IN THE SUPREME COURT OF IOWA

No. 23-0005

JOHN FELLER,

Petitioner-Appellant,

v.

STATE OF IOWA,

Respondent-Appellee.

ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR SCOTT COUNTY
HONORABLE MICHAEL SHUBATT, JUDGE

PETITIONER-APPELLANT'S FINAL BRIEF

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CERTIFICATE OF SERVICE

On October 18, 2023, the undersigned certifies that a true copy of the foregoing instrument was served upon the Petitioner-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to:

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/s/ Philip B. Mears
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ROUTING STATEMENT

On April 9, 2021 the Iowa Supreme Court decided Fortune v. State, 957 N.W.2d 696 (Iowa 2021) and Becher v. State, 957 N.W.2d 710 (Iowa 2021). Those cases significantly clarified the law with regard to sex offender modification cases, such as this one, brought under 692A.128.

The Supreme Court described a two step process for district courts.

First, there would be a determination of whether the applicant satisfied the statutory criteria for modification. Those were referred to as "gateway" requirements. One of the major requirements is that the applicant be a "low risk" to reoffend.

Second, assuming the person satisfies step one, the district court is given "discretion" in considering the application. The Supreme Court discussed what factors could or could not be considered in that exercise of discretion. The Court said that the Court should consider "only those factors that bear on whether the Applicant is at low risk to reoffend and there is no substantial benefit to public safety in extending the registration requirement". Fortune v State, 957 NW 2d 696, 706 (Iowa 2021) The court cautioned that some factors would really be "punishment" and should not be considered. This consideration must be supported by "substantial evidence." Fortune v State, 957 NW 2d 696, 703 (Iowa 2021)

In this case, the State stipulated to Feller satisfying the gateway requirements. Hearing Tr. p. 28 lines 12-16. John Feller was not only a low risk to reoffend, but he

was a "very low risk." Exhibit 1; (Con. App. p. 10)

Despite that very low risk, Judge Michael Shubatt denied relief, finding that public safety justified keeping Feller on the registry for the rest of his life. (App. p. 16)

The public safety concern had to do with the fact that Feller has a biological daughter, L.T. She was not the victim of his crime. L.T. was 4 years old when Feller went to prison in 2011. She was 15 years old at the time of the hearing in 2022. L.T. is the half sister of the victim in Feller's case. The victim was a step daughter who was 12 years older than L.T.

The public safety problem was that Feller, on a regular basis, up to and including 2022, would write letters to L.T. While Feller was on special parole, which was from 2014 to 2018, this was done with permission from both Feller's parole officer and his ex wife, who was L.T.'s mother. At first L.T. wrote back on occasion. However by 2022 she did not open the letters and did not want Feller to be sending them. There is no indication, however, that anyone told Feller that.

That is it. The public safety is that Feller periodically sent letters or cards to L.T. She now does not open them. He has no contact with her other than the letters.

It is hard to understand how this concern is supported by "substantial" evidence. It is hard to understand how Feller being on the registry impacts this

concern. It is hard to understand how this concern for L.T. translates into a concern for the entire community.

This case would provide a good opportunity for the Supreme Court to clarify what a "benefit to public safety" would be, sufficient to justify denying modification. Retention would be appropriate under Rule 6.1101(b) or (d) or (f).

Lower courts need clarification as to when what is the "public safety" justification for denying modification for low risk persons.

STATEMENT OF THE CASE

Nature of the Case:

This is an appeal brought by John Feller from a denial of an Application for Modification off the Sex Offender Registry. That action had been brought under 692A.128 of the Code. After a resistance and a hearing, the Application was denied by Judge Michael Shubatt, in an order dated October 3, 2022. (App. p. 13) The Judge also denied the Motion to Amend the findings, in an order dated December 6, 2022. (App. p. 26)

Notice of Appeal was filed on December 30, 2022. (App. p. 28)

Course of Proceeding on the Modification request:

John Feller filed his Application for Modification under Section 692A.128 on December 1, 2021 (App. p. 7). He filed it in Dubuque County which was both his county of residence and the county of conviction.

On February 1, 2022 the Dubuque County Attorney filed a Resistance to the Application. (App. p. 11) The Court set the case for hearing.

The hearing took place on July 13, 2022, in person, at the Dubuque County Courthouse. The judge was Judge Michael Shubatt. Judge Shubatt had been the judge who had sent Feller to prison back in 2011.

At the hearing Feller submitted exhibits, including the risk assessment report, Exhibit 1; (Con. App. pgs. 6-13) and several other exhibits to better explain the assessment report. An affidavit from John Feller was filed, rather than have him testify. Exhibit 8; (App. p. 86) The affidavit addressed his life since he was released from jail. The State chose not to cross examine him about that affidavit.

At the hearing several witnesses testified for the State.

Ruling denying relief

Judge Shubatt denied relief in a 5-page opinion filed on October 3, 2022. (App. p. 13) The Judge followed the format for these cases as spelled out by the Iowa Supreme Court. For the first step, he found that Feller met the minimum threshold requirements. Indeed the State had stipulated to this. Tr. p. 28, lines 12-16. Judge Shubatt then exercised his discretion to find that the application should be denied. He found there was a substantial benefit to public safety for remaining on the registry. (App. p. 16)

Very specifically, Judge Shubatt found that Feller presented a public safety risk

because he had written letters to his biological daughter L.T. for the past decade. Here is specifically what he found.

> Every month for the past decade, Feller has written L.T. letters.[1] (Here is footnote [1]: "This communication was conditionally approved by L.T.'s mother, Kayla Wolter, after discussion with Feller's Treatment Services Manager at DOC"). The general tone of the letters is manipulative; Feller constantly pushing his young daughter for a relationship she does not want to have. At this time, L.T. wants no communication with Feller. Feller continues to write her nonetheless. Brown testified that this emotional manipulation and pushiness was the exact same behavior she experienced in the years that Feller groomed her to engage in the sexual acts which eventually led to his incarceration. Given these parallels, she does not believe Feller has changed at all.
>
> Having observed and listened to Brown, the Court finds her to be an extremely credible witness and accepts her unrebutted testimony as fact. For these reasons, the Court also gives weight to her belief, which is based on her own experience and Feller's similar pattern with respect to his younger daughter, that Feller's obligation to register as a sex offender should continue.
>
> Ruling page 2-3; (App. pgs. 14-15)

The Judge acknowledged that it was a difficult decision for the court since testing showed Feller was low-risk. He noted that the Supreme Court had said that this finding was "weighty" evidence in the exercise of discretion. Ruling p.3; (App. p. 15)

The Judge found the case similar to a Court of Appeals decision from 2022 in State v. Larvick, 2002 WL 610361 (Iowa App. 2022) . He found that the evidence showed a pattern of behavior by Feller towards his current 15 year old daughter, L.T. that was similar to the prior abuse of Jessica Brown, her sister. Abusing Jessica was the case that resulted in Feller's conviction and placement on the Registry.

There were several additional comments indicating other factors that went into the judge's decision. Those included:

1. The Judge noted that Feller did not testify, choosing to just submit an affidavit. Here is what the judge said about the judge's own observation of Feller in the court room.

> Feller did not testify at the hearing, instead choosing to submit an affidavit. The law does not require him to testify, but that decision left the Court no impression of Feller other than its observation of his demeanor in the courtroom, which can best be described as discomfort and avoidance. Feller did not make eye contact with the Court nor with the witnesses who testified. He offered no explanation as to how and why he has changed, assuming he has changed. He did not express any remorse at the hearing for what he did to Jessica, even after hearing her testify about how much it has affected her. *See State v. Seidell, 977 N.W.2d 508* (Table at p. 3) (Iowa App. 2022). Feller did not explain why he continues to contact his 15-year-old daughter when she wants nothing to do with him.
> Ruling p 3; (App. p. 15)

2. In the end, the Judge found Feller showed a pattern.

> There is a pattern nonetheless, one that was established by Brown's testimony. That pattern is a manipulative, never-ending push to establish a relationship with a young girl who does not want such a relationship. While the facts of this case are slightly different from *Larvick*, they are the same on one salient point: Feller continues to engage in an identifiable pattern of behavior that he exhibited with his older daughter in the prelude to and course of his sexual abuse of her[2] (Here is what footnote [2] says: "It bears repeating that Feller did not testify, nor did he present any evidence to rebut or contradict the concerns raised by Brown and Walter").
> For all of these reasons, the Court finds that Feller presents a significant enough risk to reoffend that he should continue to register as a sex offender, notwithstanding his classification as low risk to reoffend and the other factors contained in Iowa Code
> §692A.128(2).

> The application is denied. This action is dismissed at Feller's cost.

Motion to Amend

On October 18, 2022, Feller filed a Motion to Amend or to enlarge findings as authorized under Rule 1.904. (App. p. 18)

Feller asked the court to amend or to enlarge the findings to address how writing letters to his daughter constituted a danger to the general public. Motion to Amend at pages 2-4; (App. pgs. 19-21)

Feller also asked the court to address his claim that an appropriate factor for modification should be the length of registration and the facts surrounding the creation of the lifetime registration requirement. The judge in his original order said nothing about the criminal procedure and how an essentially a two count case with the same victim for the same behavior, wound up being two separate criminal cases. It was that anomaly that resulted in lifetime registration.

Feller also asked the court to amend or to enlarge his findings to address the role played by Kayla Wolte, the mother of L.T. She was also the mother of the victim, Jessica Brown. The court had found the facts in Feller similar to those presented Larvick v State, 2022 WL 610361 (Iowa App. 2022)

In Larvick, however, an important component in the safety concern was the inability or unwillingness of the victim's mother, who had been married to Larvick, to

provide any kind of protection to the children.

In Feller, the victim of the offense acknowledged that her mother had been a strong supporter once it turned out the abuse was known. Tr. p. 16 lines 20-25. It was clear that the mother would be particularly protective of L.T. if there was any real concern.

In fact, the mother testified and in her view, the concerns were for L.T. but also others in the community. Tr. p. 21 line 25 to p. 22 line 9.

The Motion to Amend was denied without addressing the points raised by Feller. (App. p. 26)

Proceedings from the Criminal case

On October 24, 2011 Feller was sentenced after a guilty plea for the Class D felony of Lascivious Acts with a Child in both FECR95382 and FECR96569. Feller was sentenced to five years in prison in each case, to run concurrently. Feller was also given a $750 suspended fine for each case. He was also given a 10-year special sentence. Exhibit 16; (App p. 99) The two cases involved the same victim, covering the same time period.

Feller was released from prison on January 14, 2014. He discharged his special sentence on August 18, 2018. Exhibit 8; (App p. 87)

The timing of Feller's two cases is particularly relevant to his current registration requirement. Here is the timeline on the two charges:

4/18/2011 – Complaint filed in FECR095382- See online docket, Exhibit 9. (App.

p. 95)

4/25/2011– Trial Information was filed in that case charging one count of Lascivious Acts and one count of Sexual Abuse Third Degree. Exhibit 10; (App. p. 96) The Lascivious Acts charge was alleged to have been committed between 2007-2011 with the victim being J.B., a person 13 years old.

7/12/2011– A plea agreement was reached on July 12, 2011. Feller would plead guilty to two counts of Lascivious Acts, the D Felony, with the prosecution recommending a suspended sentence. See Exhibit 15, noting particularly the date first signed by the prosecuting attorney. The agreement called for the State to recommend a suspended sentence. Exhibit 15; (App. p. 98)

7/14/2011 – Instead of just amending the original Trial Information, a new case, FECR096569 was opened by filing a new and separate case. That case was opened as a separate case by filing of the Trial Information. Exhibit 13; (App. p. 102) The charge was the Class D Lascivious Acts, committed between 2007-2013 with the victim being J.B. a person 13 years old. The Minutes for that case were identical to the Minutes in the original case. (Con. App. pgs. 17-19 and 20-22) This second count covered a slightly longer time frame, moving the end date from 2011 to 2013.

8/3/2011 – Feller's lawyer wrote Feller explaining what had happened. Exhibit 20; (App. p. 91) The intent of the prosecutor had been to amend the original Trial Information to add the new count. Instead, a separate case was filed. Apparently this

was done while the prosecutor was out of the office and there was temporary help.

Presumably the parties did not appreciate the registration consequences of having an actual second case when the cases were not consolidated.

8/24/2011 – A Guilty Plea is entered in both cases.

10/24/2011 – Sentencing takes place in both cases. On October 24, 2011 Feller was sentenced for two cases of Lascivious Acts with a Child, FECR95382 and FECR96569, the D felony. Feller was sentenced to five years in prison in each case, to run concurrently. Feller was also given a $750 suspended fine for each case. He was also given a 10-year special sentence. Exhibit 16; (App. 99)

STATEMENT OF FACTS

The Facts Regarding the Criminal Case

The facts of the criminal case were not that complicated and were not that unusual. They are described in the Minute's of Testimony. Exhibits 11 and 14; (Con. App. pgs. 17-19 and 20-22) The Minutes of Testimony for the two different criminal cases were identical.

John Feller was married to Kayla Feller, now Kayla Wolter. Kayla Wolter testified at the modification hearing. She had a daughter, Jessica, born in 1994 from a prior marriage. There was also a daughter, L.F who was born during her marriage to John Feller. L.T. was 15 years old at the time of hearing in 2022. The four of them lived together from approximately 2000-2012. Tr. p. 18 line 25 to page 26 line 6.

Jessica would have been 16 years old when the charges were first brought in 2011. The abuse had been going on at least over the previous 4 years.

Jessica finally told her mother, who immediately confronted John Feller. She ordered him out of the house, changing the locks and removing all his belongings from the home. Exhibit 11, pages 1-2; (Con. App. pgs. 17-18)

There was no evidence that John Feller had ever done anything to his biological daughter, L.T. who was only about 4 years old when Feller was charged and went to prison.

Other Facts about John Feller

At the modification hearing, John Feller did not testify. Instead, he set out information about his life since the criminal case in 2014 in an affidavit. Exhibit 8; (App. p. 86)

Feller's affidavit explained a little bit about how he came to have to register for life. His lawyer wrote him during a criminal case explaining that there was going to be a slight delay. The delay was caused by the fact that the county Attorney's office has filed a new criminal charge, rather than amend the original one. See Exhibit 8 and Exhibit 20; (App. pgs. 86 and 91)

Feller understood that he would only have to register for 10 years. Indeed, the Department of Public Safety wrote him in prison. See Exhibit 17; (App. pg. 89) Four years later, after he got out of prison, he was informed that the Department of Public

Safety changed their position and was now requiring him to register for life. See Exhibit 19; (App. pg. 90)

His affidavit also explained a few things about his life since he was released from prison in January 2014. Those included:

1. He had no criminal charge of any kind since he got out of prison.
2. He had sex offender treatment while incarcerated and then completed the same program while on supervision. That included fully accepting responsibility for his actions.
3. He has been employed full time since he was released. He has worked at his present job for the last two and half years.
4. He has rented the same place in Dubuque for 8 years.
5. During that time and that work, his credit rating has gotten good.

Feller submitted exhibit 21, in response to the argument about the letters. Exhibit 21 contained a set of what are called generic notes from his parole officer between 2014 and 2017. That corresponded roughly with the period of time Feller was on special sentence. (App. pg. 92)

Those notes show that Feller received permission to communicate with L.T. He first asked his parole officer whether that would be possible. The parole officer contacted L.F's mother, Kayla. Over the course of those three years, the parole officer and L.F's mother had given John permission to communicate with L.T. There was even some communication back from L.T. to her father. (App. pg. 92)

Treatment for John Feller

The First Judicial District's assessments spend more time than other districts in setting out the treatment history for the applicant in one of these cases. That was the case with Feller's assessment. According to Exhibit 1, page 2, treatment started in prison in November 2012 and lasted until October 30, 2013. This included sections on victim impacts, and disclosure. There was also the sexual history polygraph, which he passed near the end of treatment. Exhibit 1; (Con. App. p. 7)

Upon release, he participated in the "phase 1 and 2 treatment group". He started February 5, 2014, completed those phases, and then completed aftercare on February 7 2018. Exhibit 1; (Con. App. p. 7)

It is significant that Feller had over 5 years of treatment, both in prison and in the community including the polygraph examination. It would have been during the time in the community while he was in treatment that his parole officer approved having contact with his youngest daughter L.T.

Testimony from the State's witnesses at the hearing

The State presented two witnesses at the hearing in July in Dubuque. The first witness was Jessica Brown, now 27 years old. She was the victim in Feller's criminal case. She briefly discussed the impact of the offense on her life. It was short in recognition that that impact on her was really not the reason she wanted to testify. Tr. p.9 line 2-13.

She had a concern about her younger sister, L.T. , who was 15 years old in the summer of 2022. Tr. p.9 line 22-23. She is close to her sister L.T. Tr. p.10 line 13-25.

She expressed a concern about L.T. and the "contact that Mr. Feller is attempting to make with her". Tr. p. 11. lines 4-12. She talked about letters Feller had sent, essentially from 2012 when he was in prison, through April of 2022. Tr. p.12 lines 1-4.

According to Jessica, the letters have a theme. "The theme is very much it is push." p.13 lines 1-2. She saw this as John Feller being continuously demanding wanting something or another. According to Jessica, this was similar to what occurred with her. Tr. p.13 lines 14-15.

She did, however, clarify that in her case the pushing by Feller had to with sexual demands. Tr. p.13 lines 19-20. On cross examination, Jessica indicated that she thought that Feller's continued registration protected L.T. and others. She thought that the general public with children would be at risk. Tr. p.14 line 35 to p.15 line 1-8.

She also said that L.T. sister lives with their mother. She indicated that her mother had been "absolutely" protective of Jessica and her sister, L.T. Tr. p.16 lines 18-25. She acknowledged that at least while John Feller was on parole, he had specific permission from both her mother and the parole officer to correspond. She understood that the parole officer was monitoring the letters. Tr. p.17 lines 10-14.

The other witness for the State was John Feller's ex-wife Kayla Wolter. She had two children from the previous marriage when she married John Feller in 2000. She

and John Feller had one child together, who was L.T.

She acknowledged John Feller's parole offer had contacted her to see if it was alright for John to send a letter to L.T. She explained that she had some limitations on what John could say. She then described the current letters situation.

> Laura is very aware that John writes her letters and she is very aware. I have told her numerous times that if she wishes to write to him that she can. She makes up her own mind which she is now at the age where she makes up her own mind about what kind of communications he wants with her father. She does not want communication with her father. She does not read the letters. She does not open the letters. Many of the newer letters have basically been put in a pile and were opened for this. She is very scared that what happened to her sister will happen to her if she had any contact with him.
> Hearing Tr. p. 21, lines 4-15.

Current Registration Requirements

John Feller is required to register for life. That is because he has two cases with convictions for sexual offenses. Exhibit 19; (App. p. 90) Each conviction alone would have only required 10 years on the registry. Each conviction involved the same victim. Neither conviction is an "aggravated" offense, requiring lifetime registration. Since they are in separate case numbers and were never consolidated, they count as two cases even if the sentencing was at the same time involving the same victim. See 692A.102(6) and Newton v. Iowa Dept. of Public Safety, 2011 WL 3480993, at *1 (Iowa App.,2011).

Feller is currently a Tier III registrant. That means he has to report in person to the Sheriff four times a year.

Feller is subject to the safe zone restrictions in 692A.113. He is not subject to the residency restriction in 692A.114.

John Feller has registered since 2014.

Discussion of Risk Report

There was no dispute at the hearing as to whether John Feller was low risk. The County Attorney stipulated to that during the hearing. Tr. p. 28; lines 12-16. Indeed, the judge found that Feller satisfied the gateway requirement, which included being low risk. Ruling p. 2; (App. p. 14)

Discussion of Risk assessment

All agreed that Feller was a low risk to reoffend. That factor is not only one of the gateway requirements, it is also an important factor when the court exercises discretion. Fortune, 957 N.W. 2d at 705. Indeed it is a "weighty" consideration. Becher v State, 957 N.W. 2d710. 716(Iowa 2021)

Section 692A.128(2) says that to be granted, an Application for modification must satisfy several criteria including subsection "c". That subsection says

> c. A risk assessment has been completed and the sex offender was classified as a low risk to reoffend. The risk assessment used to assess an offender as a low risk to reoffend shall be a validated risk assessment approved by the department of corrections.

692A.128. Modification, IA ST § 692A.128

But what exactly is “low” risk?

Section 692A.128 and almost all of these instruments used for the assessment use the terms "low", "moderate", and " high". One very basic question is what does those terms mean?

Because of some confusion about that, the STATIC-99 authors changed the terms in 2016. It turns out that "low, moderate, and high" were always terms relative to the "average" rate of reoffending. High meant 'higher than average'. This was a little confusing however since the average rate of reoffending itself is what many people would think of as "low". So the STATIC99 scoring was changed accordingly. "Low' became "Very Low Risk" and/or 'Below Average Risk".

The point of this is that "high" always meant higher than what the "average" is. It does not mean fifty one percent. Moreover, “average” is in fact a very low number just by itself.

The Iowa Department of Corrections, in consultation with the Iowa Division of Criminal and Juvenile Justice Planning, did a comprehensive study of sex offenders in Iowa about ten years ago. Their report was completed in 2010. According to that study the total rate of reoffending for all sex offenders in Iowa was 3.5%. See Exhibit 7 page 4; (App. p. 67) If I understand this statistical

measure, the "average" rate would be about that number.

What tools are used?

There are three recognized and validated tools or scoring methods generally used by DCS across the State. These are the STATIC 99-R, the ISORA, and the STABLE 2007. These are the tools that are "validated" and used by the "Department of Corrections." See 692A.128(1)(c).

There are also validated methods for combining the tests to produce a "combined" score.

Scoring Summary

If you look at the various tests and scores, John Feller has an overall combined risk assessment of low.

As set out in the DCS assessment, Exhibit 1; (Con. App. p. 6), here were Feller's reported risk scores from the different tests, or combination of tests.

Test	Score	Adjusted for Time Free
STATIC 99R	-1 which was Risk Level II- below average	Risk Level I or Very Low Risk
ISORA	Low risk	
ISORA/ STATIC combined	Low risk	
STABLE 2007	Low risk	
STATIC/ STABLE	Low risk	

combined		
Overall	low	

STATIC 99-R

Of these tools, the one that is best known for measuring risk is called the STATIC 99-R. This is a nationally recognized and validated scoring system for determining risk for sexual reoffending. It has also been validated for use in Iowa.

The STATIC 99-R test instrument, in 2016, switched from using the terms "low," "low-moderate," "moderate-high," or "high" to five levels relative to average. The questions did not change. The point system did not change. How that score was described was what was changed.

In Iowa, a score of "-1" is "low". See the sheet that was used for Feller appearing in Exhibit 2; (Con. App. p. 13) With the new terminology "low" is now either "below average risk" or "very low risk."

The STATIC 99R score is measured from the point the person is released from prison, or begins probation. The score itself it does not take into account behavior since that initial point.

Time free adjustment

Recent research by the authors of the STATIC 99-R indicates that the way to update the risk for the passage of time is to consider offenses since release from

prison/or placement on probation. See Exhibit 6; (App. p. 63) For every 5 years without a new sex offense, the risk % is cut in half. This, essentially means that if the risk was 3.9% percent upon release, it would be half that after five years of offense free behavior. See Hanson, R.K., Harris, A.J.R., Letourneau, E., Helmus, L.M., & Thornton, D. (2017, October 19). Reductions in Risk Based on Time Offense Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender. *Psychology, Public Policy, and Law.* Advance online publication. http://dx.doi.org/10.1037/law0000135 . Exhibit 5; (App. p. 47)

Figure 3 from that article is a chart that appears as Exhibit 6; (App. p. 63) It shows how a particular risk level goes down over time where there is offense free time in the community.

John Feller scored "-1" on the STATIC-99R test. With offense free time considered, Feller crossed the threshold to Risk Level I in 2017. Exhibit 6; (App. p. 63) Below Average is in fact "Very Low risk. His risk would have been cut in half again by 2022.

What is desistance?

The term "desistance" is mentioned in the article on Time free as a factor. Exhibit 5; (App. p. 47) The point of "desistence' and the point when Rick Level I is reached are the same point. The DCS report did not use the term "desistance" in her report. It did

discuss the meaning of Risk Level I at page 3 of the report. Risk Level I and desistance are the same point. The term 'desistance' comes from the Hansen article.

Here is the significance of that point, whatever it is called. At that point the risk of sexually offending is the same or lower than the risk presented for persons placed on probation or released from prison who do not have sex offenses. See Hanson article, Exhibit 5 p. 2 ;(App. p. 48)

The reasoning is that those non sex offenders are not required to register despite having some very small level of risk. When the sex offender's risk gets that low or lower, they should not have to register either.

ISORA

The second assessment used is the Iowa Sex Offender Risk Assessment (called the ISORA). The ISORA is another validated scoring tool for measuring sex offender risk. It was developed by the Iowa Division of Criminal and Juvenile Justice Planning in 2010, along with the Department of Corrections. It was based on a sample of over 1,000 sex offenders required to register on the Iowa Sex Offender Registry. The results were then cross validated against the STATIC 99. At the same time a composite score was developed and validated, essentially, being a blend of both the ISORA score and the STATIC 99.

The ISORA test, like the STATIC test, uses fairly objective information which is subject to verification through Department of Corrections' documents. It

is discussed both in the assessment.

John Feller received an ISORA score of “3”, putting him in the low risk range to reoffend. Low risk is 0.3% according to the DOC study.

STABLE 2007

The third scoring method used in the August 2019 assessment was the STABLE-2007. The STABLE test is intended to consider “stable dynamic risk factors.” A dynamic risk factor in the trade is essentially a clinical impression based on talking with the person. This is in contrast with "static" information, which is objective information, usually taken from court or prison/probation records.

DCS protocol calls for administering the STABLE test in addition to the two different "static" tests, those being the STATIC 99R and the ISORA. The consideration of dynamic factors by definition involves self reporting. That is what the whole test is about.

John Feller scored “2”, which is “low”.

Combined scores

In addition to those two scoring tools, the statisticians have validated combined scores in several cases. There is a statistically validated combined ISORA/STATIC 99-R. There is also a statistically validated combined score of

the STABLE 2007 and STATIC 99-R.

As might be anticipated, the combined scores for Feller were both "low" risk.

Individuals who commit family sex abuse have the lowest rate of reoffending

Whether the person is a family member is identified as a risk factor. See STATIC Factor #8; (Con. App. p. 13) But what is important is that you score points, which raises your Risk Level, if the victim is not a family member. That should be said again. It is less of a risk if the victim is family member. The least amount of points for "victim characteristics" are scored on these validated tools if the offense occurs with a family member. This is consistent with the accepted conclusion that incest offenders in general have the lowest re-offense rates of virtually any kind of sexual offenders. Hanson, R.K. (2002). Recidivism and age: Follow-up data from 4,673 sexual offenders. Journal of Interpersonal Violence, 17, 1046-1062. http://dx.doi.org/10.1177/088626002236659

ARGUMENT

THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING JOHN FELLER'S APPLICATION FOR MODIFICATION

Standard of Review:

Justice Appel in the Fortune case set out the standard of review in these modification cases brought under 692A.128. The standard of review depends on which step in the process resulted in the denial of relief.

The first step for a district court is the determination of whether the gateway requirements are established. Review is for error of law. Fortune, 957 N.W. 2d at 702-03. In this case everyone, including the judge agreed that Feller satisfied the gateway requirements.

The second step for the District Court is to exercise "discretion" in considering the application. Here is what Justice Appel said about that discretion:

> Once the initial threshold is met, the district court may grant modification. Iowa Code § 692A.128(5). As will be explained in greater detail below, the term "may" ordinarily vests the trial court with discretion. (citation omitted) "An abuse of discretion occurs when a district court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Wilson, 878 N.W.2d 203, 210–11 (Iowa 2016). "**A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law."** State v. Gomez Garcia, 904 N.W.2d 172, 177 (Iowa 2017) (quoting Graber v. City of Ankeny, 616 N.W.2d 633, 638 (Iowa 2000) (en banc)).
> Fortune v. State, 957 N.W.2d 696, 703 (Iowa, 2021)

The Fortune case made clear that there were certain reasons for denial that would be an abuse of discretion.

> In a modification proceeding, once the statutory

requirements have been met, the district court, in addition to compliance with the statutory requirements, **may consider additional factors that are relevant to the question of whether the offender poses a sufficient risk of reoffense or that public safety would require the registration regime be continued to provide a degree of control on the offender and provide information to the public.**

Specifically, a district court commits an abuse of discretion when it fails to consider a relevant factor, or considers an improper or irrelevant factor, on the question of whether the ongoing risks of danger from the sex offender justifies continuation of the registration requirements. *See Roby*, 897 N.W.2d at 137.

In the exercise of discretion under Iowa Code section 692A.128, the district court must take care to ensure that public safety, and not punishment, provides the lens through which facts are evaluated. *See State v. Pickens*, 558 N.W.2d 396, 400 (Iowa 1997) ("[T]he statute was motivated by concern for public safety, not to increase the punishment.").

Where only proper factors have been considered, we find an abuse of discretion only where there is a clear error of judgment. *Roby*, 897 N.W.2d at 137. The district court's stated reasons for a decision on modification must be sufficient "to allow appellate review of the trial court's discretionary action." *Cf. State v. Barnes*, 791 N.W.2d 817, 827 (Iowa 2010) (applying the principle to a sentencing case).
Fortune v. State, 957 N.W.2d 696, 707 (Iowa, 2021)

[W]e conclude the district court should consider only those factors that bear on whether the applicant is at low risk to reoffend and there is no substantial benefit to public safety in extending the registration requirements.

Fortune v. State, 957 N.W.2d 696, 706 (Iowa, 2021)

What can be derived from these statements about appellate review of the exercise of discretion?

Appellate review of the exercise of discretion is for abuse of discretion. That abuse of discretion standard, particularly in this context, is clearly not a toothless review.

(1) All reasons given must be related to current public safety which in turn is related to the risk posed by the Applicant.

(2) If a proper factor is considered, it must be supported by substantial evidence.

(3) Consideration of an improper factor would be an abuse of discretion.

(4) Failure to consider a relevant factor would be an abuse of discretion.

Preservation of Error:

Error was preserved in this case by making written argument to the District Court and by filing a Motion to Amend.

Summary of Argument

There was/is no question that John Feller satisfied the threshold criteria for modification. Judge Shubatt acknowledged that John Feller was low risk to reoffend. For that reason the focus on for this brief is whether the Court abused its discretion in denying the Application

Indeed the district court abused its discretion in a number of ways.

(1) The judge's primary reason for denying the application was the judge’s

imagined threat Feller currently posed to his daughter, L.T. When the evidence about that threat is examined, it should be clear that there is not substantial evidence to support that need to continue Feller on the registry.

(2) There was also an abuse of discretion because there was no substantial evidence that Feller posed any danger to the community at large. L.T. already knows about John Feller's offense. Having Feller on the registry does not make her any safer. Presumably, to support a finding of the registration, there must be something by way of threat to the community. There simply is no substantial evidence of that threat, given his very low risk.

(3) Discretion involves a balancing of factors. Failures to consider relevant factors are an abuse of discretion. In this case, Feller argued that the court should consider the unusual procedural events in the criminal case, which unfairly gave Feller lifetime on the registry. If the prosecutor had only amended the Trial Information to add the second count, Feller would have only had to register for 10 years. He would be almost finished with that obligation.

The court should consider as a relevant factor the harsh length of registration which was apparently caused by a clerical error.

(4) Fortune cautioned that the judge was not to use "non validated assessments made by the district court based upon the nature of the crime and its apparent relationship to recidivism." Fortune at p. 708. In this case, the court relied on the fact

that at the hearing, Feller did not make eye contact with Judge. The court characterized his demeanor as “discomfort and avoidance”. Moreover the judge was critical of the fact that Feller testified by affidavit.

There is no validated basis for thinking that a sex offender's discomfort when appearing in court with his victim is a basis for finding an increased risk. Moreover, affidavit testimony is perfectly acceptable- particularly when the prosecutor has the opportunity to cross examine it and chooses not to do that.

A. What do the Supreme Court cases say as a general matter about particular reasons for or against modification?

Fortune and Becher had a few generalizations about when “public safety" could justify continuing registration under certain limited circumstances.

(1) A court can consider a factor if there is a "substantial benefit" to public safety. It should be noted that the term is "substantial" benefit. Presumably just a "little benefit" or "some benefit" would not be enough.

(2) The concern about public safety must amount to a "threat to public safety.” Fortune at 706. Presumably a threat would come back to "risk."

(3) Registration might be needed to provide a degree of control on the offender and provide information to the public. Fortune at p. 706.

(4) A "conclusory appeal to public safety" would not defeat a modification application. Fortune at 706. "The threat to public safety must be tied to the individual

applicant and the record established in each case." Fortune at p. 706.

(5) Justice Appel cautioned that District Courts must "take care to ensure that public safety and not punishment provides the lens through which facts are evaluated". Fortune at p. 707.

(6) Along that same line, Justice Appel said that the results of risk assessment tools should not generally be overridden by "non-validated risk assessments made by the District Court based on the nature of the crime and its apparent relationship to recidivism." Fortune at p. 708.

B. What did the Court in Fortune and Becher say about particular factors presented in those cases?

The Court discussed Fortune's criminal record during the period of registration. The Court said criminal convictions could in fact be considered. They had to be related to some current risk or a present pattern, consistent with the behavior that led to the sexual offense. Fortune at 709. There had to be a pattern.

The Court concluded that the District Court improperly considered the fact that Fortune had hastily arranged a marriage six years before, perhaps to avoid a Department of Human Services investigation. The Court said that was an improper consideration.

> To the extent there may have been a whiff of suspicion in 2013 arising from a quick marriage, that whiff has dissipated after a six-year marriage and family life without incident. We do not think his marriage six years ago can be considered a

> risk factor today to justify the continuation of registration requirements.
> Fortune v. State, 957 N.W.2d 696, 708 (Iowa, 2021)

The Court rejected the argument that Fortune's lack of remorse was either sufficiently supported by the record or was improperly considered. Fortune at p. 709. Here is what the Court had to say on that point:

> Another factor relied upon by the district court was Fortune's lack of remorse. The record developed in this case, however, does not demonstrate a lack of remorse. When Fortune testified, neither party asked him questions regarding the topic, nor did the State make an argument about his lack of remorse at the hearing. It seems to have been a nonissue to the parties. Further, the record shows that Fortune successfully completed SOTP, which generally requires that an offender confront his responsibility for past offenses. On the record developed in this case, the district court erred in relying on a lack of remorse that did not have a factual basis in the record.
> Fortune v. State, 957 N.W.2d 696, 709 (Iowa, 2021)

In the Becher case, the District Judge had noted that Becher had adjusted well to the registration regime, and therefore had no persuasive reason for a modification. Justice Appel said this in finding this an improper reason:

> We do not agree, however, that successful adjustment to the sex offender registration requirements is a factor for denying modification. Indeed, the mandatory requirementin Iowa Code section 692A.128(2)(*a*) that an offender experience a period of time in the community without reoffense suggests that successful adjustment over time is a *positive factor* that reduces the need for ongoing compliance with the registration requirements.
> Becher v. State, 957 N.W.2d 710, 717 (Iowa, 2021)

C. There have been several relevant Court of Appeals cases since the Fortune case.

Since the Fortune case, there have now been seven Court of Appeals decisions considering appeals from the denial of modification requests.

In State v. Todd, 2021 WL 3075756 (Iowa Ct. App. July 21, 2021), the Court of Appeals reversed the denial of an application for modification. The primary issue, however, was whether Todd satisfied the threshold requirement to complete all required Sex Offender Treatment.

The Court concluded that there was not "substantial evidence" that Todd was ever required to complete any Sex Offender Treatment Programming. Since the District Court had denied the Application for not satisfying the threshold criteria, this was a reversible error.

The second case was State v. Larvick, 2022 WL 610361 (Iowa Ct. App. Mar. 2, 2022), a case from Woodbury County. This case was relied upon by Judge Shubatt in denying relief. It will be more fully discussed later in the brief.

Larvick had to register for ten years. Everyone agreed that he had satisfied the threshold criteria for modification. The District Court, in a pre-Fortune case, denied the Application, exercising its discretion.

The District Court and then the Court of Appeals found that there was substantial evidence that Larvick currently poses a specific risk to his youngest

daughter, who is the younger sister of the victim.

The appeal court also found that a risk to just the daughter was enough to satisfy the standard under Fortune. Neither court identified how keeping Larvick on the Registry made his daughter any safer.

The third case decided by the Court of Appeals was State v. Seidell, 2022 WL 951002 (Iowa Ct. App. Mar. 30, 2022). In Seidell, the District Court exercised discretion to deny relief based on what the Court said was an appalling "lack of remorse exhibited by Mr. Seidell during the testimony." The Court of Appeals, noting that Fortune had indicated that lack of remorse could be a basis for denying relief, upheld the District Court's denial. The appellate decision says that Seidell denied the offense, and did not think he had done anything wrong.

There are then two cases that are helpful in understanding discretion.

State v. Buck, 2022 WL 951067 (Iowa Ct. App. Mar. 30, 2022), was also decided on March 30, 2022. In Buck, the Court of Appeals reversed the District Court denial of modification for two reasons. First, the Court of Appeals determined that the District Court had improperly found that he was not low risk. Buck had argued that the District Court determination lacked substantial evidentiary support and amounted to error. The Court of Appeals agreed.

The Court of Appeals in Buck went further to address at least part of the exercise of discretion by the District Court. At the hearing one victim testified along with family

members. Testimony focused on the nature of the crimes, which was given some weight by the District Court.

Here is what the Court of Appeals had to say:

> As noted, the district court held a hearing. Family members of the children who were abused testified against modification of the sex offender registry requirement. Some of the testimony focused on the nature of Buck's crimes. The district court relied on this testimony, citing the particulars of Buck's crimes and his "cavalier attitude" concerning them. The district court did not have the benefit of *Fortune*, which stated reliance on the nature of the crimes came "perilously close to" advocating for "punishment, an impermissible goal of the sex offender registration." *See id.* at 708.
> While *Fortune* permitted consideration of "increased risk based upon ... repeated patterns of behavior," the comparison was between patterns in "past offenses and present behavior." *Id.* at 709. The supreme court explained, "The provisions of sex offender registration are onerous. The direct and collateral consequences of sex offender registration include stigmatization, challenges in finding employment, restrictions on residency and movement, and difficulty in finding housing." *Id.* A companion opinion indicated a period of time in the community without re-offense was a positive factor. *See Becher*, 957 N.W.2d at 717.
> *3 Because the focus here was on past crimes and past patterns of behavior, we sustain the writ and remand for consideration of the modification application in light of *Fortune*.[2] (footnote omitted)
> State v. Buck, 2022 WL 951067, at *2–3 (Iowa Ct. App. Mar. 30, 2022).

The next case from the Court of Appeals was State v. Oltrogge, No. 21- 0776, 2022 WL 2824774 (Iowa Ct. App. July 20, 2022). In Oltrogge, the appeal court reversed the District Court's denial of relief for Oltrogge, in another modification case.

The Court went further and concluded that since there were no good reasons for denying modification in the record, there were plenty of reasons to grant it. For that reason there was no point in a remanding for a hearing. Consequently, the court just remanded the case with instructions to grant the application.

The Court of Appeals in its ruling says a number of things that are relevant to the consideration of any case. Almost all of these things were discussed in the context of the exercise of discretion rather than consideration of threshold requirements. Essentially, the State conceded that Oltrogge has established the threshold requirements.

1. Here are relevant points made.
   A. Perhaps most importantly, the Court of Appeals noted that the fact that Oltrogge was low risk to re offend as measured by DCS, while not "determinative," was "weighty evidence on the modification issue." State v. Oltrogge, No. 21-0776, 2022 WL 2824774, at *4 (Iowa Ct. App. July 20, 2022).
   B. The Supreme Court in Becher had stated that significant time in the community without reoffending was a positive factor.
   C. The appeal court noted that Oltrogge's lack of criminal involvement was a positive factor and it should have been considered by the Court. State v. Oltrogge, No. 21-0776, 2022 WL 2824774, at *4 (Iowa Ct. App. July 20, 2022).
   D. The Court looked at one of the primary negative factors identified by the district judge in Oltrogge. That was the fact that Oltrogge had moved to Texas. The appellate court found that there was no apparent tie between that move and public safety and consideration of that factor was therefore improper.
   E. Finally, as a matter of remedy in Oltrogge, the appeal court noted that without consideration of the irrelevant and improper factors, there are no other factors left in the record that would support denying modification. Under that circumstance the court directed that upon remand an order be entered granting the application.

The language from Oltrogge has some relevance in our case. Past misbehavior can be relevant to Fortune considerations. But Fortune would only allow consideration of past behavior *if it is related to present behavior*.

Another case was Brown v. State, 2022 WL3420890 (Iowa Ct. App. Aug. 17, 2022). This was a case where the District Judge found Brown not to be low risk, despite the DCS report saying he was low. This was reversed for legal error as the court's findings were not supported by substantial evidence.

Another case on the list is Evans v. State, 2022 WL 3907741 (Iowa Ct. App. Aug. 31, 2022) (Application for Further Review was denied on February 8, 2023). In that case from Scott County, the Court of Appeals affirmed the District Court's exercise of discretion in denying the modification request.

Here is what the problem was in Evans. The applicant had explained at the modification hearing that there was one reason he wanted to come off the Registry, ending his ten-year registration obligation. The reason was that he had children who resided with him on weekends as part of his divorce decree. He wanted his children to have a normal life. He wanted to have his children be able to have friends come over. The strict child endangerment statute made such visit a potential problem. As long as he was on the Registry he had to make sure he never supervised those friends. To be safe, he had said that no friends could visit.

The District Court found that, because the parents of those other children would

want to know about Evans being on the Registry, there was a substantial interest in public safety. It was therefore an acceptable rationale for the exercise of discretion.

The Court of Appeals agreed, finding the case to be similar to the Larvick case. The Court found that the case fit into the Fortune language that there was a "substantial benefit to public safety" in Evans' name being on the Registry.

It should be mentioned that Evans only had a ten year registration requirement. The fact he would be on the registry for only a few more years was one of the factors mentioned by the judge in denying relief.

A final case considering modification under 692A.128 was Twigg v. State, 2022 WL 17826895 (Iowa Ct. App. Dec. 21, 2022) Twigg was a rather fact-specific case where the Court of Appeals reversed the District Court's findings that Twigg had not completed all treatment and was not low risk to reoffend

D. There was not substantial evidence that Feller presented a current risk to his non victim daughter, when all he did was write her letters.

In order to override the "weighty evidence" that Feller was low risk to re-offend, the District Court had to find a "substantial risk to public safety". The judge found Feller posed that risk because he wrote letters to L.T. He wrote those letters after having gotten permission to do so from his Parole Officer and L.T.'s mother.

There are quite a number of reasons why this conclusion should be rejected as

not supported by substantial evidence.

1. To start with, Feller had permission from his parole officer and the child's mother to send the letters. See Exhibit 21; (App. p. 92); See testimony at hearing from Kayla Wolter. Tr. p 19 line 24 to p.20 line 25. Indeed, sometime near the beginning of the letters, L.T. wrote back.

2. There is no indication that Feller was ever told to stop. The letters were not answered, that is not disputed. Indeed there is no indication that the recent letters were even opened. They certainly were not opened or read by L.T.

3. The Judge equated sending a periodic letter in 2022 with the grooming that took place with Jessica Brown as described in the Minutes. But that behavior took place when Feller and Jessica Brown were living in the same household. Moreover, Jessica described that behavior as pushing in a sexual way. Tr, p. 13, lines 1-24. There is absolutely no indication that Feller had any contact whatsoever with the younger daughter outside of these occasional letters. There certainly is nothing sexual in any of the letters.
This is not a "pattern" that should be recognized by Fortune.

4. Judge Shubatt found that Feller's case was similar to that presented in Larvick v State, 2022 WL 610361 (Iowa 2022) . What the judge overlooked was the contrast between the mothers of the girls in Larvick and in Feller. In Larvick, the mother had provided no protection at all to her children. This was in stark contrast with the protection offered by Kayla Wolter. The Minutes show she immediately removed Feller from the home, and even changed the locks. Jessica Brown described her mother as "absolutely" protecting her children. Tr. p. 16 to p. 17, line 6, There would be no threat to L.T. as long as Kayla Wolter is around.

5. There was no evidence that the Registry provides any protection to L.T. She already knows about his conviction and his behavior. Neither the prosecutor, nor his witnesses or the judge ever explained how keeping John Feller on the registry will provide any more protection to L.T. than if he were off.

E. There was no threat to the community, aside from a concern for L.T.

Judge Shubatt's concern was almost exclusively a concern for reoffending with the L.T. Fortune and Becher make clear, as does the statute, that the registry is

designed to protect the public in general: society, not particular people, or in this case a particular person.

There was testimony from the State's witnesses about a concern for Feller being a threat to L.T. There was no evidence of any threat to anyone other L.T.

Feller argued that the hearing and in his Motion to amend that the threat to public safety must somehow exist beyond any concern for L.T.

No one offered any evidence beyond the thinking that if he did it to one person, he might do it to another. This is not validated thinking. That is not a particularized reason authorized by Fortune. John Feller is very low risk to re-offend. Individuals who commit abuse within the family are the least likely to re-offend of any group of sex offenders. See discussion at page 29 of this brief. The Judge did not make any kind of finding of a threat to anyone else.

On this point there is of course the Court of Appeals decision in State v. Larvick, 2022 WL 610361 (Iowa 2022) In that case there was also a threat just to one person, his other daughter. The Court of Appeals said that daughter was a member of the public and protecting one person is consistent with the statute.

That part of the Larvick opinion should be rejected. The purpose of the statute is to protect society. The purpose of the statue is to inform the general public. If there is no threat to them, there is no need for the registry.

F. The court failed to consider the unusual circumstance that took place in the criminal case, resulting in lifetime on the registry.

Fortune says in exercising the discretion, the district court should consider the statutory factors and "any other factors that the district court finds relevant to the modification issue". Fortune at page 705

The particular procedures in the criminal case bear repeating. They expose a clearly unfortunate and unreasonable problem with the sex offender registry. The registry, with support from the statute, provides that if you have one offense, assuming it is not an aggravated offense, registration is 10 years. If you have two offenses, even if both are not aggravated, you have lifetime. What constitutes a second case is as simple. Do you have a second case number? Then you have a second case. See 692A.102(6) and Newton v. Iowa Dept. of Public Safety, 2011 WL 3480993 (Iowa App. 2011)

In Feller's case, there was a second case number. An agreement had been reached to have Feller plead to 2 Class D Lascivious Acts Counts. The existing Trial Information only had one such Count.

The prosecutor had made a decision to amend the Trial Information to add a second Lascivious Acts Count. She wanted to expand the dates for the offenses. Instructions had been left with staff to do that by filing a Motion to Amend the Trial Information. See Exhibit 20; (App. pg. 91) Instead, what was done was to prepare and

get approved a Trial Information with a new case number.

At that point, presumably, none of the participants, including the prosecutor and probably the judge, understood the quite significant difference between amending the existing filed case and a submitting a brand new case number.

The point is that his offenses really should have been thought of as a single case, involving a single victim over slightly different times. The legislature had said that his offenses only carried ten years on the registry. If that had happened Feller should only have had to register for ten years. He started to register in January, 2014.

Can or should this factor be considered?

The nature of the offense is something that Fortune says can be considered but should not be over emphasized. In Evans v State, 2022 WL 3907741 (Iowa App. 2022) in the exercise of discretion, the district court engaged in an appropriate balancing. Favoring keeping Evans on the Registry was due to the fact that Evans only had 2.5 years to go on his ten year obligation. This was regarded on appeal as an appropriate factor. It makes sense that the length of registration would be a relevant factor.

In Feller he has an unfortunate lifetime obligation. His offenses really only should have carried ten years. This should have been considered and was not.

G. Other factors mentioned by Judge Shubatt show legal error.

There are several other factors mentioned by Judge Shubatt that should be

discussed.

1. The judge criticized Feller for not making eye contact.

Fortune cautioned that the district judge was not to use “non validated assessments made by the district court based upon the nature of the crime and its apparent relationship to recidivism. " Fortune at p. 708. In this case, the district court relied on the fact that at the hearing Feller did not make eye contact with Judge or the witnesses. The court characterized his demeanor as “discomfort and avoidance”. Ruling page 3; (App. p. 15)

There is no validated basis for thinking that a sex offender's discomfort when appearing in court at a modification hearing is a basis for finding an increased risk or a public safety issue. That would be particularly the case when he is probably in the same room with the victim or his ex wife, for the first time in 12 years.

2. The Judge criticized Feller for testifying by affidavit.

The judge was critical of Feller noting he did not testify. Ruling p. 3; (App. p. 15) Affidavit testimony is perfectly acceptable, particularly when the prosecutor has the opportunity to cross examine it and chooses not to do that. The judge did acknowledge that he did not discount the affidavit evidence. Ruling p. 3; (App. p. 15)

The Court of Appeals addressed affidavit testimony in Oltrogge v. State, 2022 WL 2824774 (Iowa App. 2022)

> The district court discounted some of these factors in finding that “Defendant's history of employment, behavior in the

> community, family circumstances, etc. since his discharge from supervision by the Department of Correctional Services was largely self-reported by Defendant, without verification and corroboration from credible, reliable sources." But Oltrogge's affidavit relating that information was made under oath, admitted into evidence without objection from the State, and not rebutted by any other evidence in the record. *Cf. id.* at 709 (determining the district court's finding that applicant lacked remorse "did not have a factual basis in the record" where neither party asked him questions about the topic during his testimony). The same information was also relayed by Oltrogge to the assessor who performed the STABLE 2007 evaluation, which led to that assessor's conclusion that he was at low risk to reoffend. We accordingly find the court abused its discretion in discounting this information. *Cf. Becher*, 957 N.W.2d at 716 (stating that while the "district court is not bound by an evaluation that determines that an offender ... is at low risk to reoffend.... it is weighty evidence on the modification issue that should not be evaluated out of its proper context").
> State v. Oltrogge, 2022 WL 2824774, at *4 (Iowa App., 2022)

The judge seemed to want Feller to take the stand and explain the letters he kept sending to L.T. See Judge's footnote 2 at page 4 of the Ruling (App. p. 16)

Feller submitted evidence he had permission to send these letters. See Exhibit 21; (App. p. 92) There was no evidence that anyone told him to stop. Indeed the letters apparently were just unopened. The testimony of the two state witnesses did not show a current public safety concern. There was no need to explain the letters.

For that matter there is no prohibition on a judge asking questions in a civil case.

If the judge had a problem with the affidavit or wanted an explanation he could have either asked the questions himself or just asked counsel for Feller to have Feller explain why he would send the letters.

3. The judge expressed a concern in his ruling that Feller did not express remorse. Ruling p.3; (App. p. 15)

The judge's ruling says Feller did not express remorse. The judge even cites the Court of Appeals decision in State v. Seidell, 2022 WL 951002 (Iowa App. 2022).

Feller's affidavit said he took responsibility for the offense. (App. p. 87) The DCS report showed he completed 4 years of treatment successfully. (Con. App. p. 7) Here is what Fortune said about that judge's concern for a lack of remorse:

> Another factor relied upon by the district court was Fortune's lack of remorse. The record developed in this case, however, does not demonstrate a lack of remorse. When Fortune testified, neither party asked him questions regarding the topic, nor did the State make an argument about his lack of remorse at the hearing. It seems to have been a nonissue to the parties. Further, the record shows that Fortune successfully completed SOTP, which generally requires that an offender confront his responsibility for past offenses. On the record developed in this case, the district court erred in relying on a lack of remorse that did not have a factual basis in the record.
> Fortune v. State, 957 N.W.2d 696, 709 (Iowa, 2021)

Feller's case is very much not Seidell. Seidell when he testified at the modification hearing apparently denied he had caused any harm.

See also Oltrogge v State, 2022 WL 2824774 *4 (Iowa App. 2022)

Conclusion

The Iowa Supreme Court in April of 2021 described in two cases how district courts should evaluate modification cases. The Supreme Court said that in exercising discretion, district courts could in some fashion take into consideration "public safety." In this case, the district judge relied on that "public safety" rationale in denying an application from John Feller.

In considering how the district judge reached that conclusion, this Court should now discuss just what kind of public safety consideration can justify a denial.

The Iowa Supreme Court used the term "substantial benefit" to public safety. It also made clear that public safety should be related to a current danger presented by the applicant. That in turn gets you back to the risk presented by the applicant.

This Court should find that in this case the judge abused his discretion. There was not substantial evidence of a substantial risk to public safety that would exist by keeping John Feller on the registry for life. The case should be returned to the district court for direction to grant the application.

RESPECTFULLY SUBMITTED,

/s/ Philip B. Mears
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REQUEST TO BE HEARD IN ORAL ARGUMENT

The Petitioner-Appellant hereby requests to be heard in oral argument in connection with this appeal.

RESPECTFULLY SUBMITTED,

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/s/ Philip B. Mears — 10-18-2023
Signature — Date