the Iowa Department of Corrections to deny treatment until just prior to fully discharging his sentence, which serves no legitimate rehabilitative goal and is nothing more than a disciplinary action based on an inmate's prior offense conduct concealed under the guise of a treatment policy with the sole purpose of ensuring maximum punishment. Iowa R. App. P. 6.1101(2)(a), (b), (c), (d) & (f).

## **STATEMENT OF THE CASE**

### **A. NATURE OF THE CASE.**

Kevin Kel Franklin appeals from the order entered July 6, 2016, dismissing his pro se application for postconviction relief.

### **B. COURSE OF PROCEEDINGS.**

The Applicant was convicted June 15, 1990, of Murder in the Second Degree in violation of Iowa Code § 707.3 (1989) and of Sexual Abuse in the Second Degree in violation of Iowa Code §§ 708.1 and



709.3(1) (1989) and sentenced to consecutive sentences of fifty years and twenty five years, respectively. (App. 1-2). Neither sentence was subject to a mandatory minimum. See generally Iowa Code Chapter 902 (1989). Direct appeal was denied June 21, 1991. (App. 3-4). Procedendo issue July 12, 1991. (App. 5).

On November 5, 2015, the Applicant filed a pro se application for postconviction relief claiming: “Applicant is otherwise unlawfully held in custody or other restraint.” 11/5/15 PCR Application p. 2 (App. 6-8). The Applicant simultaneously filed a Motion for Correction of an Illegal Sentence pursuant to Rule 2.24(5)(a) of the Iowa Rules of Criminal Procedure. (App. 9).

Postconviction Counsel was appointed November 6, 2015, to represent the Applicant. (App. 10-12).

On February 3, 2016, the State filed a Motion for Summary Judgment asserting in Division One that the application for postconviction relief was untimely, that there was no factual or legal basis to support the allegations, and that there was no genuine issue of material fact to be determined. In Division Two, the State asserted the Applicant’s motion to correct an illegal sentence should be characterized

as a parole/administrative issue cognizable only under Iowa Code § 822.2(1)(g). 2/3/16 Motion (App. 13-15).

No resistance was filed either by the Applicant pro se or by Postconviction Counsel.

Hearing on the State's Motion for Summary Judgment was held June 10, 2016, with the Applicant participating telephonically. 6/10/16 MSJ Hrg. Trans. pp. 1:1-2:12. On July 6, 2016, the Court stated the issue as whether "an attack on a policy of the Department of Corrections and Board of Parole fall under chapter 822." 7/6/16 Ruling p. 2 (App. 19). After noting the Iowa Supreme Court decision in *Maghee v. State*, 773 N.W.2d 228, 241 (Iowa 2009), which held that disciplinary actions are subject to review under chapter 822, the Court then determined this case was "not a disciplinary action," nor "a review of the underlying conviction or sentence," concluded the Court lacked "subject matter jurisdiction," granted the State's motion for summary judgment and dismissed the Applicant's "petition." 7/6/16 Ruling p. 3 (App. 20).

### **C. FACTS.**

Applicant is currently parole and work release eligible and has been since 2012. By IDOC policy and procedures, applicant is required to participate and complete sex offender treatment programming (SOTP). The DOC has

continually denied the applicant's requests to participate in SOTP, even though due to the law at the time applicant was sentenced he is not required to participate in SOTP, and furthermore can not by law nor by IDOC policy be punished for not taking SOTP. Applicant asserts that this is being done intentionally and maliciously as a way for the IDOC to artificially lengthen his sentence and effectively remove any meaningful chance of parole or work release for the applicant.

...

The applicant has requested to administrative staff at FDCF verbally and in writing to put in for SOTP. Applicant has put in written classification requests, and followed through the appeal process. All of this has yielded naught for the applicant, being told it is not time for him to go to SOTP.

11/5/15 PCR Application p. 2 (App. 7).

## **ARGUMENT**

**THE DISTRICT COURT ERRED WHEN IT CONCLUDED THAT IT LACKED SUBJECT MATTER JURISDICTION TO CONSIDER THE APPLICANT'S CLAIM UNDER IOWA CODE § 822.2(1)(e).**

### **A. ERROR PRESERVATION.**

Although the Applicant stated his claim in the language of Iowa Code § 822.2(1)(e) (“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.”), Postconviction Counsel failed to apprise the Court that this was in-fact

the provision the Applicant was relying on. *See generally* 6/10/16 Hearing Trns.

Although the Court may have indirectly considered the applicability of Iowa Code § 822.2(1)(e) to “disciplinary decisions of the Department of Corrections” when it cited *Maghee v. State*, 773 N.W.2d 228 (Iowa 2008), Postconviction Counsel failed to assert that the policy of the Department of Corrections is in-fact a disciplinary decision based on prior conduct and failed to file a motion pursuant to Rule 1.904(2) of the Iowa Rules of Civil Procedure to enlarge or amend the ruling.

The ineffective assistance of Postconviction Counsel constitutes cause for failure to adequately raise an issue. *Dunbar v. State*, 515 N.W.2d 12, 14-15 (Iowa 1994).

“Ineffective-assistance-of-counsel claims are an exception to the traditional error-preservation rules.” *State v. Fountain*, 786 N.W.2d 260, 263 (Iowa 2010). “To establish a claim of ineffective assistance of counsel, the defendant must prove by a preponderance of the evidence: (1) that trial counsel failed to perform an essential duty, and (2) that prejudice resulted from this failure.” *Id.* at 265. “The claim fails if the defendant is unable to prove either element of this test.” *Id.* at 266.

If counsel failed to raise a meritorious issue a normally competent attorney would have raised, and such failure cannot be attributed to reasonable trial strategy, then we can conclude the defendant has established that counsel failed to perform an essential duty.

*State v. Schlitter*, 881 N.W.2d 380, 389 (Iowa 2016), reh'g denied (July 13, 2016) (internal quotation marks and citation omitted).

## **B. STANDARD OF REVIEW.**

Postconviction relief proceedings including summary dismissals are reviewed for errors at law. *Castro v. State*, 795 N.W.2d 789, 792 (Iowa 2011) (citations omitted). Issues of statutory construction are reviewed for errors at law. *Reilly v. Iowa Dist. Court for Henry County*, 783 N.W.2d 490, 493 (Iowa 2010) (citation omitted).

## **C. MERITS.**

Postconviction relief may be granted when “the person is otherwise unlawfully held in custody or other restraint.” Iowa Code § 822.2(1)(e).

On November 5, 2015, the Applicant filed a pro se application for postconviction relief stating his claim in language identical to Iowa Code § 822.2(1)(e) (“Applicant is otherwise unlawfully held in custody or other restraint.”) and alleged the following facts:

Applicant is currently parole and work release eligible and has been since 2012. By IDOC policy and procedures, applicant is required to participate and complete sex offender treatment programming (SOTP). The DOC has continually denied the applicant's requests to participate in SOTP, even though due to the law at the time applicant was sentenced he is not required to participate in SOTP, and furthermore can not by law nor by IDOC policy be punished for not taking SOTP. Applicant asserts that this is being done intentionally and maliciously as a way for the IDOC to artificially lengthen his sentence and effectively remove any meaningful chance of parole or work release for the applicant.

11/5/15 PCR Application (App. 6-8).

The State asserted: “No factual nor legal basis exists to support the allegations made by the Applicant.” 2/3/16 MSJ p. 2 (App. 13-15). However, the State offered no affidavits and offered no evidence to refute the Applicant’s allegations of fact. *See generally* 6/10/16 MSJ Hrg. Trns. The district court determined, as a matter of law, that “[t]his is not a disciplinary action” and stated: “The court concludes that it lacks subject matter jurisdiction of this action.” 7/6/16 Ruling p.3 (App. 20).

The Applicant “is eligible for a reduction of sentence equal to one and two-tenths days for each day the inmate demonstrates good conduct and satisfactorily participates in . . . [a] treatment program established by the director.” Iowa code § 903A.2(a)(1)(d).

[A]n inmate required to participate in a sex offender treatment program shall not be eligible for a reduction of sentence unless the inmate participates in and completes a sex offender treatment program established by the director.

Iowa Code § 903A.2(1)(a)(2).

“The Iowa department of corrections is established to be responsible for the control, **treatment, and rehabilitation** of offenders. . .” Iowa Code § 904.102 (emphasis added). The deputy director for offender services shall be responsible for sex offender treatment. Iowa Admin. Code R. 201-1.8(5).

“*Rehabilitative objectives or purposes*’ means activities designed to further the reintegration of the offender into the community as a productive, law-abiding citizen.” Iowa Admin. Code R. 201-40.1(905).

The United States Supreme Court has recognized the importance of sex offender treatment programs:

Therapists and correctional officers widely agree that clinical rehabilitative programs can enable sex offenders to manage their impulses and in this way reduce recidivism. . . . An important component of those rehabilitation programs requires participants to confront their past and accept responsibility for their misconduct. Denial is generally regarded as a main impediment to successful therapy and therapists depend on offenders' truthful descriptions of events leading to past offences in order to determine which behaviours need to be targeted in therapy. . . .

Acceptance of responsibility is the beginning of rehabilitation. And a recognition that there are rewards for those who attempt to reform is a vital and necessary step toward completion.

...

The State's interest in rehabilitation is undeniable.

*McKune v. Lile*, 536 U.S. 24, 33, 47-48 (2002) (holding that a reduction in privileges for refusing to admit prior conduct as part of sex offender treatment did not violate an inmate's right against self incrimination).

The Iowa Supreme Court has also recognized the importance of sex offender treatment. "No one disputes that the SOTP was established for bona fide rehabilitative purposes, or that requiring the offender to acknowledge responsibility for his offense serves one of those purposes." *State v. Iowa Dist. Court for Webster County*, 801 N.W.2d 513, 528 (Iowa 2011) (holding that "a convicted sex offender who failed to complete a treatment program due to his assertion of Fifth Amendment rights may constitutionally have his eligibility for earned-time credits suspended.").

However, unlike the inmates in *Lile* and *Webster County*, the Applicant in this case is not refusing to participate in sex offender treatment. He is not asserting his constitutional right against self



incrimination to avoid treatment. He is not refusing to take responsibility for his crime. He is not asking for credit that he has not earned.

In-fact, the Applicant has done just the opposite. He has told the Department of Corrections that he is ready, willing and able to participate and successfully complete the necessary treatment. But, the Department of Corrections has told him he must wait, because the Department's policy is to deny sex offender treatment until just prior to fully discharging his sentence, which deprives him of both the opportunity to reduce his sentence with earned time credit and to be considered for parole or work release.

The factual question presented in this case is whether the policy of the Department of Corrections serves a legitimate rehabilitative goal or whether it is nothing more than a disciplinary action based on an inmates' prior offense conduct concealed under the guise of a treatment policy with the sole purpose of ensuring maximum punishment.

When an inmate is accused of violating a prison rule, his conduct is subject to review by an independent administrative law judge appointed by the director of the Iowa Department of Corrections. Iowa

Code § 903A.1. If the rule was violated, the judge could order “forfeiture of any and all earned time.” Iowa Code § 903A.3(1). “Prior violations by the inmate may be considered.” Iowa Code § 903A.3(1). “The director shall establish rules as to what constitutes ‘satisfactory participation’ for purposes of a reduction of sentence under section 903A.2, for programs that are available or unavailable.” Iowa Code § 903A.4.

Two primary reasons for the establishment of the Department of Corrections are “treatment” and “rehabilitation.” Iowa Code § 904.102. But, under the policy of the Department Corrections, an inmate convicted of a sex offense is doomed to fully discharge his sentence with no opportunity for reduction for earned time. By waiting to offer treatment at that point, there is no incentive to participate in a sex offender treatment program even if the inmate may be willing to accept responsibility and wants to avoid making the same mistake again. The maximum punishment has been inflicted.

On the other hand, the prospect of substantially reducing one’s sentence by successfully completing sex offender treatment provides a powerful incentive. Of course, the emphasis must be on successful

completion and the Department no doubt has the ability and the tools necessary to determine whether treatment is appropriate and whether successful treatment is likely when an inmate specifically requests treatment.

Treatment decisions should be based on the individual, not on an arbitrary time schedule totally unrelated to either the needs of the individual for rehabilitation or the needs of society for protection from future crimes. The denial of treatment should not be based solely on the conduct that put the inmate in prison in the first place, and thus punitive. The decision to either provide or deny treatment should be based on an individualized assessment that considers the likelihood of successful completion and the likelihood of effective rehabilitation.

#### **D. CONCLUSION.**

The Applicant has stated a claim that is cognizable under Iowa Code § 822.2(1)(e). However, the current record is inadequate to determine whether the policy of the Department of Corrections policy serves a legitimate a rehabilitative goal or whether it is nothing more than a disciplinary action based on an inmates' prior offense conduct concealed under the guise of a treatment policy with the sole purpose of

ensuring maximum punishment. This case should be remanded to the district court for an evidentiary hearing on the Applicant's claim. See *State v. Denato*, 173 N.W.2d 576, 579 (Iowa 1970); see also *State v. Webber*, 885 N.W.2d 829, 2016 WL 4035239 (Iowa Ct. App. 2016).

### **REQUEST FOR ORAL ARGUMENT**

Defendant -Appellant hereby respectfully requests that this appeal be heard in oral argument upon submission of this case.

Respectfully submitted,

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### **ATTORNEY'S COST CERTIFICATE**

I, the undersigned, hereby certify that the true cost of producing the necessary copies of the foregoing Appellant's Proof Brief and Request for Oral Argument was \$4.20 for copy expense, and that amount has been paid in full by the Booth Law Firm.

/s/ Unes J. Booth  
Unes J. Booth, Attorney for Defendant-Appellant

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

This brief complies with the type-volume limitation of Iowa R. App. P.6.903(1)(g)(1) because this brief contains 2,419 words, excluding the parts of the brief exempted by Iowa R. App. P.6.903(1)(g)(1).

This brief 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 brief has been prepared in a proportionally spaced typeface using WordPerfect X6 in 14 point Georgia.

/s/ Unes J. Booth  
Unes J. Booth, Attorney for Defendant-Appellant