

IN THE SUPREME COURT OF IOWA
Supreme Court No. 22-1967
Polk County No. CVCV063809

DANIEL MURILLO,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE SAMANTHA GRONEWALD, JUDGE

APPELLEE'S BRIEF

BRENNA BIRD
Attorney General of Iowa

NICHOLAS E. SIEFERT
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
(515) 281-8894 (fax)
Nick.Siefert@ag.iowa.gov

KIMBERLY GRAHAM
Polk County Attorney

KEVIN HATHAWAY
Assistant Polk County Attorney

ATTORNEYS FOR THE STATE OF IOWA

FINAL

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. Whether the district court erred by denying Murillo's application for removal from the sex offender registry

Authorities

Becher v. State, 957 N.W.2d 710 (Iowa 2021)
Fortune v. State, 957 N.W.2d 696 (Iowa 2021)
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Iowa Code § 692A.128
Iowa Code § 692A.128(2)(b)
Iowa R. App. P. 6.103(1)

ROUTING STATEMENT

Because this case involves the application of existing legal principles, transfer to the Court of Appeals is appropriate. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

Daniel R. Murillo appeals the district court's denial of his application for removal from the sex offender registry. Murillo argues the district court erred both in determining he did not successfully complete all required sex offender treatment programming and in determining he posed a continuing risk to the community.

Course of Proceedings

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

Facts

Daniel Murillo pled guilty to sexual abuse in the third degree in August 2005. Application for Removal from Registry, Dkt. No. 1, at 1; App. 6. Two months later, in October 2005, he was sentenced to an indeterminate term of incarceration not to exceed ten years. *Id.*

During his time in prison, Murillo participated in the Sex Offender Treatment Program (SOTP). Hearing Tr. 7:1–7. According

to Murillo, during the initial stages of his SOTP programming, he refused to admit to the specifics of his criminal acts as described in police reports—his victim alleged he used a Taser on her, handcuffed her hands and feet to a bed, and raped her—until his SOTP counselor informed him that continued refusal would result in his removal from treatment, which would in turn mean his “time would have been doubled.” Plaintiff’s Ex. 1 (Evaluation), Dkt. No. 11, at 3; Conf. App. 8; Hearing Tr. 7:16–8:9. In fact, what Murillo described as his time “being doubled” would be more accurately framed as his time not being cut in half. If Murillo failed to complete his required SOTP programming, then he would have been ineligible for the statutory reduction in sentence he was otherwise entitled to. See Iowa Code § 903A.2(1)(a)(5)(2009) (“However, an inmate required to participate in a sex offender treatment program shall not be eligible for a reduction of sentence unless the inmate participates in and completes a sex offender treatment program established by the director.”).

In an effort to discharge his prison sentence as soon as possible, Murillo reversed course and admitted to his SOTP counselor the various details contained in the police reports. Plaintiff’s Ex. 1

(Evaluation), Dkt. No. 11, at 3; Conf. App. 8. Murillo’s strategic decision to admit the specifics of his crime to his SOTP counselor worked. He was allowed to remain in treatment and ultimately received a Certificate of Completion stating he completed SOTP programming in October 2009.¹ Hearing Tr. 7:8–15; Plaintiff’s Ex. 2 (Certificate), Dkt. No. 12; Conf. App. 13. As a result, Murillo remained eligible for a reduction of his ten-year prison sentence and discharged that sentence in December 2009, just four years and two months after the ten-year sentence was imposed. Hearing Tr. 6:8–18.

Murillo has been required to register as a sex offender since his release from prison. Application for Removal from Registry, Dkt. No. 1, at 1; App. 6. In June 2022, Murillo filed an application with the district court seeking removal from the sex offender registry. *Id.* at 1–2; App. 6–7. Attached to his application was a risk assessment completed by the Clinical Services Director of the Fifth Judicial District Department of Correctional Services (who is both a licensed psychologist and also a SOTP provider). *Id.* at 5–11; Conf. App. 6–12. A significant component of the risk assessment involved a phone

¹ He was issued this certificate despite two “inconclusive” history polygraph examinations during treatment. Plaintiff’s Ex. 1 (Evaluation), Dkt. No. 11, at 3, Conf. App. 8.

interview during which Murillo repeatedly and specifically professed his innocence. *Id.* at 5–7; Conf. App. 6–8.

Murillo told his interviewer he did not commit the crime to which he pled guilty. *Id.* at 7; Conf. App. 8. Murillo claimed his conviction stemmed from the woman falsely accusing him of having Tased her, handcuffed her hands and feet to a bed, and then having raped her. *Id.* According to Murillo, the victim (his girlfriend) had been a willing participant in consensual sexual encounters. *Id.* He “denied tasing the victim” and “denied forcing sexual contact on her, raping her, or engaging in any illegal sexual contact with” her. *Id.* He would admit only that he engaged in consensual intercourse with his girlfriend during which the two used handcuffs on each other. *Id.*

Murillo changed his story one final time at the hearing on his application for removal from the sex offender registry, where he once again admitted in court that he had forcibly raped his victim. Hearing Tr. 14:13–25. Murillo testified his inconsistent accounts were a result of the fact that he “struggles” to accept responsibility for his actions. Hearing Tr. 15:1–17; 17:1–17; 19:3–14; 20:3–22:11; 29:16–25.

ARGUMENT

I. **The district court did not err by denying Murillo’s application for removal from the sex offender registry.**

Jurisdiction

The Iowa Court of Appeals has explained that appeals from a district court’s denial of an application for removal from the sex offender registry should be initiated by petition for writ of certiorari when the application for modification was filed within the existing criminal file. *State v. Larvick*, No. 20-1273, 2022 WL 610361, at *1 (Iowa Ct. App. March 2, 2022) (citing *State v. Todd*, No. 19-2001, 2021 WL 3075756, at *3 (Iowa Ct. App. July 21, 2021)). However, because Murillo filed his application for removal from the sex offender registry as an original civil action, the State does not contest jurisdiction. *See* Iowa R. App. P. 6.103(1).

Preservation of Error

The State does not contest error preservation. After Murillo petitioned the district court to eliminate his requirement to register as a sex offender, the parties briefed the issue now raised on appeal following a contested modification hearing on the matter, and the district court directly addressed the issue before denying Murillo’s application. Applicant’s Brief, Dkt. No. 17, at 3–4; App. 17–18; State’s

Brief, Dkt. No. 18; App. 21–23; Order on Application, Dkt. No. 20, at 2–4; App. 25–27.

Standard of Review

“Under Iowa Code section 692A.128 a district court may consider modification of a sex offender's registry requirement when certain mandatory criteria are met.” *Becher v. State*, 957 N.W.2d 710, 714 (Iowa 2021). “Determining whether the mandatory criteria are met and any other questions of interpretation of section 692A.128 are reviewed for correction of errors at law.” *Id.*; accord *Fortune v. State*, 957 N.W.2d 696, 702–03 (Iowa 2021).

“Once the initial threshold is met, the district court may grant modification.” *Fortune*, 957 N.W.2d at 703. “This second step determination is reviewable on appeal for abuse of discretion.” *Fortune*, 957 N.W.2d at 705. “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).

Merits

Iowa Code section 692A.128 authorizes a district court to modify an individual's sex offender registry requirements.

Modifications under this section follow a two-step analysis. “The first step for the district court is determining whether an applicant has met the gateway requirements of Iowa Code section 692A.128.”

Fortune, 957 N.W.2d at 705. “If the statutory requirements are not met, that is the end of the matter and the district court must deny the modification.” *Id.* “If the applicant meets the threshold statutory requirements, the district court proceeds to the second step, namely, determining, in its discretion, whether the registration requirements should be modified.” *Id.* “In this second step, the district court should consider the statutory factors and any other factors that the district court finds relevant to the modification issue.” *Id.*

The first issue on appeal is whether Murillo satisfied the threshold statutory requirement that he “has successfully completed all sex offender treatment programs that have been required.” *See* Iowa Code § 692A.128(2)(b). Murillo argues the answer is obvious—he presented a Certificate of SOTP Completion issued to him by the Iowa Department of Corrections, and therefore no further inquiry is necessary. Appellant’s Br. at 9–10. But Murillo ignores the importance of his own, self-reported prevarication. Murillo’s strategic flip-flopping about whether he had committed the criminal

acts he pled guilty to led the State interviewer to express doubt about whether Murillo's SOTP completion was valid:

This criteria of [Murillo] needing to “successfully” complete all sex offender treatment that is required is difficult to answer. Based on information obtained in this evaluation, [Murillo] admitted to his offense to the Court, then denied the allegations of sexual abuse made against him when he was incarcerated, then admitted to engaging in the behaviors outlined in the police report to keep his earned time, and now again has recanted this admission. He stated that he only took the plea (admitting guilt in court) in fear that he would go to prison for life, and then admitted again in prison in order to keep his earned time, essentially lying to the Court and his treatment facilitators.

. . . Although [Murillo] has a Certificate of Completion from [the Department of Corrections], this completion was done under false pretenses that [Murillo] was admitting his crime. If [Murillo] did not lie, and maintained his belief that he was innocent as he does now, he would not have completed treatment. . . .

Plaintiff's Ex. 1 (Evaluation), Dkt. No. 11, at 5–6; Conf. App. 10–11

The district court was similarly troubled by the manner in which Murillo consistently professed his innocence except when he stood to gain a direct benefit by admitting guilt. Order on Application, Dkt. No. 20, at 2–3; App. 25–26. The district court ultimately determined Murillo had not successfully completed sex

offender programming. *Id.* at 3; App. 26. In so finding, the district court relied on *State v. Wallace*, No. 15-1448, 2016 WL 6636681, at *3 (Iowa Ct. App. Nov. 9, 2016) for the proposition that evidence in the record can serve to rebut a presumption that the individual successfully completed required sex offender treatment. Order on Application, Dkt. No. 20, at 2; App. 25.

In *Wallace*, an individual argued he must have successfully completed SOTP because he had discharged his probation and successful completion of SOTP was a prerequisite to discharging his probation. 2016 WL 6636681, at *3. Nevertheless, a panel of the Iowa Court of Appeals held that a district court properly relied on conflicting probation reports stating the individual did not perform well with treatment and supervision and was unable to successfully complete sex offender treatment and probation. *Id.* at *2. The *Wallace* court held the district court, as factfinder, was entitled to assign weight to those reports and also to the conclusions of the preparer of the department of correctional services risk assessment, who found the individual's conduct "emblematic of a person who was simply 'going through the motions'" and determined there was "compelling evidence" the individual did not successfully complete all

required sex offender treatment programming even though there was no information available stating he failed treatment. *Id.* at *2–3.

Here, as in *Wallace*, the content of the risk assessment completed by the Fifth Judicial District Department of Correctional Services constituted substantial evidence in support of the district court’s determination that Murillo failed to successfully complete his required SOTP programming. *Id.* at *3.

The district court’s determination that Murillo had not successfully completed all required sex offender programming is also in line with Iowa Supreme Court precedent regarding the Sex Offender Treatment Program. In *State v. Iowa District Court for Webster County*, 801 N.W.2d 513 (Iowa 2011), the Iowa Supreme Court wrestled with the extent to which the Department of Corrections could require sex offenders to admit to their crimes of conviction as a part of their SOTP participation, particularly in the context of the Fifth Amendment. The Supreme Court found no legal problem with the Department of Corrections’ expectation that all sex offenders admit to their crime of conviction, and explained why the expectation was fundamental to the aims of the SOTP’s rehabilitative goals:

Encouraging a convicted sex offender to participate in a SOTP where he has to acknowledge his crime also serves important rehabilitative goals. The State of Iowa is not “starkly . . . attempt[ing] to compel testimony.” Rather, the undisputed purpose of the program is to get the offender to confront his or her past behavior so it does not reoccur. . . .

The specifics of this case illustrate what the legislature might have had in mind when it enacted section 903A.2(1)(a). The evidence, summarized above, supports a finding that [the sex offender] committed a rather violent sexual assault. [The sex offender]’s original story to the police was that he had not had sexual relations with the victim. At trial, [he] changed course and admitted having had sex with the victim, but claimed it was consensual. Now, according to a memo that is part of the record, [the sex offender] maintains, “I am not guilty and am not going to take the program.” Under these circumstances, a rehabilitation program requiring the offender to confront his past offense might be particularly beneficial. We do not see the Fifth Amendment as a barrier to an earned-credit incentive for [the sex offender] to participate in such a program.

801 N.W.2d at 527.

The primary difference between the facts in *Webster County* and the facts in this case is that the sex offender did not make the same strategic decision Murillo did to participate in the SOTP. Given that Murillo admitted during his interview that he manipulated the SOTP process by telling his counselor what she wanted to hear while

knowing he had no intention of actually confronting his past behavior during treatment or internalizing the rehabilitative lessons to be learned in the program, the district court did not err in determining Murillo did not successfully complete the programming. *See also In re C.H.*, 652 N.W.2d 144, 150 (Iowa 2002) (“We note that sexual offender treatment where the offender refuses to take responsibility for the abuse may constitute ineffective therapy.”).

Regardless, this Court can still affirm because the district court also held, alternatively, that Murillo’s “inconsistent acceptance of responsibility for his criminal behavior” served as a separate basis for denying his application under the discretionary second-step analysis under *Fortune*. Order on Application, Dkt. No. 20, at 3–4; App. 26–27. Murillo argues the district court abused its discretion in so finding because the risk assessment completed by the Fifth Judicial District Department of Corrections classified him as a low risk to reoffend.² Appellant’s Br. at 10–13. He is incorrect.

² Although the district court did not address it, the State did not concede Murillo’s low-risk classification was reliable under the circumstances. *See State’s Brief*, Dkt. No. 18, at 1–2; App. 21–22 (“The applicant, through his constantly-shifting answers during the evaluation . . . and his testimony at the hearing cast serious doubt . . . on the trustworthiness of the risk assessment completed for this application. . . . Further, assuming the applicant told the truth at the

The Iowa Supreme Court explained in *Fortune* that when engaging in the second-step analysis, 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.*” 957 N.W.2d at 706 (emphasis added). In other words, “[i]n 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.” *Id.* at 707. The district court complied with these directives in determining that Murillo’s “inconsistent acceptance of responsibility for his criminal behavior” suggested a need for further treatment that “generates concerns for the Court as to Mr. Murillo’s ongoing risk to the community.” Order on Application, Dkt. No. 20, at 3–4; App. 26–27.

On this issue, Murillo’s case presents facts similar to those in *State v. Seidell*, No. 21-0493, 2022 WL 951002 (Iowa Ct. App. March 30, 2022). In *Seidell*, the Court of Appeals affirmed a district court’s denial of a request for removal from the sex offender registry where

hearing, he admits that he gave false information . . . during his evaluation. This calls into question the risk assessment itself . . .”).

the district court found the individual's testimony and demeanor during the modification hearing served as a basis for finding "that he is still a threat to the community given his minimization of what he did." 2022 WL 951002, at *3–4. The sex offender whose modification application was denied in *Seidell* had successfully completed his sex offender treatment requirements and the Department of Corrections stipulated he otherwise met the criteria required for modification. *Id.* at *1.

Murillo, by his own admission in his interview, lied to his SOTP counselor in order to get through treatment he otherwise would have failed. Even if it can be fairly said he successfully completed his sex offender programming under such circumstances, then the district court was still well within the boundaries of its discretion when it determined Murillo posed an ongoing risk to the community. This is so because the district court used facts in the record before it which demonstrated Murillo's prior admissions of guilt amounted to little more than lip service paid whenever it suited him. *See, e.g.*, Hearing Tr. 22:15–23:25. *See also Fortune*, 957 N.W.2d at 709 ("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.*")

(emphasis added). Because the court considered proper factors in exercising its discretion, it did not abuse that discretion.

CONCLUSION

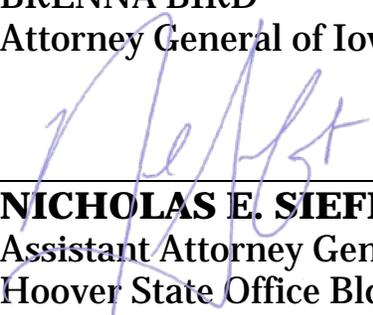
For the reasons stated above, this court should affirm the district court's denial of Murillo's application for removal from the sex offender registry.

REQUEST FOR NONORAL SUBMISSION

The State requests that this case be submitted without oral argument.

Respectfully submitted,

BRENNA BIRD
Attorney General of Iowa



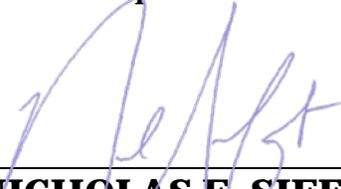
NICHOLAS E. SIEFERT
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
Nick.Siefert@ag.iowa.gov

CERTIFICATE OF COMPLIANCE

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

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **3,020** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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NICHOLAS E. SIEFERT
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
Nick.Siefert@ag.iowa.gov