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## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

### **I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING SEAY TO A 5 YEAR PRISON TERM?**

#### **ROUTING STATEMENT**

Because this case involves the application of existing legal principles to the facts herein, transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.903(2)(4)(2024) and 6.1101(3)(a)(2024).

#### **NATURE OF THE CASE**

This is an appeal from the judgment and conviction entered in the Iowa District Court of Black Hawk County following an Alford guilty plea to Failure to Comply with Sex Offender Registry (Second or Subsequent Offense), a Class D Felony, in violation of Iowa Code section 692A.104, 692A.105 and 692A.111 in which Seay received, *inter alia*, a five (5) year indeterminate term of imprisonment. (D0037, Order Judgment and Sentence, 7/23/2024).

Defendant-Appellant Otis Seay, hereinafter referred to as Seay, was charged by Trial Information with Failure to Comply with the Sex Offender Registry (Second or Subsequent Offense), a Class D Felony, in violation of Iowa Code section 692A.104, 692A.105 and 692A.111. (D0011, Trial Information,

11/28/2022). Seay pleaded not guilty to the charge. (D0015, Written Arraignment and Plea of Not Guilty, 11/29/2022). After several continuances, a plea hearing was set for April 27, 2023. (D0028, Order [setting plea], 3/24/2023). On that date, Seay tendered an Alford guilty plea to Failure to Comply with Sex Offender Registry (Second or Subsequent Offense). (D0032, Order Following Guilty Plea, 4/27/2023). Sentencing was initially set for June 29, 2023. Id. However, on that date, the Presentence Investigation Report was not completed and sentencing was continued to July 27, 2023. (D0033, Order [continuing sentencing], 6/29/2023). On July 27, 2023, the parties appeared before the Court, the Honorable David P. Odekirk, Judge presiding. The Court heard the arguments of the parties and sentenced Seay to an indeterminate period not to exceed five (5) years in prison, assessed a \$1,025.00 fine and 15% surcharge, payment of court costs, attorney fees, a \$260.00 civil penalty. See D0037, Order Judgment and Sentence, 7/27/2023 and D0043, Order Nunc Pro Tunc, 8/2/2023. Clearly the intention of the trial court was to sentence Seay to a five year prison as reflected in the amended order and not 1 year as initially stated in the original sentencing order. Seay appealed the sentencing Order. (D0040, Notice of Appeal, 8/1/23).

### **STATEMENT OF FACTS**

Seay was convicted of three counts of sexual abuse in the third degree on December 18, 2022. (D0013, Minutes of Evidence at 6, 11/28/2022). That

conviction required him to register as a sex offender with the Iowa Sex Offender Registry. Id. Seay began his initial registration on February 3, 2017, presumably after he completed his initial sentence of imprisonment. Id. Seay was convicted of Failure to Comply with Sex Offender Registry, 1<sup>st</sup> offense on September 11, 2018. Id. Seay was also convicted of Failure to Comply with Sex Offender Registry, 2<sup>nd</sup> or Subsequent Offense on April 9, 2019 and September 29, 2020. Id.

While staying at the Waterloo Residential Facility, Seay handed residential facility staff a business card with the Facebook profile name of Al Stump, Jr. Id. The business card had a telephone number of 319-290-2205. Id. The business card was given to Michelle Shepherd. Id. Records from Facebook indicated that account was created on September 9, 2022 and the phone number associated with that account was 319-290-2205. Id. Seay had not updated the Iowa Sex Offender Registry within five days after creating a Facebook account profile under the name of Al Stump, Jr. Id. Thus, sometime between the period of September 9, 2022 through November 18, 2022, Seay failed to comply with all sex offender registry requirements, particularly as it relates to updating relevant information as that term is defined in Iowa Code section 692A.101(23)(a). Seay registered the phone number of 319-290-2205 with the Iowa Sex Offender Registry when he appeared at the Black Hawk County Sheriff's Office on September 1, 2022. Id.

Additional facts will be discussed as pertinent to Seay's arguments.

## **JURISDICTIONAL STATEMENT (CAUSE)**

Iowa Code section 814.6 requires a guilty plea of defendant to establish good cause to proceed with an appeal as a matter of right. Iowa Code section 814.6(1)(a)(3). Good cause confers jurisdiction over the appeal. State v. Wilbourn, 974 N.W.2d 58, 66 (Iowa 2022); State v. Jordan, 959 N.W.2d 395, 399 (Iowa 2001). “[A] legally sufficient reason is a reason that would allow a court to provide some relief.” Id. Good cause exists to appeal from a conviction following a guilty plea when the defendant is challenging the sentence rather than the plea itself. State v. Damme, 944 N.W.2d 98, 105 (Iowa 2020); State v. Davis, 972 N.W.2d 546, 554 (Iowa 2022). In this case, Seay is challenging aspects to his sentencing and not the guilty plea, and therefore he has good cause to appeal.

## **ARGUMENT**

### **I. TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING SEAY TO A FIVE (5) YEAR PRISON TERM.**

**Standard of review:** Sentencing decisions are reviewed for abuse of discretion or for a defect in the sentencing procedure. State v. Thompson, 856 N.W.2d 915, 918 (Iowa 2014). “An abuse of discretion will only be found when a court acts on grounds clearly untenable or to an extent clearly unreasonable.” State v. Leckington, 713 N.W.2d 208, 216 (Iowa 2006). The reviewing court gives

sentencing decisions by the trial court a strong presumption in their favor. State v. Loyd, 530 N.W.2d 708, 713 (Iowa 1995).

**Preservation of error:** Seay filed a Notice of Appeal from the Order Judgment and Sentence sentencing him to, *inter alia*, 5 years in prison. (D0040, Notice of Appeal, 8/1/2023). “We hold that good cause exists to appeal from a conviction following a guilty plea when the defendant challenges his or her sentence rather than the guilty plea.” State v. Damme, 944 N.W.2d 98, 105 (Iowa 2020).

**Merits:** At the sentencing hearing held July 27, 2023, Seay made his arguments for a 5 year suspended sentence with a specific placement at the Waterloo Residential Facility. Seay’s attorney pointed to the fact that Seay had been incarcerated for at least 251 days prior to the sentencing date. (D0061, Sentencing Hearing held before the Honorable David P. Odekirk, Judge presiding, on July 27, 2023 at 9, line 11, 2/22/2024). Seay specifically asked that he be placed at the Waterloo Residential Facility instead of being sent to prison. (D0061, Sentencing Transcript at 9, line 16, 2/22/2024). At his allocution, Seay indicated to the Court that he opened the Facebook account to try to make some extra money because he is disabled. (D0061, Sentencing Transcript at 11, line 7-8, 2/22/2024). Seay further told the Court that he had started college while he was at the Facility. (D0061, Sentencing Transcript at 11, line 18-20, 2/22/2024). Seay further



recounted to the Court a number of difficult personal circumstances he has been through. Seay had been molested as a child and raped in prison. (D0061, Sentencing Transcript at 11, line 22-23, 2/22/2024). Furthermore, Seay's fifteen-year-old daughter is doing methamphetamine and no one can find her. (D0061, Sentencing Transcript at 12, line 5-6, 2/22/2024). Seay also has a twenty-year-old daughter that does not have anywhere to go and is apparently having sex with numerous guys just to find a place to stay. (D0061, Sentencing Transcript at 12, line 7-10, 2/22/2024). Finally, Seay reiterated to the Court that he has a number of different programming options he can attend while at the Waterloo Residential Facility. For example, Seay can receive mental health programming and attend Elevate while at the Facility. (D0061, Sentencing Transcript at 12, line 25 through 13, line 1, 2/22/2024). And as Seay himself put it, Riverview has his back. (D0061, Sentencing Transcript at 12, line 24, 2/22/2024).

Seay acknowledges that the Presentence Investigation Report recited his lengthy criminal history and ultimate recommendation of 5 years imprisonment. (D0034, Presentence Investigation Report at 17-18 [cover page included], 7-10-2023). The prosecutor also recited Seay's lengthy criminal history and recommended a 5 year prison sentence stating in part that Seay “. . . ran out of options with respect to community-based services.” (D0061, Sentencing Transcript at 8, line 20-21, 2/22/2024). As damning as the Presentence

Investigation Report was, the author of that report pointed out that in 2022 after Seay's release from prison, Seay was assessed using the Iowa Risk Revised. (D0034, Presentence Investigation Report at 17 [cover page included], 7/10/2023). The IRR scored Seay in the low category for future violence and the low category for future victimization. (D0034, Presentence Investigation Report at 17 [binder page included], 7/10/2023). The IRR also indicated that Seay would be placed at a low level of supervision. Id. Seay acknowledges that the PSI report immediately noted that Seay was placed at an intensive level of supervision as evidenced by his Waterloo Residential Facility placement. Id. The point that Seay is making is that he *could* be placed in community based supervision as indicated in the Iowa Risk Revised assessment tool. As to the 5 year prison sentence, Seay is not arguing that the sentence imposed was invalid or that the sentence was outside the statutory parameters, but only that the trial court abused its discretion in imposing the indeterminate prison sentence totaling 5 years. State v. Hopkins, 860 N.W.2d 550, 554 (Iowa 2015). In other words, Seay is arguing for a strictly probationary sentence. The reviewing court does not decide the sentence it would have imposed, but whether the sentence imposed was unreasonable. State v. Formaro, 638 N.W.2d 720, 755 (Iowa 2002). Sentencing courts in Iowa have broad discretion to rely on information presented to them at sentencing. State v. Headley, 926 N.W.2d 545, 550 (Iowa 2019). The relevant factors when imposing

sentence includes “the nature of the offense, the attending circumstances, defendant's age, character and propensities and chances of [the defendant's] reform.” State v. August, 589 N.W.2d 740, 744 (Iowa 1999)(quoting State v. Hildebrand, 280 N.W.2d 393, 396 (Iowa 1979). The trial court abused its discretion in sentencing Seay to a 5 year prison term.

### **CONCLUSION**

For all of the reasons stated above, Defendant-Appellant Otis Seay, Jr. respectfully requests that this Court reverse the sentence of the district court and remand this case for a new sentencing hearing.

### **NONORAL SUBMISSION**

Counsel does not request to be heard in oral argument.

### **CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATIONS.**

1. This Appellant Brief complies with the type-volume limitation of Ia. R. App. P. 6.903(1)(e)(2024), 6.903(1)(g)(1) and 6.903(1)(i)(1)(2024) because the Appellant Brief contains 2888 words and has been prepared in a proportionally spaced typeface using Times New Roman in 14 point font.

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