IN THE SUPREME COURT OF IOWA
Supreme Court No. 19-1285

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KENNETH LEE DOSS,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR WARREN COUNTY
THE HONORABLE RICHARD B. CLOGG, JUDGE

APPELLEE'S BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Doss has Failed to Show that His Trial Counsel was Ineffective.

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II. Doss's Parole was Lawfully Revoked and His Collateral Challenges Must be Pursued in the Proper Forum.

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ROUTING STATEMENT

Retention is unnecessary. Doss claims he has raised an issue of first impression, but he does not identify what issue of first impression he has raised. *See* Appellant's Br. p.11. The State submits that the claims raised can be resolved through the application of existing legal principles, thus, transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

Kenneth Lee Doss originally pleaded guilty and was sentenced in 2007. *See generally* Pet. Ex. 3 (Plea Hr'g Tr.); Pet. Ex. 6 (Sent. Order); App. 44–45. Since then, Doss has attempted to challenge his case in multiple forums. *See* PCR Appl. p.2 (acknowledging Doss has filed "PCR's, Habeas corpus, correction of sentence"); *see also Doss v. State*, No. 08-1512, 2009 WL 2184835, at *1 (Iowa Ct. App. Jul. 22, 2009) (dismissing appeal from denial of PCR). In 2017, Doss filed a new application for postconviction relief and he proceeded to a PCR hearing where he alleged (1) his counsel was ineffective for permitting him to plead guilty without informing him of the specific underlying conditions he eventually received as part of his 903B supervision and (2) the specific underlying conditions that the Iowa Board of Parole

imposed contained rules that are unconstitutional as applied to him. *See* PCR Appl.; Pet. Post-Trial Br.; App. 6–10, 47–59. The PCR court rejected both claims and Doss appeals arguing the PCR court erred on rejecting both claims.

Course of Proceedings

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

Facts

For his plea of guilty, Doss admitted that on or about September 6, 2005:

> I spent the night at my cousin's house. I got up in the middle of the night and went into my second cousin's bedroom, got underneath the covers, and I touched her pubes and I realized—I was in there about five minutes, realized what I was doing was wrong, and went downstairs.

Pet. Ex. 3 (Plea Hr'g Tr.) 11:16–:24. Doss also admitted that his second cousin was a child. Pet. Ex. (Plea Hr'g Tr.) 11:25–12:2.

ARGUMENT

I. Doss has Failed to Show that His Trial Counsel was Ineffective.

Preservation of Error

Doss claims he preserved error by filing a timely notice of appeal. Appellant's Br. p.12. This "is an incorrect statement of law." *E.g.*, *State v. Kirk*, No. 15-0242, 2016 WL 146553, at *1 (Iowa Ct. App. Jan. 13, 2016). The Iowa Court of Appeals explained this in a published opinion in *State v. Lange* approximately seven years ago: "While this is a common statement in briefs, it is erroneous, for the notice of appeal has nothing to do with error preservation." *State v. Lange*, 831 N.W.2d 844, 846–47 (Iowa Ct. App. 2013) (quoting Thomas A. Mayes & Anuradha Vaitheswaran, *Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice*, 55 Drake L. Rev. 39, 48 (Fall 2006)). As the Iowa Court of Appeal has "stated time and time again," including "more than fifty times since [the] published opinion of *State v. Lange*, . . . the filing of a notice of appeal does not preserve error for [appellate] review." *Dixon v. State*, No. 18-1972, 2019 WL 6358434, at *2 & n.1 (Iowa Ct. App. Nov. 27, 2019).

That said, this claim was raised to, and rejected by, the PCR court below. *See* Pet. Post-Trial Br.; Order Denying; App. 47–68. The State does not contest error preservation.

Standard of Review

Claims of ineffective assistance of counsel are reviewed de novo. *State v. Thorndike*, 860 N.W.2d 316, 319 (Iowa 2015) (citing *State v. Clay*, 824 N.W.2d 488, 494 (Iowa 2012)).

Merits

To establish ineffective assistance of counsel, "a defendant must typically show that (1) counsel failed to perform an essential duty and (2) prejudice resulted." *State v. Keller*, 760 N.W.2d 451, 452 (Iowa 2009) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Both elements must be proven, and failure to prove a single element is fatal to the claim. "If the claim lacks prejudice, it can be decided on that ground alone without deciding whether the attorney performed deficiently." *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). The "crux of the prejudice component rests on whether the defendant has shown 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would

have been different.' " *Whitsel v. State*, 439 N.W.2d 871, 873 (Iowa Ct. App. 1989) (*quoting Strickland*, 466 U.S. at 694).

Before pleading guilty, a defendant must be informed of "the mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered." Iowa R. Crim. P. 2.8(2)(b)(2). Doss argues that when he pleaded guilty his counsel was ineffective for failing to ensure he was informed of the conditions of the 903B supervision he eventually received when he was discharged from incarceration, specifically referencing the rules of the sex offender treatment program (SOTP) that he had to follow. *See* Appellant's Br. 12–21. The State disagrees and submits (1) the underlying conditions of 903B supervision are collateral consequences that a court need not disclose before accepting a guilty plea, (2) at the time of his guilty plea Doss was not misinformed about the collateral consequences, (3) the court substantially complied even if the conditions are direct consequences, and (4) Doss has failed to show he would have rejected a plea deal and proceeded to trial even if his counsel breached a duty.

Before reaching the merits, it is important to be clear what Doss is—and is not—challenging. Doss is not claiming that he was not

informed that 903B supervision was a consequence of pleading guilty. Instead, Doss merely argues that he was not informed of the specific conditions and rules that effectuate his supervision.

A. The conditions and rules of 903B supervision are at most collateral consequences.

Although a plea taking court must inform defendants of the consequences of their plea, they need only warn them of the direct consequences:

> To the extent defendant alleges the sentencing court failed to inform him fully of the consequences of his plea, he implicates the due process clause of the Fourteenth Amendment to the United States Constitution. To adhere to the requirements of the Fourteenth Amendment a sentencing court must [e]nsure the defendant understands the direct consequences of the plea including the possible maximum sentence, as well as any mandatory minimum punishment. However, the court is not required to inform the defendant of all indirect and collateral consequences of a guilty plea.

State v. Carney, 584 N.W.2d 907, 908 (Iowa 1998); *accord State v. Fisher*, 877 N.W.2d 676, 682–83 (Iowa 2016). The conditions of 903B supervision are not direct consequences.

To support his claim that the conditions of his 903B supervision were direct consequences, Doss primarily relies on the Iowa Court of

Appeals opinion in *State v. Hallock*.[1] 765 N.W.2d 598 (Iowa Ct. App. 2009). But Doss's reliance on *Hallock* is misplaced.

The court in *Hallock* determined that a 903B special sentence itself is a sentencing provision and that it is not a collateral consequence. *Id.* at 605–06. But in doing so, the court primarily relied on the fact that "[i]t is the court, not the parole board or the Iowa Department of Corrections, that imposes this special sentence." *Id.* at 605; *accord State v. Kress*, 636 N.W.2d 12, 21 (Iowa 2001) ("Significantly, section 901.10 gives the *court*, rather than the parole board, the express power to determine the application of section 124.413. That the court determines such application makes clear that section 124.413 is a sentencing statute." (emphasis in original)). But the opposite is true of the underlying conditions of 903B supervision.

The conditions of Doss's 903B supervision are contained in the parole agreement and the SOTP conditions and rules. *See* Pet. Exs. 1–2; App. 22–26; *see also* Iowa Code § 903B.1 (mandating supervision "as if on parole"). These parole agreements are between

[1] In his proof brief, Doss erroneously references *Hallock* as being an Iowa Supreme Court opinion, and he additionally provided a citation referencing an incorrect reporter volume, court, and year. *See* Appellant's Proof Br. pp.14–15.

the Iowa Board of Parole (IBOP), the Iowa Department of Corrections (IDOC), the Iowa Department of Correctional Services (IDCS), and Doss. *See* Pet. Exs. 1–2; App. 22–26. The sentencing court had no part in imposing the underlying conditions of Doss's supervision, and the court does not determine what is, or is not, included in them. *See* Iowa Admin. Code r. 201–45.2(1)–(2); Pet. Exs. 1–2; App. 22–26. The standard conditions of parole must be "as established and approved by the board of parole." Iowa Admin. Code r. 201–45.2(1). And any special conditions "shall only be imposed in accordance with the needs of the case as determined by the judicial district department of corrections, the department of corrections or the Iowa board of parole." *Id.* at 201–45.2(2). Thus, the sentencing court has no part in imposing the conditions of release and *Hallock* does not support Doss's position. Because it is the IDOC, the IDCS, and the IBOP imposing and determining the terms of Doss's supervision—and not the court—the conditions of supervision are not part of Doss's sentence and rule 2.8(2)(b)(2) does not require their disclosure. *See* Iowa R. Crim. P. 2.8(2)(b)(2) (requiring disclosure of "maximum possible punishment provided *by the statute defining the offense*"); *see also State v. Ramirez*, 636 N.W.2d 740, 742–43 (Iowa 2001)

(quoting Charles Alan Wright, *Federal Practice and Procedure* § 173, at 191–94 (1999)) (listing various collateral consequences including "loss of civil rights," "later parole date," "revocation of existing parole," "adverse recommendation from the court to the parole authorities," etc.).

The Iowa Supreme Court has explained that "[t]he distinction between 'direct' and 'collateral' consequences of a plea . . . turns on whether the result represents a definite, immediate and largely automatic effect on the range of defendant's punishment." *Carney*, 584 N.W.2d at 908 (quoting *State v. Warner*, 229 N.W.2d 776, 782 (Iowa 1975)). If the consequence "is mandatory, immediate, and part of the punishment for [the] offense, the court must inform the defendant of this consequence before accepting his or her plea." *Fisher*, 877 N.W.2d at 684.l

The underlying conditions of Doss's supervision were not a mandatory part of his sentence. First, Doss has failed to establish that SOTP was required or mandatory because of his conviction. His claim fails for this reason alone. Testimony presented during the PCR trial showed that SOTP was not a required aspect of his lifetime supervision and it was instead specifically chosen for Doss by the

IBOP and the IDCS. *See* PCR Hr'g Tr. 9:4–:24. An offender on supervision could even receive "no additional programming." PCR Hr'g Tr. 9:17–:24. Second, Doss voluntarily chose to sign the SOTP agreement and to participate in SOTP. *See* Pet. Ex. 2; App. 25–26. Doss had a choice to decline to agree to the terms contained therein and thus his decision to sign the agreement, and to be bound by the rules, was voluntary. *See State v. Iowa Dist. Ct. for Webster Cty.*, 801 N.W.2d 513, 516 (Iowa 2011) ("Harkins alleges, and the State does not dispute, that before he could participate in [SOTP], Harkins had to sign a 'Treatment Contract,' . . . Harkins refused to sign the contract and to participate in the SOTP."); PCR Hr'g Tr. 11:1–:7 ("They have the option of not signing [the SOTP agreement] but then that would requires us to take the matter in front of, in a parolee's case, the administrative law judge . . . ."). Third, the specific conditions imposed for Doss's supervision (such as SOTP and the SOTP rules) are decided by the IDOC, the IDCS, and the IBOP, and they are not part of the sentence at all. *See* Iowa Admin. Code r. 201–45.2(2). The precise conditions Doss received were not chosen by the court as part of Doss's sentence but were put in place by administrative agencies in their sole discretion. *See* PCR Hr'g Tr. 9:4–:24. Finally, even the

rules in the SOTP agreement itself are not mandatory because the agreement states—twice—that the rules can be changed: "I agree to abide by all conditions as stated in this contract throughout the duration of my supervision *unless I obtain documented approval for any changes, additions or amendments by my [Parole Officer], Board of Parole (when required) and [the] SOTP team*." Pet. Ex. 2 (emphasis added); App. 25–26. Doss's parole officer explained that the rules in the SOTP agreement "are negotiable" and that "[t]hey have the ability to get those amended and changed." PCR Hr'g Tr. 11:13–:16, 15:4–:6. It appears the SOTP rules are regularly amended and modified based on a particular offender's treatment needs. *See* PCR Hr'g Tr. 15:18–16:5 ("[W]e do have that evaluation period before we come up with amendments and changes to a more specified, specific plan for that individual."). The contested supervision conditions (i.e., the SOTP rules) are not a direct consequence because they were not a mandatory part of Doss's sentence.

The conditions of supervision were not an immediate consequence of pleading guilty. Indeed, while Doss claims that the conditions of his supervision are a direct consequence of his guilty plea, he simultaneously asserts that he is excused from the three-year

PCR time bar because he did not know about the conditions for years after his conviction.[2] *See* Pet. Pre-Trial Brief at pp.1–3 (claiming that although Doss was sentenced in 2007, his claims are not time-barred because "Doss was not aware of the terms and conditions" until August 15, 2015, and he was not "aware of the required rules of the [SOTP] until he was required to sign those rules on October 31, 2016"). This undermines Doss's assertion that the conditions and rules were a direct consequence because they were not immediate.

The conditions of supervision—and specifically the rules of SOTP that Doss is challenging—are not punishment. The Iowa Supreme Court has recognized that conditions and rules are essential to the rehabilitative and protective goal and purposes of parole. *See State v. King*, 867 N.W.2d 106, 121–22 (Iowa 2015). And the Iowa Supreme Court has also found: "SOTP was established for bona fide rehabilitative purposes." *State v. Iowa Dist. Ct. for Jones Cty.*, 888 N.W.2d 655, 662 (Iowa 2016) (quoting *Iowa Dist. Ct. for Webster Cty.*, 801 N.W.2d at 519). Quoting prior decisions, the court further recognized that:

[2] The record below reflects that the State did not assert a claim that the time bar would preclude any of Doss's claims.

> "There is a high rate of recidivism among untreated sex offenders and a broad range of agreement among therapists and correctional officers that clinical rehabilitation programs 'can enable sex offenders to manage their impulses and in this way reduce recidivism.' "

Id. (quoting *Iowa Dist. Ct. for Webster Cty.*, 801 N.W.2d at 519). Because the purpose of SOTP is to reduce recidivism and to rehabilitate, the rules of the treatment program are not punishment but are merely part of that treatment. The specific rules that Doss is contesting are part of the treatment program and were approved by the IDCS's clinical services director. *See* PCR Hr'g Tr. 10:17–:21. And the rules are modified and amended based on the individualized treatment needs of the specific offender after they have consulted with the IDCS's psychologists. *See* PCR Hr'g Tr. 15:18–16:5. Even Doss admitted that the purpose of the SOTP rules are "[t]o make sure the public is safe." PCR Hr'g Tr. 61:9–:10. The intent of SOTP—and its underlying rules—is rehabilitation and safety, not punishment.

Just as a sentencing court need not inform a defendant of the specific rules the IDOC imposes at their prisons when informing the defendant that incarceration is a possible consequence of pleading guilty, the court need not inform a defendant of the potential rules of supervision when informing them that a 903B special sentence is a

consequence of pleading guilty. The important part is that the defendant knows the consequence itself (i.e., that he was informed of the special sentence in general), not the underlying mechanisms and details of how that consequence will be implemented. Because the underlying conditions of supervision—and specifically the SOTP rules—are not direct consequences, this Court should reject Doss's argument and affirm.

B. When he pleaded guilty, Doss was not misled about the potential, future conditions of 903B supervision.

Doss claims that even if the conditions of his 903B supervision are collateral consequences, he was misled about the nature of the conditions. *See* Appellant's Br. pp.17–19. The State generally agrees that "[n]either defense counsel nor the court may *misinform* a defendant regarding collateral consequences of a guilty plea." *Saadiq v. State*, 387 N.W.2d 315, 324 (Iowa 1986) (emphasis in original) (citing *Meier v. State*, 337 N.W.2d 204, 207 (Iowa 1983)); *see also Mott v. State*, 407 N.W.2d 581, 584 (Iowa 1987) ("[I]f a defendant has been affirmatively misled by an attorney concerning the consequences of a plea, the plea may be held to be invalid, even though the consequences are characterized as collateral."). But the

State submits Doss has failed to show he was affirmatively misinformed about the conditions of his 903B supervision.

To support his claim he was misinformed, Doss relies solely on self-serving testimony he provided at his PCR hearing. *See* Appellant's Br. p.18. Specifically, Doss relies on his testimony that his counsel informed him that "[a]s long as [he] followed the actual law, [he] would be okay." PCR Hr'g Tr. 33:13–:22. Doss also testified that his counsel did not discuss any of the specific rules or conditions of 903B supervision with him. PCR Hr'g Tr. 33:23–34:6. At the PCR hearing—approximately 11 to 12 years after Doss's guilty plea—Doss's trial counsel could not recall any of their conversations or even Doss at all. *See* PCR Hr'g Tr. 21:3–:22, 25:2–:11. And interestingly, although Doss claims he was able to recall his counsel's precise words that happened to be favorable to him, when Doss was asked about what violations had caused his initial sentence of probation to be revoked, Doss admitted that he could not recall everything from "back then" because "that was 2007." PCR Hr'g Tr. 60:2–:8.

Doss's self-serving claim that his trial counsel misinformed him is not credible and this Court should reject it. *See Cole v. State*, No. 15-0344, 2016 WL 7395722, at *3 (Iowa Ct. App. Dec. 21, 2016)

(declining to find a breach of a constitutional duty based solely on applicant's self-serving testimony). And even if Doss's counsel had told him that, it did not rise to the level of affirmatively misleading him. This Court should reject Doss's claim and affirm.

C. Even if the underlying conditions of 903B supervision are direct consequences, Doss's counsel was not ineffective because the court substantially complied with rule 2.8(2)(b)(2).

A court need only substantially comply with Iowa Rule of Criminal Procedure 2.8(2)(b) before accepting a guilty plea. *See State v. Kirchoff*, 452 N.W.2d 801, 804 (Iowa 1990). "Substantial compliance is met unless the court's disregard for the requirements of rule [2.]8(2)(b) raises doubt as to the voluntariness of the plea." *State v. Yarborough*, 536 N.W.2d 493, 496 (Iowa Ct. App. 1995) (citing *State v. Fluhr*, 287 N.W.2d 857, 864 (Iowa 1980), *overruled on other grounds by Kirchoff*, 452 N.W.2d at 804). "Substantial compliance 'requires that the essence of each requirement of the rule be expressed to allow the court to perform its important role in each case.' " *State v. Weitzel*, 905 N.W.2d 397, 406 (Iowa 2017) (citing *State v. Meron*, 675 N.W.2d 537, 544 (Iowa 2004)).

The plea-taking court substantially complied and thus Doss's counsel was not ineffective even if the 903B supervision conditions

were direct consequences. Doss was informed that he would be placed on probation for life. Pet. Ex. 3 (Plea Hr'g Tr.) 10:11–:18. By being informed that he would be placed under supervision for life, Doss was put on notice there would be limitations on his freedoms. The court's notice was sufficient to convey the essence of the supervision and it was unnecessary to delve deeper into the underlying conditions. Doss's attorney was not ineffective because the court substantially complied with Rule 2.8(2)(b)(2).

D. Doss has failed to show he would have rejected a plea and insisted on proceeding to trial.

Even if there was a breach, Doss was not prejudiced. To show that he was prejudiced, Doss must show that but for counsel's breach, he would have rejected to plea and insisted on proceeding to trial. *See State v. Straw*, 709 N.W.2d 128, 138 (Iowa 2006). And Doss has failed to show he would have done so.

To support his claim of prejudice, Doss relies primarily on self-serving testimony he would have insisted on going to trial. *See* Appellant's Br. pp.19–21. But conclusory self-serving claims of prejudice are not sufficient to show a defendant would have insisted on proceeding to trial. *See, e.g.*, *Kirchner v. State*, 756 N.W.2d 202, 206 (Iowa 2008) (citing *Wanatee v. Ault*, 101 F. Supp. 2d 1189, 1204

(N.D. Iowa 2000), *aff'd*, 259 F.3d 700 (8th Cir. 2001)) ("Kirchner offered no evidence to support his self-serving statement that he would have accepted the plea deal had he known the great likelihood of his conviction of first-degree kidnapping."); *State v. Tate*, 710 N.W.2d 237, 241 (Iowa 2006) (rejecting self-serving statements as merely a conclusory claim of prejudice); *Smith v. State*, No. 09-1518, 2010 WL 4867384, at *6 (Iowa Ct. App. Nov. 24, 2010) ("[A] court does not have to accept this kind of self-serving claim."). Doss's testimony was not credible and it was insufficient to show prejudice.

In direct contradiction of Doss's claim is the plea bargain itself. Before pleading guilty, Doss was charged with sexual abuse in the third degree (a class C felony), lascivious acts with a child (a class D felony), and indecent contact with a child (an aggravated misdemeanor). FECR023573 Am. Trial Info.; App. 5. Had Doss been convicted of all three charges he would have faced 17 years' incarceration. *See* Iowa Code §§ 902.9(1), 903.1(2). And because sexual abuse is a forcible felony, Doss would not have been able to request a suspended sentence on that charge. *See* Iowa Code §§ 709.4(1), 907.3. But instead, Doss only had to plead guilty to a single charge and he was able to argue for (and received) a suspended

sentence with probation. *See* Pet. Ex. 3 (Plea Hr'g Tr.) 2:18–4:22, 7:13–8:20; Pet. Ex. 4 (Sent. Hr'g Tr.) 5:7–:22; Pet. Ex. 6 (Sent. Order); App. 44–45. And the record reflects Doss additionally received a dismissal on another assault charge in another case. *See* Pet. Ex. 3 (Plea Hr'g Tr.) 7:19–:21; Pet. Ex. 6 (Sent. Order) p.2 (referencing dismissal of another case number); App. 45. Doss received a substantial bargain and he has not shown that he would have rejected this opportunity and insisted on going to trial had he known of the potential rules and conditions he could receive as part of 903B supervision. This Court should reject his claim.

In addition to relying on his self-serving testimony, Doss attempts to point to facts that have happened years after his guilty plea as proof of prejudice. *See* Appellant's Br. p.21 (discussing how the SOTP rules "really effected" Doss and that Doss has had his supervision revoked because he violated the conditions of supervision). But this Court should decline to consider such matters as they are irrelevant to the current inquiry. What matters is whether if at the time of Doss's guilty plea if Doss would have insisted on going to trial, and even had Doss been informed of the particular rules and conditions he still would not have had the benefit of predicting the

future. And at the time of Doss's guilty plea, there is no evidence he would have rejected the favorable deal and insisted on going to trial.

Doss has failed to show he was prejudiced. This Court should reject Doss's claim of ineffective assistance of counsel and affirm the district court's denial of his application for postconviction relief.

II. Doss's Parole was Lawfully Revoked and His Collateral Challenges Must be Pursued in the Proper Forum.

Preservation of Error

Doss's again claims he preserved error by filing a timely notice of appeal. Appellant's Br. p.22. As discussed above, he is wrong in making such an assertion. *Lange*, 831 N.W.2d at 846–47. While the State does not contest error preservation for the majority of the claims raised because they were raised (and rejected) in the district court, Doss did not preserve error for every argument made on appeal. *See* Pet. Post-Trial Br.; Order Denying; App. 47–68. Specifically, on appeal Doss challenges the internet restrictions in the SOTP rules. *See* Appellant's Br. pp.23–24. But Doss did not challenge that rule below and it was not addressed by the PCR court. Pet. Post-Trial Br. p.10 ("Doss submits that the rules and requirements of his special sentence parole that restrict his dating, attending church, seeking counseling, and associating with people of

his choice, are unconstitutional and illegal as applied to him."); Order Denying p.8; App. 56, 67. Even if such a challenge were permitted in PCR proceedings, the claim regarding internet use is not preserved, and this Court should decline to address it. *See Harper v. State*, 397 N.W.2d 740, 742 (Iowa 1986) ("On appeal, we should not address issues, even if of constitutional magnitude, if error has not been preserved on the issue in the postconviction court.").

The State also notes that Doss appears to claim his challenge on appeal addresses an illegal sentence. *See* Appellant's Br. p.22. But Doss is not challenging his sentence. He is only challenging the conditions and rules imposed by the IBOP as part of his supervision. Doss is not excused from error preservation.

Standard of Review

"Constitutional challenges are reviewed de novo." *State v. Stephenson*, 608 N.W.2d 778, 782 (Iowa 2000).

Merits

Doss attempts to use this appeal from PCR to allege that the conditions of his supervision—as imposed by the IBOP—are unconstitutional as applied to him because his supervision was revoked. But while Doss can claim in PCR that his parole/supervision

was unlawfully revoked (which he does not claim in this appeal likely because there is evidence that he violated the rules and he openly admits that he violated the rules), he cannot use such proceedings to make a collateral attack on the rules themselves because the rules were imposed as an agency action and are not themselves subject to chapter 822 review. *See* Iowa Code § 822.2(e); PCR Hr'g Tr. 12:25–13:23 (discussing the rules Doss violated leading to his revocation), 46:17–:20 ("Q. And you eventually violated those rules? A. Yes, I did. Q. That's why you're back in prison? A. Yes."). This Court should decline to consider Doss's claim because Doss is required to pursue the claim under chapter 17A where the IBOP can defend their agency actions.

The Iowa Court of Appeals has previously found that postconviction relief is not the correct forum to challenge conditions of parole:

> The district court found PCR "proceedings are not an appropriate forum to challenge conditions imposed upon parolees." The Board [of Parole] is a state agency subject to Iowa Code chapter 17A. As such, the judicial review provisions of chapter 17A are "the exclusive means by which a person . . . adversely affected by" the Board's decisions may seek judicial review of those decisions. . . .

> [T]he mere imposition of parole conditions does not squarely qualify for PCR.

Benford v. State, No. 17-1253, 2018 WL 3912118, at *1 (Iowa Ct. App. Aug. 15, 2018) (first omission in original) (footnote omitted) (quoting Iowa Code § 17A.19) (citing *Frazee v. Iowa Bd. of Parole*, 248 N.W.2d 80, 82 (Iowa 1976)). The Iowa Court of Appeals has repeatedly explained that challenges to the IBOP's actions must be pursued under chapter 17A. *See, e.g.*, *Fassett v. State*, No. 15-0816, 2016 WL 3554954, at *6 (Iowa Ct. App. June 29, 2016) ("In effect, the district court ruled [the inmate] could not proceed under chapter 822 and should instead seek relief under chapter 17A. We agree. Chapter 822 does not include statutory authority for postconviction review of parole board policies."); *Pierce v. State*, No. 09-1853, 2011 WL 3925484, at *3 (Iowa Ct. App. Sept. 8, 2011) ("We conclude chapter 17A furnished the exclusive means of challenging the Board's action or inaction."); *McKeag v. State*, No. 08-0752, 2009 WL 2169041, at *2 (Iowa Ct. App. July 22, 2009) (explaining "[t]he parole board is a state agency governed by the Iowa Administrative Procedures Act, chapter 17A," and "the judicial review provisions of chapter 17A are 'the *exclusive means* by which a person . . . adversely affected by agency action may seek judicial review of such agency action,' except

as expressly provided otherwise by another statute referring to chapter 17A by name").

Because there is no authority to consider collateral challenges of supervision and parole conditions in PCR proceedings, the same should be true in an appeal from PCR proceedings. *See* Iowa Code §§ 822.2(1) (permitting proceedings under chapter 822 for only certain claims), 822.9 (authorizing appeal from PCR proceedings). This conclusion follows Iowa Court of Appeals decisions where the court has declined to consider claims made on appeal that would not be permitted in the underlying PCR proceedings. *See Mark v. State*, No. 17-0391, 2018 WL 3057444, at *2 (Iowa Ct. App. June 20, 2018) ("Becker finally claims trial counsel and postconviction counsel were ineffective for failing to challenge the amount of restitution owed. . . . We find this claim cannot be brought in the present action."); *Phillips v. State*, No. 99-1846, 2000 WL 1827368, at *4 (Iowa Ct. App. Dec. 13, 2000) ("Phillips's final complaint is that his postconviction counsel rendered ineffective assistance in failing to properly assert his claim that trial counsel should have challenged the district court's order imposing the payment of court costs and attorney fees without inquiring as to his ability to pay. We conclude his restitution

complaint is not properly before this court. Errors relating to victim restitution, court costs, or fees are not subject to collateral attack through the postconviction process under chapter 822. Other procedures exist for Phillips to address the issue of restitution." (citations omitted)). This Court should decline to address the merits of a claim in an appeal from PCR proceedings when such a claim is not permitted in PCR proceedings at all.

The very rules Doss contests demonstrate why chapter 17A proceedings are the appropriate forum to address his claims. The SOTP rules state—twice—that they could have been changed or amended upon request by Doss to his parole officer, the IBOP, or the SOTP team. Pet. Ex. 2; App. 25–26. Thus, Doss had administrative remedies he could have pursued instead of simply ignoring—and violating—the rules and making collateral attacks on the backend. And chapter 17A proceedings would have required that Doss exhaust his administrative remedies before he could proceed to judicial review. *See* Iowa Code § 17A.19(1). In judicial review constitutional challenges, such as what Doss is attempting to make, can be raised and resolved. *See* Iowa Code § 17A.19(10)(a) (granting court power in chapter 17A proceedings to correct agency actions that are

"[u]nconstitutional on its face or as applied"). And in such proceedings, the agency (such as the IBOP or the IDCS) could have responded to Doss's claims or amended the SOTP rules if Doss's claim had merit. But because Doss waited to make a collateral attack in chapter 822 proceedings, the respective agencies are not parties to the present appeal, and they were deprived of the opportunity to either defend or fix any alleged deficiencies.[3]

Had Doss correctly pursued his claim under chapter 17A, he would have been required to provide notice to the agencies, thus providing them an opportunity to respond. *See* Iowa Code § 17A.19(2). Instead, because Doss used chapter 822 proceedings, the record does not reflect that the IBOP (or any other relevant administrative agency) was informed of his collateral attack on their agency actions. This Court should decline to consider Doss's claims because he must pursue his challenge of the agencies' actions in the correct forum.

The State recognizes that "an impediment to the court's authority can be obviated by consent, waiver or estoppel." *State v.*

[3] Although Counsel represents the State in this appeal, Counsel does not represent the IDOC, the IDCS, or the IBOP.

Davis, 581 N.W.2d 614, 616 (Iowa 1998) (citing *State v. Mandicino*, 509 N.W.2d 481, 483 (Iowa 1993)); *see also Franklin v. State*, 905 N.W.2d 170, 171–72 (Iowa 2017) (explaining distinction between authority and subject matter jurisdiction). And it appears the State below did not argue there was a lack of authority. However, the circumstances of this case demonstrate why it is important to ensure chapter 17A proceedings are utilized when an agency action is implicated. Because the IBOP (and any other relevant State agencies) was not notified about Doss's claims, it had no opportunity to respond. It would make little sense to conclude that an agency's action can be reviewed in an improper forum with the incorrect parties when the agency never had an opportunity to waive their participation or to raise defenses such as the failure to exhaust administrative remedies. The IBOP appears to have never been notified this case was ongoing or that their agency actions were being contested. Permitting a claim to proceed in the manner Doss is attempting would subvert the intent of the legislature which crafted chapter 17A as the "exclusive means" to contest agency actions and included requirements that the agency be actually notified of such proceedings.

Because Doss's collateral challenge to the conditions of his supervision is not permitted in postconviction relief proceedings, this Court should decline to consider this claim. Doss can only challenge agency actions under chapter 17A, not chapter 822.

CONCLUSION

This Court should affirm the dismissal of Kenneth Lee Doss's application for postconviction relief.

REQUEST FOR NONORAL SUBMISSION

Oral submission is unnecessary.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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