

IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 20-0375

**TRAVIS BOMGAARS, KYLE CROSS, ANTHONY GOMEZ,
JAMES HALL, RAYMOND LABELLE, SHANE MILLETT,
KELLY SAND,**

Appellants,

v.

STATE OF IOWA,

Appellee.

**APPEAL FROM THE IOWA DISTRICT COURT IN AND FOR
JOHNSON COUNTY
THE HON. BRAD MCCALL JUDGE**

**AMICUS CURIAE BRIEF OF DUANE YATES IN SUPPORT
OF APPELLANTS**

/s/Thomas Hurd
THOMAS HURDAT0010952
LAW OFFICE OF THOMAS HURD P.L.C.
309 Court Avenue, Suite 233
Des Moines, IA 50309
Phone: (515) 875-4924
Fax: (515) 875-4925
Thomas@thomashurdlaw.com
ATTORNEY FOR AMICUS CURIAE DUANE
YATES

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

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(4) because the brief contains 1,561 words.
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 the brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman

Date: 24th day of February 2021

/s/Thomas Hurd

THOMAS HURD AT0010952
LAW OFFICE OF THOMAS HURD P.L.C.
309 Court Avenue, Suite 233
Des Moines, IA 50309
Phone: (515) 875-4924
Fax: (515) 875-4925
Thomas@thomashurdlaw.com
ATTORNEY FOR AMICUS CURIAE DUANE
YATES

STATEMENT REGARDING DRAFTING OF BRIEF

The Undersigned certifies to the Court that no party's counsel authored this brief, in whole or in part, and that no party or party's counsel contributed money to fund the preparation or submission of the brief, nor did any other person contribute money to fund the preparation or submission of this brief. The brief was entirely drafted pro bono by the Undersigned.

/s/Thomas Hurd
THOMAS HURD AT 0010952
LAW OFFICE OF THOMAS HURD P.L.C.
309 Court Avenue, Suite 233
Des Moines, IA 50309
Phone: (515) 875-4924
Fax: (515) 875-4925
Thomas@thomashurdlaw.com
ATTORNEY FOR AMICUS CURIAE DUANE
YATES

CERTIFICATE OF FILING

I hereby certify:

That I filed the attached typewritten Amicus Brief by electronic filing thereof on the 24th day of February 2021, to the Clerk of the Supreme Court, Iowa Supreme Court, 1111 E. Court Avenue, Des Moines, Iowa 50319.

/s/Thomas Hurd

THOMAS HURD AT0010952
LAW OFFICE OF THOMAS HURD P.L.C.
309 Court Avenue, Suite 233
Des Moines, IA 50309
Phone: (515) 875-4924
Fax: (515) 875-4925
Thomas@thomashurdlaw.com
ATTORNEY FOR AMICUS CURIAE DUANE
YATES

CERTIFICATE OF SERVICE

I hereby certify:

On the 24th day of February 2021, the Undersigned did serve the within Amicus Brief on all other parties to this appeal by electronic service thereof to the following respective counsel for said parties:

IOWA ATTORNEY GENERAL – CRIMINAL APPEALS DIVISION
PHILLIP MEARS

And served a copy of the attached brief to the Applicant at the following address via US mail:

Duane Yates #1030181
Newton Correctional Facility
307 South 60th Avenue West
Box 218
Newton, IA 50208

/s/Thomas Hurd
THOMAS HURD AT0010952
LAW OFFICE OF THOMAS HURD P.L.C.
309 Court Avenue, Suite 233
Des Moines, IA 50309
Phone: (515) 875-4924
Fax: (515) 875-4925
Thomas@thomashurdlaw.com
ATTORNEY FOR AMICUS CURIAE DUANE
YATES

TABLE OF CONTENTS

CERTIFICATE OF COMPLIANCE 2

STATEMENT REGARDING DRAFTING OF BRIEF 3

CERTIFICATE OF FILING..... 4

CERTIFICATE OF SERVICE..... 5

TABLE OF CONTENTS 6

TABLE OF AUTHORITIES..... 7

INTERESTS OF AMICI CURIAE 9

ARGUMENT.....10

 I. THE ABILITY TO APPOINT COUNSEL IN ACTIONS
 UNDER IOWA CODE 822.2(1)(E) LIES IN THE
 SOUND DISCRETION OF THE TRIAL COURT, AND
 COUNSEL APPOINTED TO REPRESENT INDIGENT
 DEFNDANTS PURSUING ACTIONS UNDER IOWA
 CODE 822.2(1)(E) ARE PAYABLE UNDER IOWA
 CODE 815. 10

CONCLUSION 17

TABLE OF AUTHORITIES

99 Iowa Acts, ch. 135 15, 16

Anderson v. State, 801 N.W.2d 1 (Iowa 2011) 10

Iowa Code 4(30)(a)..... 11

Iowa Code 13B(1)16

Iowa Code 444.10 (1966).....16

Iowa Code 815.7.....16

Iowa Code 815.10(1)(a) 13, 15, 17

Iowa Code 815.11 14, 15, 17

Iowa Code 822.2(1)(a) 10

Iowa Code 822.2(1)(c)13

Iowa Code 822.2(1)(d)13

Iowa Code 822.2(1)(e)*passim.*

Iowa Code 822.2(1)(f).....*passim.*

Iowa Code 822.2(1)(g)13

Iowa Code 822.312

Iowa Code 822.3A(1)12

Iowa Code 822.5*passim.*

Iowa Code 822.6C..... 7

Iowa Code 908.2A(1)(c)..... 13, 14

Maghee v. State, N.W.2d 28 (2002) 15, 16

INTERESTS OF AMICI CURIAE

Duane Yates is a prisoner incarcerated in Newton Correctional Facility who has filed a postconviction relief action in Woodbury County Case No. PCCV179303 raising a claim under Iowa Code 822.2(1)(e). Specifically, Yates contends, and the State of Iowa admits in their responsive filings, that Yates was not initially offered SOTP until after the expiration of his mandatory minimum sentence. Yates has sought and received the appointment of counsel over objections of the State that there is no right to counsel in an action under Iowa Code 822.2(1)(e). It is anticipated the State will attempt to attack the appointment of counsel just as they did in Appellant's case and the Public Defender has informally indicated counsel will not be paid for any assistance. Yates contends the appointment of counsel is valid and desires for the Supreme Court to settle the question to protect his interest in having counsel and pursuing his action before his sentence expires, however Yates' argument supporting the appointment of counsel relies directly on Iowa Code 822.2(1)(e) without additional Code sections. Therefore, while Yates supports Appellants, Yates' argument for counsel advanced here is slightly different than the arguments advanced by Appellants on an issue clearly preserved.

ARGUMENT

I. THE ABILITY TO APPOINT COUNSEL IN ACTIONS UNDER IOWA CODE 822.2(1)(E) LIES IN THE SOUND DISCRETION OF THE TRIAL COURT, AND COUNSEL APPOINTED TO REPRESENT INDIGENT DEFENDANTS PURSUING ACTIONS UNDER IOWA CODE 822.2(1)(E) ARE PAYABLE UNDER IOWA CODE 815.

Ours not to reason why, ours but to read, and apply. It is our duty to accept the law as the legislative body enacts it. Anderson v. State, 801 N.W.2d 1, 1 (Iowa 2011).

In their brief, Appellants argue the decision striking the appointment of counsel order should be set aside because Appellant's could have pursued their claims under Iowa Code 822.2(1)(a) and 822.2(1)(c). Appellant Brief at 64. While Amicus Yates supports this argument, Yates contends there is no need to rely on alternate code sections for appointment of counsel because appointment of counsel is not precluded under Iowa Code 822.2(1)(e) & (f) and appointments of counsel under these sections are still payable under Iowa Code 815.

Iowa Code 822.5 (2020 ed.) provides as follows:

822.5 Payment of costs. If the applicant is unable to pay court costs and stenographic and printing expenses, these costs and expenses shall be made available to the applicant in the trial court, and on review. *Unless the applicant is*

confined in a state institution and is seeking relief under section 822.2, subsection 1, paragraphs “e” and “f”, the costs and expenses of legal representation shall also be made available to the applicant in the preparation of the application, in the trial court, and on review if the applicant is unable to pay. However, nothing in this section shall be interpreted to require payment of expenses of legal representation, including stenographic printing, or other legal services or consultation, when the applicant is self-represented or is utilizing the services of an inmate.

The italicized language above does not preclude the appointment of counsel to an Applicant seeking relief under Iowa Code 822.2(1)(e) and Iowa Code 822.2(1)(f). Rather, the word “shall” as used in the italicized language above is an auxiliary verb which speaks only to when the Court has a mandatory duty to do the action of the sentence (to “make available” the “costs and expenses of legal representation”). Iowa Code 4(30)(a) (“The word “shall” imposes a duty.”). The word “unless” as used above is a conjunction which severs the relationship between the action of the sentence (appointment of counsel under a mandatory duty) and an Applicant who is “confined in a state institution and is seeking relief under section 822.2, subsection 1, paragraphs “e” and “f.” “Unless” does not otherwise speak to whether the court, in its discretion, may appoint counsel under the same circumstances. Nothing in Iowa Code 822.5 imposes a mandatory

duty upon the Court to refrain from appointing counsel in actions under Iowa Code 822.2(1)(e) and Iowa Code 822.2(1)(f) when the court deems counsel appropriate and desirable, if appointment is otherwise allowed by law. *See generally*, 822.5.

In contrast to Iowa Code 822.5, other sections of Iowa Code 822 do utilize language mandatorily restricting the discretion of courts to take certain actions. *See*, Iowa Code 822.3 (“...An allegation of ineffective assistance of counsel in a prior case under this chapter *shall not* toll or extend the limitation periods in this section *nor shall* such claim relate back to a prior filing to avoid the application of the limitation periods...”); Iowa Code 822.3A(1) (“...The court *shall not* consider, and opposing counsel shall not respond to, such pro se filings.”); Iowa Code 822.6C (“Costs *shall not* be charged to the applicant, the applicant’s attorney, the county attorney, or the attorney general for converting a court file to an electronic format or for otherwise providing access to a court file under this chapter.”). Such preclusive language is absent from Iowa Code 822.5 or, if present, only precludes the Court from appointing counsel in actions under Iowa Code 822.2(1)(e) and Iowa Code 822.2(1)(f) as a matter of right, not as an act of discretion.

The Court may still need a grant of statutory authority to appoint counsel, however, a grant of authority is found in Iowa Code Chapter 815. Iowa Code 815.10(1)(a) states:

The court, for cause ...shall appoint the state public defender's designee... to represent an indigent person at any stage of the criminal, postconviction ... or on appeal of any criminal, postconviction ... in which the indigent person is entitled to legal assistance at public expense.

For actions brought under Iowa Codes 822.2(1)(a)-(d) and Iowa Code 822.2(1)(g) the “cause” is satisfied by the entitlement of the Applicant to counsel as a matter of right under Iowa Code 822.5. For actions brought under Iowa Code 822.2(1)(e) and Iowa Code 822.2(1)(f), the “cause” is not an entitlement to counsel as a matter of right, but may be shown if the court deems counsel to be appropriate or desirable in an exercise of its discretion.¹ Counsel may be appointed due to the high importance of the matter such as here, where multiple inmates have a “colorable claim” to redress a common, serious grievance restricting their liberty. *See, e.g.* Iowa Code 908.2A(1)(c)

¹ It is clear that the district court here did find Mears participation in the trial court proceedings highly desirable. The Court specifically commended Mears as “an outstanding and zealous advocate for his clients” whose “involvement in the case greatly facilitated the presentation of the facts, as well as the Court’s consideration of the law.” Decision at fn. 70. This is entirely consistent with the Undersigned’s view of Mears reputation in the legal community which many lawyers strive to emulate.

Another example may be where the court believes counsel is because the Applicant “lacks skill or education and would have difficulty presenting” the Applicant’s case. *See, e.g.* Iowa Code 908.2A(1)(c).

An appointment of counsel as outlined above is payable under Iowa Code 815. Iowa Code 815.11 clearly indicates the indigent defense fund is available to pay appointments under Iowa Code 822 and there is no limitation excluding actions brought under Iowa Code 822.2(1)(e) and Iowa Code 822.2(1)(f). Nothing contained in Iowa Code 822.5 changes this – it says only that appointment is required under a mandatory duty. Iowa Code 822.5 contains a narrow exclusion which does not allow payment when the inmate is “self-represented or utilizing the services of an inmate.” This is a narrow exclusion designed for inmates to not be paid for their own pro se legal work or for that of so called “jailhouse lawyers,” but is plainly not broad enough to include an attorney appointed to represent an Applicant in an action brought under Iowa Code 822.2(1)(e) and Iowa Code 822.2(1)(f). Accordingly, a non-inmate attorney appointed in the discretion of the Court to represent an Applicant in an action brought under Iowa Code 822.2(1)(e) and Iowa Code 822.2(1)(f) is eligible to be paid by the indigent defense fund.

Nothing about the Court's prior precedents forecloses this analysis. The Court's prior precedents generally consider only whether Applicants bringing actions under Iowa Code 822.2(1)(e) and Iowa Code 822.2(1)(f) are entitled to counsel as a matter of right², or, in the alternative, whether the Court has "inherent discretion" to appoint counsel and, if so, whether counsel appointed through the Court's "inherent discretion" can be paid. *See, Maghee v. State*, N.W.2d 28 (2002) ("we are not convinced that the inherent power to appoint counsel to assist the court in conducting a proceeding carries with it the power to order the state to compensate counsel thus appointed."). The argument advanced here, that the Court has statutory discretion to appoint counsel, does not rely on the "inherent discretion" of the Court. Rather, the argument here relies on a reading of Iowa Code 822.5 *in pari matrimonia* with Iowa Code 815.10(1)(a) and 815.11 and is therefore different from the issues considered in *Maghee* and its progeny.

Also, the Court in *Maghee* did not consider Iowa Code 815.10 which had been recently amended at the time of *Maghee* by 99 Iowa

² This appears to have been the rationale of the trial court in denying counsel. Dec. at 23.

Acts, ch. 135 § 28. *See generally, Maghee v. State*, N.W.2d 28 (2002) (every reference to Iowa Code ch. 815 is to 815.7). The *Maghee* court only considered that Iowa Code 444.10 (1966) had been abolished. *Maghee* at 31 (Iowa 2002). The *Maghee* court did not consider whether the recent amendments enacted by 99 Iowa Acts, ch. 135, specifically the amendment to Iowa Code 814.10, had created the precise authority the *Maghee* court had found ceased to exist when Iowa Code ch. 444.10 had been abolished. 99 Iowa Acts, ch. 135 appears to be the first enactment that consolidated payment for postconviction representation under the coordination of the State Public Defender. 99 Iowa Acts, ch. 135 at § 3 (adding postconviction relief to Iowa Code 13B, subsection 1). While the *Maghee* court did consider Iowa Code 815.7, 815.7 relates only to payment of counsel and sets the rates for payment when a counsel is appointed. Iowa Code 815.7 is not a statute containing any grant of authority for the Court to appoint counsel. On the other hand, Iowa Code 815.10, which the *Maghee* court did not consider, clearly confers a grant of appointing authority upon the Court. Accordingly, *Maghee* is not controlling.

Because 822.5 read *in pari matrimonia* with Iowa Code 815.10(1)(a) and 815.11 authorizes discretionary appointment of counsel and payment statutorily, this issue can be favorably resolved in favor of Appellants on this ground and any decision on the “inherent discretion” of the court to appoint counsel or order the public defender to pay for it, while interesting, can be resolved another day.

CONCLUSION

WHEREFORE, for the reasons stated, Amicus Curiae Duane Yates requests this Court decide the issues presented herein in favor of Appellants.

/s/Thomas Hurd
THOMAS HURDAT0010952
LAW OFFICE OF THOMAS HURD P.L.C.
309 Court Avenue, Suite 233
Des Moines, IA 50309
Phone: (515) 875-4924
Fax: (515) 875-4925
Thomas@thomashurdlaw.com
ATTORNEY FOR AMICUS CURIAE DUANE
YATES