IN THE SUPREME COURT OF IOWA

No. 16-1392

RAY J. KRAKLIO

Plaintiff-Appellant,

vs.

KENT A. SIMMONS

Defendant-Appellee

APPEAL FROM THE SCOTT COUNTY DISTRICT COURT

THE HONORABLE J. HOBART DARBYSHIRE

APPELLEE'S APPLICATION FOR FURTHER REVIEW

Court of Appeals Decision of September 13, 2017

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ISSUES PRESENTED FOR REVIEW

I.

Whether this Court will allow the lower appellate court to expand the Exoneration Rule that protects criminal defense lawyers from malpractice liability for representation of a legally convicted and legally sentenced client to now allow liability and recovery for a convict who complains he was kept on supervised probation past its expiration date.

II.

Whether the Preservation of Error Rule set out in *DeVoss v. State* and the Waiver of Argument Rule set out in Iowa Rule of Appellate Procedure 6.902 (2) (g) (3) and case law must be strictly enforced against a party to prevent unfairness to the district court judge and the opposing party, and to ensure the efficient adjudication of issues.

CERTIFICATE OF COMPLIANCE

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

- this brief contains 5409 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903.

2. 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 based on Word 14 in Times New Roman font.

/s/ Kent A. Simmons

KENT A. SIMMONS

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STATEMENT SUPPORTING FURTHER REVIEW

The opinion filed in the Court of Appeals admittedly expands case law firmly established by this Court by analogizing to cases in the the Supreme Court of Kansas, and in the process creates a rule that is in direct conflict with *Barker v. Capotosto*, 875 N.W.2d 157 (Iowa 2016), and *Trobaugh v. Sondag*, 668 N.W.2d 577 (Iowa 2003)

Additionally, in the process, the appellate panel neglects error preservation and argument preservation rules in direct conflict with *DeVoss v. State,* 648 N.W 2d 56 (Iowa 2002), *Hyler v. Garner,* 548 N.W. 2d 864, (Iowa 1996), and *Inghram v. Dairyland Mut. Ins. Co., 215 NW 2d 239* (Iowa 1974), as well as Rule 6.902 (2) (g) (3) of the Iowa Rules of Appellate Procedure.

This Court must grant Further Review to preserve the integrity of the *Barker* and *Trobaugh* decisions and to explain the absolute importance of the error and argument preservation rules to the efficient and fair administration of justice.

STATEMENT OF THE CASE

NATURE OF THE CASE: This is an appeal challenging a very simple application of clearly established, unambiguous case law to dismiss Plaintiff Kraklio's lawsuit in Summary Judgment.

PROCEEDINGS: Kraklio's sole claim in his Complaint filed October 17, 2014, was that Attorney Simmons was liable for failing to see that Kraklio was discharged from felony probation supervision when the term expired in Scott County No. FECR 255016. (App. 1-2) Defendant Simmons filed the Motion for Summary Judgment and required supporting documents on April 23, 2016. Pursuant to Rule of Civil Procedure 1.981, Simmons filed the brief in support of the motion that included the required Statement of Uncontested Facts. The Motion also included three attached exhibits, one of which was the attorney's sworn affidavit. (App. 9-37) The May 20, 2016 oral arguments on the Motion, before the Honorable J. Hobart Darbyshire, were not reported. Defendant Simmons raised four separate assignments for full summary relief:

1. Plaintiff must first gain relief through proceedings in the criminal case or in a postconviction proceeding that set aside the criminal conviction before he can pursue a claim for malpractice against his criminal defense attorney;

2. Kraklio's probation officer chose not to supervise him while his convictions were on direct appeal. At the beginning of the appeal process, Simmons advised Kraklio he had the right to begin the supervision while on appeal because he had not posted an appeal bond, and Kraklio chose not to begin supervision. The supervision did not start until over two years after Kraklio was sentenced, and and the five-year term had not expired when Kraklio was discharged;

3. Kraklio could not produce expert testimony to establish Simmons had a duty to calculate his probation expiration date and insure his discharge; and

4. Even if Kraklio could establish a duty and the discharge was past the expiration date, Kraklio could not establish any actual loss or monetary damage.

(App. 10-11)

Although Simmons asked the Court to rule on all grounds he had raised, Judge Darbyshire chose to dispose of the suit on the simple ground Simmons had raised in his first assignment. Kraklio could not proceed in a malpractice claim because he had not gained relief from one of the three class "C" felonies to which

he had pled guilty. If the Court were to reverse the judge's ruling, a judge would have to proceed to rule on Defendant's other three grounds for summary judgment. (Ruling; App. 82-85)

Statement of the Facts

No good deed goes unpunished. Attorney Simmons began representing Kraklio when the district court appointed him to handle the direct appeal on the criminal case in question. Simmons was able to gain a Limited Remand in that case that allowed him to conduct discovery depositions to develop the evidence that showed Kraklio should not have pled guilty to the three felonies because they were prosecuted beyond the Statute of Limitations. The Court of Appeals panel went ahead and concluded there was no ineffective assistance on one of the felony counts. Kraklio's plea of guilty and conviction would stand on that class "C" felony. The other two felony counts were affirmed also, but the panel reserved the question of ineffective assistance on those two counts for postconviction relief (PCR) proceedings. Kraklio later hired Simmons and paid him almost $10,000.00 for preparing, filing and litigating the PCR. The fee agreement was for pursuit of

the PCR, only. Simmons later provided Kraklio with services related to his ongoing problems with probation supervision in the criminal case as a courtesy. The sentencing judge had imposed three ten-year sentences of imprisonment to run concurrently and suspended them, attempting to run three five-year periods of probation consecutively for a fifteen-year probation. The probation department corrected the supervision to one five-year term due to statutory constraints on probation. (Simmons Affidavit and Brief; App. 23-28) (Ruling, pp. 1-2' App. 82-83)

The order on the Summary Judgment summarized the services Simmons rendered in the appeal and the PCR. First, the judge set out Kraklio's crimes and sentences:

> After a lengthy investigation into welfare fraud allegedly committed by Kraklio, a trial information was filed on November 26, 2002, charging Plaintiff with three felony counts of fraudulent practice (Counts 4, 5, and 6 of the trial information) in case number 255016 in the District Court for Scott County. The alleged activity took place from the early 1980's through March of 2000. Kraklio pled guilty to all three counts on March 13, 2003. He was given a ten-year suspended sentence and placed on probation for five years. Kraklio was ordered to pay restitution in the amounts of $17,560.00 for Count 4, $66,100.87 for Count 5, and $40,800.64 for Count 6. (Order, p. 1; App 82)

Mr. Kraklio's trial attorney in the criminal case had failed to identify Statute of Limitation bars. Because the direct appeal panel went ahead and rejected ineffective assistance questions on Count 6, a challenge to that count was not reserved for PCR. Judge Darbyshire went on to explain that Simmons eventually gained Kraklio summary judgment relief on the two counts that had been reserved for the PCR, and those two counts were dismissed. That resulted in Kraklio escaping liability on over $83,000.00 in welfare fraud victim restitution judgments on those counts. (Order, p. 2; App. 83) Kraklio was actually in prison when the PCR relief was gained because his probation had been revoked for refusal to pay restitution. A judgment for over $40,000.00 in restitution remained in place for the count that remained as a conviction. The summary judgment order set out the fact Simmons was able to get Kraklio out of prison by filing a Motion for Reconsideration of Sentence after his parole had been denied. Upon reconsideration and reinstatement of the probation, Simmons had no further involvement in the probation issues, and Kraklio's ongoing revocation problems were handled by other court-appointed attorneys. Kraklio's ongoing assertion that

Simmons continued to represent him on his probation failures after the Reconsideration of Sentence is simply false. (Order, 2-3, Simmons Affidavit; App. 23-26, 83-84)

ARGUMENT

THERE WAS NO ERROR IN THE ORDER GRANTING SUMMARY JUDGMENT BECAUSE THE JUDGE SIMPLY APPLIED THE CLEARLY ESTABLISHED "EXONERATION RULE", THE PLAINTIFF HAS NEVER CITED ANY AUTHORITY FOR OVERTURNING THAT RULE, AND THE FACTS OF THE INSTANT CASE DEMONSTRATE THE WISDOM IN THE POLICY BEHIND THE EXONERATION RULE AND THE ERROR PRESERVATION RULE

STANDARD OF REVIEW: Errors on summary judgment rulings are reviewed for errors of law. *Barker v. Capotosto, 875 N.W.2d 157, 161 (Iowa 2016)*

PRESERVATION OF ERROR: Appellee disagrees with Kraklio's assertion that he preserved error in the district court. The case law is perfectly clear in its

refusal to grant Plaintiff authority to pursue a cause of action for legal malpractice alleged to have occurred in a criminal case. Plaintiff has not been exonerated of the criminal conviction. In the district court and in argument below, Defendant Simmons has set out the longstanding rule that prohibits a convict from suing his lawyer for malpractice in connection to the case resulting in conviction, *unless* the conviction has been vacated. Kraklio did not cite any legal authority in the district court in an argument that the rule of the case law should be changed. The Plaintiff did not discuss the policy concerns supporting the Exoneration Rule to show any indication the rule was not intended to apply to his case. (App. 38-41) An appellant cannot raise an issue on appeal that he has not preserved and presented in a way that would give the trial judge an opportunity to rule on the issue. Additionally, the Plaintiff had not cited any legal authority in his brief filed in the instant appeal that would allow this Court to change the well established "Relief-Required Rule", also known as the "Exoneration Rule". "Failure to cite authority in support of an issue may be deemed waiver of that issue." Iowa Rule of Appellate Procedure 6.903 (2) (g) (3). Kraklio's statement of the Preservation of Error fails to refer to "places in the record where the issue was raised and decided." I.R.A.P. 6.903 (2) (g) (1). The issue on which Simmons prevailed was raised in

the Motion for Summary Judgment filed April 23, 2016, and the trial court granted relief in the Order on Defendant's Motion for Summary Judgment filed July 18, 2016. (App. 82-85) Specifically, Judge Darbyshire concluded that because Kraklio had never gained postconviction relief on the class "C" felony Count 6, "he cannot advance a legal malpractice claim against Simmons." That Count 6 was the basis for Kraklio's ongoing probation supervision, revocation of probation, sentence of imprisonment, and Reconsideration of Sentence to return to probation. (Order, p. 4; App. 85)

The error preservation rules are discussed in greater detail in Section "C" in the argument on The Merits, and The Panel's Errors, below.

THE MERITS

A. Relief-Required or Exoneration Rule

The rule governing the issue upon which the district court granted summary judgment was established in a unanimous decision of the Iowa Supreme Court in *Trobaugh v. Sondag, 668 N.W.2d 577 (Iowa 2003) ,* and it was recently reaffirmed in *Barker v. Capotosto, 875 N.W.2d 157 (Iowa 2016).* In *Trobaugh* and in *Barker,* the plaintiffs were allowed to go forward with their complaints for criminal malpractice only because they first had obtained the "relief required" or had been "exonerated" from all of the criminal convictions in question. (*Trobaugh,* 668 NW 2d at 579; *Barker,* 875 NW 2d at 160) Kraklio's instant attempt in criminal malpractice **fails as a matter of law** because he failed to reach this threshold.

Ironically, it was Attorney Simmons who persuaded the PCR trial court to vacate two of the three Class "C" felony convictions resulting from Kraklio's guilty pleas. Attorney Simmons did **not** take almost $10,000.00 in fees to represent Kraklio on his criminal revocation proceedings, he received the fee for payment to prepare, file and litigate the PCR. (PCCE 106433) (App. 83) The law set out below from *Trobaugh,* as affirmed in *Barker,* explains the policy concerns disallowing a guilty person from suing for malpractice, and the particular facts of the instant case clearly show the wisdom in this policy.

In all of his responses, Mr. Kraklio attempts to shift blame for his predicaments to his attorney. In adopting what the *Barker* court would later call the "exoneration rule", the Court in *Trobaugh v. Sondag,* 668 N.W.2d 577, 582 (Iowa 2003) explained the operation of the rule and the policy concerns behind the rule. The *Trobaugh* court referred to the rule as the "relief-required approach":

> Many courts have concluded that some form of relief from a conviction is necessary before a criminal defendant can successfully bring a civil lawsuit for legal malpractice against a former attorney. See Canaan v. Bartee, 72 p. 3d 911, 915-16 (Kan. 2003) (collecting cases)...
>
> A court taking this approach to the issue generally grounds its conclusions on one of a number of policy-based considerations, including:
>
> > equitable principles against shifting responsibility for the consequences of the criminal's action; the paradoxical difficulties of awarding damages to a guilty person; theoretical and practical difficulties of proving causation; the potential undermining of the postconviction process if a legal malpractice action overrules the judgments entered in the postconviction

> proceedings; preserving judicial economy by avoiding relitigation of settled matters; creation of a bright line rule determining when the statute of limitations runs on the malpractice action; availability of alternative postconviction remedies; and the chilling effect on thorough defense lawyering. Canaan, 72 p. 3d at 916.
>
> ****
>
> Upon considering all of the issues presented and the wealth of commentary on this issue by other courts, we conclude that the approach that requires a defendant to achieve relief from a conviction before advancing a legal malpractice action against his former attorney is superior in this particular area of the law. In reaching this conclusion, we are persuaded by the extensive, well-reasoned policy arguments underlying the relief-required approach. See Canaan, 72 P.3d at 916. *Trobaugh* 668 N.W 2d at 581-583.

The Plaintiff does not address the exoneration rule or the policy behind the rule. He simply attempts to make a distinction on the facts, a distinction that is immaterial to the operation of the rule:

> As the sentence was discharged by the Court on February 4, 2010, the plaintiff could not have filed a postconviction relief action against

> the defendant. Once the sentence was discharged, the Plaintiff had not ability [sic] to seek postconviction relief. (Resistance par. 3).

The foregoing statement is not only immaterial. It is also false. A postconviction applicant can attack a conviction resulting in a sentence that has been discharged. The only limitation is that the PCR must be filed within three years from the date of procedendo on direct appeal. Section 822.3. Plaintiff's time to file a PCR expired April 29, 2008. If Kraklio believed the revocation hearing violated his rights, he could have filed a postconviction action pursuant to Section 822.2(e), and he had three years from the January 31, 2008 revocation to do that. The bottom line is that Mr. Kraklio never filed a PCR wherein he claimed Attorney Simmons was ineffective, and he never gained relief from Count 6, a class "C" felony, that carried five years probation. He did not gain the "relief-required" or the "exoneration" from that felony that would be required before he could proceed with a civil action for malpractice against either of the attorneys who represented him in the criminal action or PCR. There were two reasons he gained relief on Counts 4 and 5. One was because Attorney Simmons gained a limited remand in the direct appeal and discovered the evidence that led the appellate court to reserve

those two counts for PCR. The second reason was that Attorney Simmons then filed a PCR for Mr. Kraklio and obtained summary judgment vacating Counts 4 and 5.

B. Policy Behind the Exoneration Rule

An important part of the Uncontested Facts developed in the Summary Judgment proceedings is Kraklio's concession that Simmons informed him shortly after the direct appeal process began that he could assert his right to have his supervised probation commence. Kraklio chose not to do that. This circumstance was set out in the Affidavit of Attorney Kent A. Simmons attached to the Motion for Summary Judgment, and was originally asserted as an Affirmative Defense of Waiver in his Answer. (Answer; Simmons Affidavit; App. 4, 24) In his affidavit filed in response to summary judgment, Kraklio did not deny that Simmons imparted this legal advice or the timing of the advice. Kraklio simply attested to his "legal" opinion:

> Although Kent claims that my probation was suspended, that is not the case. I never posted an appeal bond and continued on probation or incarceration from April 17, 2003 through February 4, 2010. (Kraklio Affidavit, 5/9/16; App. 46)

Simmons pointed out all the facts Kraklio's affidavit failed to contest in his Second Statement of Uncontested Facts filed May 19, 2016. (App. 74-77) The policy concerns underlying the "relief-required" or "exoneration" rule ring quite loudly in the instant case. Comparison of the affidavits of the parties illustrates almost everything that is wrong with a legal idea that a convict who has violated probation, and gone to prison for the violation, should be able to gain damages for mistakes made by a probation officer or his attorney in determining his discharge date. (Competing Affidavits; App.) Kraklio's affidavit even claims he should receive money damages for the "inconvenience" of being on probation supervision. Mr. Kraklio pled guilty to three felony counts, and never claimed he was not guilty of the felonious conduct. Attorney Simmons gained relief on two of the counts on the basis of ineffective assistance of other counsel in regard to the statute of limitations that applied to the criminal charges. Mr. Kraklio now seeks to benefit from his felonious conduct, and all the predicaments and "inconvenience" his conduct caused him.

In addition to the *Trobaugh* court's policy concerns with "shifting the responsibilities for the consequences of the criminal's action" and "the paradoxical difficulties of awarding damages to a guilty person," the next concern cited in

Trobaugh was "theoretical and practical difficulties of proving causation." Mr. Kraklio formally admitted that he is a fraud. He pled guilty not just to an isolated act of welfare fraud, but to a scheme that engaged a multitude of fraudulent acts over two decades. He was notified by Simmons in the first attorney-client meeting that the probation officer could not unilaterally refuse to provide supervision during the direct appeal process. Kraklio chose to forego a demand for the start of his credit for time spent on probation. Kraklio never denied the fact of this advice from Simmons set out in the attorney's affidavit. (App. 23-24, 45-46) Should a court apply an analysis for comparative fault ? He sat on his rights and enjoyed the freedom of an unsupervised lifestyle. If Simmons had notified the probation officer that Kraklio would consider his probation period to have commenced because he had not filed appeal bond, the expected result would be the officer would require Kraklio to submit to supervision. It is a safe bet Kraklio would have sued Attorney Simmons for taking action against his wishes.

C. Plaintiff's Waiver of Error

Simmons argued the application of the *Barker* and *Trobaugh* cases in his brief filed contemporaneously with his Motion for Summary Judgment on April

23, 2016. (Brief pp. 5-6, 9-10; App. 31-32, 35-36) Plaintiff filed only one document in resistance to Summary Judgment, and that was the Resistance filed May 9, 2016. There was no supporting brief. The Resistance did not address the "Relief-Required Rule" or "The Exoneration Rule". The Resistance did not even mention *Trobaugh* or *Barker*. Kraklio did not cite any authority in the district court as to why those firmly established authorities should be overturned or expanded.

(App.38-41) Kraklio cited no such authority in his opening brief in the instant appeal, and he did not file a reply brief. Without authority for his argument that Judge Darbyshire's simple application of the "Exoneration Rule" was in error, Kraklio first failed to preserve error in the district court and then waived error in this Court pursuant to Rule 6.902 (2) (g) (3) when he failed to make any argument for expansion of the rule in his appeal brief. See: *State v. Maynard, 232 N.W.2d 265, 266 (Iowa 1975)*. Simmons argued both of those preservation defects in his appeal brief at page 21.

THE PANEL'S ERRORS

The Exoneration Rule, Illegal Sentence and Argument Preservation

There was no doubt the Exoneration Rule would preclude the instant suit for malpractice. In the district court, Kraklio did not even mention the *Barker and Trobaugh* cases by name, and simply stated, "The claims in this case are not similar to the cases cited by Defendant." Simmons had raised *Barker, Trobaugh* and the Exoneration Rule as his first ground for Summary Judgment. While Kraklio had admittedly not been exonerated from the conviction under Count 6, he offered no argument as to how the Court should expand those cases to carve out an exception for the convict who has not been exonerated. (Brief in Support of Summary Judgment, 5-6; App. 31-32) (Resistance, p. 2-3, App. 39-40) Not surprisingly, Judge Darbyshire applied the clear Exoneration Rule set out in the cases and granted summary judgment.

On appeal, Kraklio did mention the cases by name, but again he did nothing to explain how the Exoneration Rule in those cases should be expanded to create a rule to allow him to sue for malpractice. His argument on appeal was no different

than it had been in the district court: "The problem with relying on the Barker and Trobaugh decisions are that [sic] the facts in those matters are not similar to the facts in this case and the claim is not based on the same issues." (Appellant's Brief, p. 5) Kraklio cited no authority for his proposition that his case should not be precluded by the Exoneration Rule because the facts were "not similar". He offered no policy or other analysis as to why the appellate court should excuse his failure to offer a legal argument in the district court or why the appellate panel should expand the rule to protect his claim. He cited no authority. He did not do the work. The argument was waived. Two of the judges on the appellate panel did the work for him. The Court of Appeals decision reflects the effort and work this Court said should not be engaged. In *State v. Hicks,* 791 NW 2d 89, 97-98 (Iowa 2010), this Court quoted with approval two earlier decisions. The first quote was this: "[W]e will not speculate on the arguments [the parties] might have made and then search for legal authority and comb the record for facts to support such arguments." *Hyler v. Garner,* 548 N.W. 2d 864, 876 (Iowa 1996) Directly on the heels of that quote, the *Hicks* court delivered this one: "We do not assume a partisan role and undertake a party's research advocacy." *Inghram v. Dairyland Mut. Ins. Co. 215 NW 2d 239, 240* (Iowa 1974)

The Court of Appeals did undertake the research and fact development for Kraklio and did thereby assume the advocate's role in explaining that if, given the chance, this Court would extend malpractice claims to a convict who was not exonerated but had suffered an illegal sentence. Judge Mullins acknowledged there was no Iowa authority on this point, and then disclosed the result of his research:

> We have no Iowa cases considering this question,
> but the Kansas Supreme Court has discussed
> the " prior relief " requirement in a sentencing context.
> *See Garcia v. Bell,* 363 NW 2d 399, 408 (Kan. 2015)
> (Slip Op. 6)

The opinion notes *Garcia* was filed before the instant motion was heard in the district court, and even before *Barker* was published. The opinion then engages over three pages of legal and factual analysis of *Garcia, Canaan, Trobaugh, Barker* and another Kansas case, *Mashaney v. Board of Indigents' Defense Services,* 355 P. 3d 667 (Kan. 2015), to conclude: "If *Garcia* is a logical extension of *Mashaney,* then Kraklio's case is, similarly, a logical extension of *Barker."* Actually, the instant case is not a logical extension of *Barker,* and Judge Mullins's reference to *Barker's* "policy considerations" should have alerted him to that fact. (Slip Op. 6- 9)

At the top, it is highly important to distinguish some critical facts and procedures that prompted the *Garcia* decision. The case presented a situation where there was indisputably an "illegal sentence" imposed upon the plaintiff. Because of a legal error criminal defense counsel failed to correct, a longer prison sentence was imposed than was allowed by law. More importantly, the plaintiff's illegal sentence in *Garcia* "resulted in significant deprivations of liberty." When the plaintiff in *Garcia* gained relief on the illegal sentence by his own *pro se* motion, the Kansas court saw the parallel between an illegal sentence and a "conviction.":

> Of note, Garcia's claim of legal malpractice is factually distinguishable from that in *Mashaney* because it relates to an illegal sentence, rather than a wrongful conviction. Nevertheless, both errors resulted in significant deprivations of liberty, and *Mashaney's* reasoning is equally applicable here. Accordingly, Garcia was not required to prove that he was actually innocent of either the crime for which he was illegally sentenced to a post-release supervision term or the crime that triggered his imprisonment for violating the unlawfully imposed post-release supervision. Instead, Garcia was required to obtain post-

> sentencing relief from the unlawful sentence. That "exoneration" occurred when the district court acknowledged that it had imposed an illegal sentence by entering a nunc pro tunc order, setting aside the illegal post-release supervision term. *Garcia,* 363 P. 2d at 573.

Mr. Kraklio was never subjected to an illegal sentence. He originally pled guilty to three class "C" felonies in three counts of welfare fraud. The judge's attempt to put him on three consecutive terms of five years probation would have been illegal, but the probation officer immediately corrected that to just one five-year term of probation. Under Section 907.7, the Code, a defendant cannot be required to serve more than five years on any felony probation. (App. 6) Kraklio's complaint on the criminal revocation proceeding was not that an illegal sentence had been imposed, but simply that he should have been released from supervision on the legal sentence of probation that had been imposed. This is an important distinction on two levels.

First, the bright line of defining an "illegal sentence" clearly requires that there is a legal duty that can be shown as breached by the criminal defense attorney. This is the central theme in *Barker's* continued adherence to *Trobaugh*. The need for the malpractice plaintiff to prove proximate will discourage frivolous

claims. An illegal sentence is one that is not authorized by statute or is unconstitutional. *State v. Lathrop,* 781 NW 2d 288, 294 (Iowa 2010) The panel's analogy of Kraklio's situation to an illegal sentence is defective in that respect.

Secondly, the defective analogy opens up the expanded rule to major policy concerns the Exoneration Rule was designed to avoid. Those policy concerns were set out in *Trobaugh,* 668 NW 2d at 581-583, and adopted in *Barker* by its full embrace of *Trobaugh.* The panel's conclusion that its extension of *Barker* is consistent with the policy concerns of *Barker* is plainly wrong. The policy concerns of *Trobaugh* are quoted above at pages 14-16.

Error Not Preserved

In her dissent, Judge Vaitheswaran agreed this Court may someday see fit to allow a malpractice action when a criminal defendant has gained relief on "something other than relief from the underlying conviction." The basis of her dissent was that the revocation hearing transcript Kraklio filed in resistance to summary judgment did not show any particulars as to why the judge ruled the probation had expired in entering Kraklio's unsuccessful discharge. Judge Vaitheswaran did not believe the plaintiff had shown any proof that he had gained any relief on his sentence or his period of probation that was connected to anything Simmons had or had not

done. In essence, Kraklio's meager effort at resisting summary judgment in the district court had not preserved any error on Judge Darbyshire's ruling. (Slip Op. 11-13).

What is even more glaring and indisputable, is that Kraklio never raised a theory in the district court that depended upon the rule established in *Garcia.* The plaintiff would not have to raise the *Garcia* case by name, but would have to raise some authority to argue to Judge Darbyshire that he should go beyond the rule of *Trobaugh* and *Barker.* Simmons had raised both of those cases and the exoneration rule in his brief supporting summary judgment. Kraklio engaged in no analysis regarding the existing case law to develop an argument as to why the exoneration rule should be expanded to cover issues related to discharge from probation supervision when there is no dispute that the imposition of probation was legal. He filed a resistance citing some caselaw relevant to probation supervision, but he never addressed *Trobaugh, Barker,* or the Exoneration Rule.

In *DeVoss v. State,* 648 N.W. 2d 56, 60-63 (Iowa 2002), this Court abrogated previous case law that had allowed relaxation of rules of error preservation. The Court cited several cases where error preservation was relaxed in reviewing of summary judgment rulings. The Court noted it had also relaxed

error preservation rules in order to reverse district court decisions. With *DeVoss,* the Court stated it was abandoning the relaxation practice and creating a hard and fast rule for error preservation as a matter of fundamental fairness.

> [I]t is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider. Furthermore, it is improper to allow a party to choose to remain silent in the trial court in the face of error, taking a chance on a favorable outcome, and subsequently assert error on appeal if the outcome in the trial court is unfavorable. *DeVoss,* 648 N.W. 2d at 60.

The effect of Kraklio remaining silent on the possible expansion of the Exoneration Rule in the district court resulted in a drastic effect as the case stands at this point. Simmons requested the district court rule on "each and every" of his four grounds for summary judgment. (App. 36) Judge Darbyshire saw no reason to go beyond the grant of relief on the first ground. He did not rule upon the remaining three. If Kraklio had raised even a semblance of an argument based on *Garcia's* expansion of the Exoneration Rule, the judge may have given him the benefit of that argument and likely would have gone on to rule on at least one more of the three

remaining grounds. Now, with the appellate panel making Kraklio's case for him, this action is headed back to district court to address the remaining three grounds. This is a perfect illustration of the unfairness to the district court explained by the *DeVoss* decision. The judge was given no opportunity to rule on the claim, and as a result, saw no reason to rule on other grounds raised by Simmons. It is also a perfect illustration of the unfairness to Defendant Simmons.

CONCLUSION

For all reasons stated, the Court must grant Further Review, affirm the Order on Defendant's Motion for Summary Judgment and order dismissal of the suit.

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