IN THE SUPREME COURT OF IOWA
Supreme Court No. 16-1171

KEVIN KEL FRANKLIN, JR.,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR UNION COUNTY
THE HONORABLE JOHN D. LLOYD, JUDGE

APPELLEE'S BRIEF

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FINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

State Statutes

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. Franklin is Not Entitled to Relief Under Iowa Code Section 822.

Everett v. State, 789 N.W.2d 151 (Iowa 2010)
Fassett v. State, No. 15-0816, 2016 WL 3554954 (Iowa Ct. App. June 29, 2016)
Maghee v. State, 773 N.W.2d 228 (Iowa 2009)
McKeag v. State, No. 10-1084, 2011 WL 3925537 (Iowa Ct. App. Sept.8, 2011)
Miller v. State, No. 09-1853, 2011 WL 2041822 (Iowa Ct. App. May 25, 2011)
Pettit v. Iowa Department of Corrections, No. 16-0582, 2017 WL 728124 (Iowa Feb. 24, 2017)
Pierce v. State, No. 09-1853, 2011 WL 3925484 (Iowa Ct. App. Sept. 8, 2011)
Iowa Code § 822.2(1)(e)
Iowa Code § 822.2(1)(f)

ROUTING STATEMENT

Franklin seeks retention for this Court to decide whether his challenge to the parole board's policy states a claim under Iowa Code section 822.2(1)(e). The Iowa Court of Appeals has considered this issue and concluded that decisions concerning the timing of inmates' participation in sex offender treatment are agency actions that must be challenged under chapter 17A. *See Fassett v. State*, No. 15-0816, 2016 WL 3554954 at *6-7 (Iowa Ct. App. June 29, 2016). A similar claim under section 822.2(1)(a) is currently pending in *State v. Belk*, Sup. Ct. No. 16-0304. A decision in *Belk* is likely to provide guidance

in this case. Because it can be decided based on the holding of *Fassett*, transfer to the Court of Appeals is appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

Kevin Kel Franklin, Jr., appeals from the summary disposition of his application for postconviction relief.

Course of Proceedings

The State accepts the defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

Because of the nature of Franklin's claim, lengthy recitation of the underlying facts is not necessary. Suffice it to say that Franklin was convicted of second degree murder and second degree sexual abuse in 1990. PCR Order 07/06/16; App. 18-21. He was sentenced to consecutive fifty- and twenty-five-year terms. Any additional relevant facts will be discussed as a part of the State's argument.

ARGUMENT

I. Franklin is Not Entitled to Relief Under Iowa Code Section 822.

Preservation of Error

The district court considered and ruled on Franklin's claim. Error is preserved.

Standard of Review

Review of the denial of postconviction relief is for correction of errors at law. *Everett v. State*, 789 N.W.2d 151, 155 (Iowa 2010).

Merits

Franklin is incarcerated at the Fort Dodge Correctional Facility. His tentative discharge date is in 2033. According to his application for postconviction relief, he became eligible for parole in 2012. He alleges that pursuant to the policy of the Iowa Board of Parole, he cannot be paroled until he has completed sex offender treatment. He further alleges that he has been denied the opportunity to participate in sex offender treatment by a policy of the Iowa Department of Corrections as a mechanism to "artificially lengthen his sentence." A substantially identical claim was raised in *Fassett*, 2016 WL 3554954 at *6-7.

In 2002, Fassett was sentenced to concurrent terms of ninety-nine, ninety-nine, ten, and five years. *Id.* at *1. In 2014, he filed an application for postconviction relief under section 822.2(1)(e). In it, he claimed that because he had not yet been offered an opportunity to take part in sex offender treatment, the department of corrections was effectively imposing another mandatory minimum sentence. *Id.* The court of appeals held that "decisions regarding the timing of inmates' participation in the SOTP is an agency action falling within discretion of the department of corrections and board of parole" and concluded that "chapter 17A is therefore the appropriate vehicle for Fassett's complaint regarding the fact he has not yet been allowed to participate." *Id.* at *7.

Fassett cited *Maghee v. State*, 773 N.W.2d 228 (Iowa 2009) for the proposition that disciplinary decisions of the department of corrections are reviewable under chapter 822. The court of appeals contrasted the decision of the Iowa Supreme Court in *Maghee v. State*, 773 N.W.2d 228 (Iowa 2009) with two subsequent cases, *McKeag v. State*, No. 10-1084, 2011 WL 3925537 (Iowa Ct. App. Sept.8, 2011) and *Miller v. State*, No. 09-1853, 2011 WL 2041822 (Iowa Ct. App. May 25, 2011). *Maghee* involved the revocation of

work release, a situation explicitly covered by section 822.2(1)(e). *McKeag* and *Miller* involved challenges to the parole board's decision to do case file reviews rather than in-person interviews. *Fassett*, 2016 WL 3554954 at *6. In both cases, the court of appeals held that "because the Iowa Board of Parole is a state agency existing within the purview of chapter 17A, the complained-of actions fell within the definition of "agency action" under section 17A.2(2) and chapter 17A provided the exclusive avenue for relief." *Id.*

The court of appeals then cited *Pierce v. State*, No. 09-1853, 2011 WL 3925484 at *3 (Iowa Ct. App. Sept. 8, 2011), where a panel of the court of appeals affirmed a dismissal of an application for postconviction relief alleging that the board of parole denied him due process by failing to grant him review. The court explained:

> Pierce appears to have brought his postconviction relief application under section 822.2(1)(e), which affords relief where "[t]he 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." While this is the same provision invoked by Maghee, Pierce, unlike Maghee, did not fall within its ambit. As noted, Maghee asserted that the department of corrections wrongly revoked his work release, a claim that falls squarely within the language of section 822.2(1)(e). Pierce, in contrast, alleged that

> one sentence of his multiple consecutive sentences was discharged, an allegation that is not consistent with the continuous term rule of section 901.8. Pierce also did not provide any evidence that he is unlawfully being held in custody or other restraint. Indeed, he concedes he has yet to complete the balance of his prison term. For that reason section 822.2(1)(e) does not apply to him and he cannot avail himself of postconviction review.

Pierce, 2011 WL 3925484 at *3 (internal citation omitted).

The court of appeals viewed Fassett's challenge to the timing of his placement in sex offender treatment in the same way that it viewed the challenges to board of parole policies in *McKeag*, *Miller*, and *Pierce*. It went on to explain why the administrative process is necessary to enable judicial review of Fassett's claim:

> [W]ithout any administrative process to review, we are left with a record devoid of evidence regarding the status of Fassett's parole eligibility. Fassett claims he would be eligible for parole if not for the fact he has not yet been allowed to participate in the SOTP, but we do not have a record to support his claim. The record does not contain any statement by either the department of corrections or the board of parole concerning Fassett's eligibility for parole; no State authority has said why Fassett has not yet participated in the SOTP or when he will be scheduled to participate. The record does not establish conclusively that the SOTP truly is the sole remaining hurdle for Fassett to overcome on his path to early release, or

> whether other barriers, such as unrelated programs—a drug treatment program for his methamphetamine convictions, for example—still remain. By seeking relief under chapter 17A, Fassett will be able to create a record sufficient to enable judicial review, if necessary.

Fassett, 2016 WL 3554954 at *7. Franklin essentially concedes this point; his brief admits that the record is insufficient to determine his claim without an "evidentiary hearing." Appellant's Br. at 14-15. Seeking relief under chapter 17A would allow Franklin to create his record.

The recent decision of the Iowa Supreme Court in *Pettit v. Iowa Department of Corrections*, No. 16-0582, 2017 WL 728124 (Iowa Feb. 24, 2017) does not affect the holding of *Fassett*. *Pettit* involved a challenge to sex offender treatment classification brought under chapter 17A. The Iowa Supreme Court held that the proper method for reviewing a sex offender treatment *classification* is by a postconviction relief action. *Id.* at *4. The Court's decision hinged on the determination that the classification "is part of the disciplinary procedure because it would lead to a loss of the accrual of earned time if the inmate does not comply." *Id.* at *6.

Because a prisoner who objected to sex offender treatment could face the loss of earned time, the Court held that the classification should be challenged under section 822.2(1)(f). *Id.* at *5; *see also* Iowa Code § 822.2(1)(f) (permitting postconviction relief where the inmate's "reduction of sentence pursuant to sections 903A.1 through 903A.7 has been unlawfully forfeited"). In a footnote, the Court stated that section 822.2(1)(e) could possibly apply if the inmate was challenging the program while he was actually undergoing it, and thus experiencing allegedly "unlawful restraint." *Id.* at *5 n.4.

Unlike Pettit, Franklin is not challenging his sex offender treatment classification. In his brief, he specifically distinguishes his case from cases where inmates refused to participate in treatment. Appellant's Br. at 11-12. The timing of placement in sex offender treatment does not affect the accrual of earned time. In his brief, Franklin alleges that the department of corrections denies sex offender treatment until just prior to an inmate fully discharging his sentence—thus depriving him of "the opportunity to reduce his sentence with earned time credit." This claim is entirely new and directly contradicts the claim that Franklin raised in his application.

While the record is sparse, Franklin testified at the hearing that his "discharge date is 2033." PCR Tr. P.6 L.7; App. 17. His attorney then confirmed Franklin's understanding that he "would not begin sex offender treatment until you've reached approximately two years prior to that discharge date." PCR Tr. P.6 Ls.10-14; App. 17. As explained, Franklin was sentenced in 1990 to consecutive fifty- and twenty-five year terms. Without earned time, Franklin's discharge date would not occur until 2065. He understood that he would be placed in sex offender treatment approximately two years prior to 2033, indicating that he was not deprived of the opportunity to reduce his sentence through earned time. This claim is invented on appeal and is not supported by the record. Franklin is challenging the parole board's policy. His earned time is not implicated in any way, and *Pettit* has no application to this case.

CONCLUSION

For the foregoing reasons, this Court should affirm the denial of postconviction relief.

REQUEST FOR NONORAL SUBMISSION

Nonoral submission is appropriate for this case. In the event that argument is scheduled, the States wishes to be heard.

Respectfully submitted,

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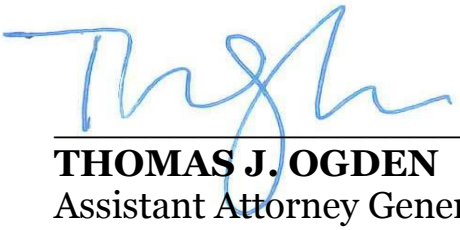

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CERTIFICATE OF COMPLIANCE

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:

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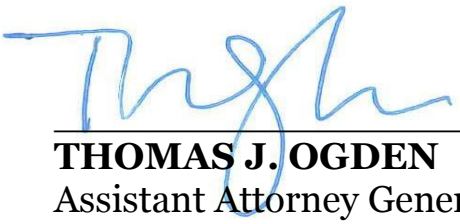
Dated: April 5, 2017



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