

## PCR: THE TRIAL ABOUT YOUR TRIAL

### I. WHAT IS POSTCONVICTION RELIEF?

- A. Iowa Code Chapter 822—Formerly Chapter 663A. (Transferred 1993.)
- B. Took effect in 1971.
- C. “Uniform Postconviction Procedure Act”. Iowa Code §822.11
- D. Applies to individuals who have been convicted of or sentenced for a public offense. §822.2(1)
- E. Civil proceeding subject to Rules of Civil Procedure. §822.7; *Jones v. State*, 479 N.W.2d 265 (Iowa 1991).
- F. Mechanism for collateral attack of an Iowa criminal conviction.
- G. Sole means of collateral relief from the conviction of a public offense. §822.2(2).
- H. Burden is on the applicant to show entitled to relief. *State v. Wissing*, 528 N.W.2d 561, 563 (Iowa 1995); *DeVoss v. State*, 648 N.W.2d 56, 64 (Iowa 2002).
- I. Relief for conviction obtained by oversight or omission during trial.
- J. Final opportunity to have the case reviewed by a new attorney.

### II. WHAT ARE GROUNDS FOR PCR?

Applicant must allege one of the following grounds:

- A. Conviction in violation of U.S. or Iowa Constitution or some other law e.g. 6<sup>th</sup> Amend Right to Counsel. §822.2(1)(a)
  - 1. Only *convictions*.
  - 2. Not deferred judgments. *Daughenbaugh v. State*, 805 N.W.2d 591 (Iowa 2011).
- B. District Court lacked discretion to sentence applicant (eg. consecutive and concurrent sentences). §822.2(1)(b); The trial court generally has discretion to impose concurrent or

consecutive sentences for convictions on separate counts. *State v. Criswell*, 242 N.W.2d 259, 260 (Iowa 1976); See Iowa Code section 901.8 (1991); *State v. Delaney*, 526 N.W.2d 170, 178 (Iowa App. 1994).

- C. Sentence exceeds statutory maximum sentence. §822.2(3)(1)(c); See *Kolzow v. State*, 813 N.W.2d 731 (Iowa 2012).
- D. Newly discovered evidence that requires applicant's conviction or sentence be vacated. §822.2(1)(d). Applicant must show that evidence existed at the time to trial and all of the following: 1) that evidence was discovered after judgment; 2) that evidence was not discoverable earlier; 3) that evidence is material (not just cumulative or impeaching); and 4) that evidence would probably change the outcome of the trial. *Summage v. State*, 579 N.W.2d 821 (Iowa 1998).
- E. Applicant is being illegally held after expiration of sentence or other reason, unlawful revocation of probation. Sole remedy for probation revocation. §822.2(1)(e); *State v. Rheuport*, 225 N.W.2d 122 (Iowa 1975).
- F. Applicant's reduction in sentence for earned time was forfeited unlawfully. §822.2(1)(f); Chapter 903A. These cases filed in county of confinement; AG's office handles. *Wycoff v. Iowa Dist. Ct. for Lee County*, 580 N.W.2d 786 (Iowa 1998).
- G. Other available avenues (statutory or common law) supplanted by Chapter 822. §822.2(1)(g)
- H. NOT Grounds: §822.2(1)(g)
  - 1. Restitution. Chapter 910; *Earnest v. State*, 508 N.W.2d 630, 633 (Iowa 1993).
  - 2. Court costs and fees. §904.702 or Chapter 815 and 910.
  - 3. Municipal ordinance violations. *Wright v. City of Cedar Falls*,

424 N.W.2d 456 (Iowa 1988).

III. PRELIMINARY PCR MATTERS.

A. *Application.* §822.3; Iowa Practice Forms §9:28.

1. *Contents*—Procedure of underlying conviction, grounds, requested relief, applicant's personal knowledge of claim, applicant's supporting documentation. §822.3; May allege ineffective

2. *Verification.* Application must be verified by the applicant. §822.3

3. *Service.* Upon filing, the clerk of court must serve the application on county attorney and Attorney General's Office. §822.3

4. *Grounds.*

a. All grounds must be raised in "original, supplemental or amended application". Subsequent applications are barred. §822.8 (Applicant may show sufficient reason for not raising grounds earlier e.g. ineffective appellate counsel.)

b. Grounds resolved in direct appeal may not be relitigated. §822.8; *Legrand v. State*, 540 N.W.2d 667 (Iowa App. 1995). Also not means of litigating issues that should have been preserved on direct appeal. *Berryhill v. State*, 603 N.W.2d 243 (Iowa 1999).

B. *Venue.* Application must be filed in county of conviction; except for challenges to prison discipline or earned time which are filed in county of confinement. §822.7

C. *Filing Fees.* Applicant may file without filing fees. §822.2.

D. *Costs.* Applicant entitled to expenses for costs such as transcript and depositions, must be court ordered. §822.5.

E. *Appointment of Counsel.*

1. Court has discretion to appoint (or not) counsel. §822.5; *Wise v. State*, 708 N.W.2d 66 (Iowa 2006).
2. May deny removal of counsel or right to proceed without counsel. *Leonard v. State*, 461 N.W.2d 465 (1990).
3. Court must make a record “sufficient appraisal of dangers of self representation.” *Debruin v. State*, 779 N.W.2d 494 (Iowa App. 2010).
4. Court may not appoint counsel to advise court as to viability of PCR claims. *Gamble v. State*, 723 N.W.2d 443 (Iowa 2006).
5. No counsel for prison claims or costs for “jailhouse lawyer”.
6. Under public defender payment system, there is a limit on attorney fees and time and eligibility. “Postconviction relief—the greater of \$1,000 or one-half of the fee limitation for the conviction from which relief is sought. Nothing in this subrule is intended to in any manner diminish, increase, or modify the state public defender’s authority to review any and all claims for services as authorized by the Iowa Code.” Iowa Admin. Code 493-12.6(13B,815).

F. *Statute of Limitations.* 3-years from date of conviction or procedendo. 90 days in prison disciplinary cases. §822.3. Prisoners must exhaust administrative remedies before filing postconviction application. Purpose is to “conserve judicial resources, promote substantive goals of criminal law, foster rehabilitation, and restore a sense of repose in our criminal justice system.” *Cornell v. State*, 529 N.W.2d 606, 611 (Iowa App.1994); *Avina v. State*, 832 N.W.2d 384 (Iowa App. 2013).

G. *Exception to Statute of Limitations.* §822.3; Ground of fact or law that **could not** have been raised within applicable time period. Motion to Correct Illegal Sentence. Iowa R. Cr. Pr.

2.24(5)(a). “Lack of knowledge” of law is *not* an exception. *State v. Edman*, 444 N.W.2d 103, 106 (Iowa App.1989). Iowa has not yet recognized an “actual innocence” exception to statute of limitations. *Mayberry v. State*, No. 11–1932, 2013 WL 2371213 (Iowa Ct.App. May 20, 2013), in which the applicant argued Iowa has an “actual innocence” exception to the three-year statute of limitations under Iowa Code section 822.3. In *Mayberry*, we assumed without deciding that Iowa had such an exception, found the applicant did not prove he was actually innocent, and dismissed his claim. *Id.* at \*4; *Walters v. State*, 843 N.W.2d 477 (Iowa App. 2014).

H. *Answer*. State must answer within 30 days, unless extension granted by court. §822.6.

1. No default judgment for failure to answer. *Furgison v. State*, 217 N.W.2d 613 (Iowa 1974).

2. Must attach relevant portions of the record to answer.

3. Affirmative defenses.

I. *Amendments*. Applicant may amend or withdraw application, which “shall be freely given.” Iowa R. Civ. P. 1.402(4). Amendments raising new or additional issues must also be raised within the 3-year statute of limitations or barred. See *Estate of Kuhn v. Marco*, 620 N.W.2d 488, 491 (Iowa 2000).

J. *Discovery*.

1. Parties are entitled to civil discovery. §822.7.

2. Rules of civil procedure apply. §822.7.

3. Applicant’s right to experts not absolute. Court has authority to deny discovery requests that “do not further the administration of justice”. Iowa Code §815.7(5); Iowa R. Cr. P. 19(4); *State v. Woodyard*, 414 N.W.2d 654 (Iowa App. 1987); no “fishing expeditions” *State v. Leutfainy*, 585 N.W.2d 200, 217 (Iowa 1998).

IV. DISMISSAL—SUMMARY DISMISSAL/JUDGMENT.

- A. Cases may be dismissed for lack of prosecution. Iowa R. Civ. P. 1.944. See *Lado v. State*, 804 N.W.2d 248 (Iowa 2011).
1. Reinstatement allowed if filed within 6 months and dismissal resulted from oversight or mistake. Iowa R. Civ. P. 1.944(6).
  2. Court lacks authority to reinstate after 6 months even with “good cause”. *Walker v. State*, 572 N.W.2d 589, 590 (Iowa 1997).
  3. Ineffective assistance of counsel does not require reinstatement; but may be reinstated if “structural error”. See *Lado*.
- B. Court may move to dismiss sua sponte. §822.6. If so, court,
1. Must notify parties of intent to dismiss.
  2. Must give applicant an opportunity to respond.
  3. Not proper if material issue of fact exists.
- C. Either party may move to dismiss (if pleading deficient) and/or for summary judgment (after development of facts). §822.6.
- D. *Grounds for Dismissal:*
1. Outside of 3-year statute of limitations without an exception. §822.3. Purpose is to “conserve judicial resources, promote substantive goals of criminal law, foster rehabilitation, and restore a sense of repose in our criminal justice system.” *Cornell v. State*, 529 N.W.2d 606, 611 (Iowa App.1994); *Avina v. State*, 832 N.W.2d 384 (Iowa App. 2013).
  2. Res Judicata. §822.8; Issues previously litigated on direct appeal. PCR proceedings are “not intended as a vehicle for relitigation, on the same factual basis, of issues previously adjudicated, and the principle of [r]es judicata bars additional litigation” of previously adjudicated issues. *State v. Wetzel*, 192 N.W.2d 762, 764 (Iowa 1971); *Miller v. State*, No.

13-1240, 2015 WL 1815903, at \*3 (Iowa App. Apr. 22, 2015).

3. Waiver. “Generally, a claim not raised on direct appeal cannot be raised in a postconviction relief proceeding unless the applicant can demonstrate a sufficient cause or reason for not properly raising the issue previously.” *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999).
  4. No material issue of fact.
  5. Must be supported by the record, filings, affidavits.
- E. *Hearing*. Must be reported if there are disputed questions of fact. §822.7. If purely legal questions, written briefs are sufficient, reporting not required. *Arnold v. State*, 540 N.W.2d 243 (Iowa 1995).

## V. PCR TRIAL.

- A. *Hearing*. Applicant entitled to an evidentiary hearing on claims of ineffective assistance of counsel.
  1. Testimony may be live, by deposition or by affidavit. §822.7; *Higdon v. State*, 812 N.W.2d 726 (Iowa App. 2012).
  2. Court has discretion to require Applicant’s appearance hearing. §822.7.
  3. Applicant not entitled to be “personally present” at civil proceeding; within court’s discretion. *Myers v. Emke*, 476 N.W.2d 84 (Iowa 1991). No “due process” right to appear in person; may appear telephonically. *Webb v. State*, 555 N.W.2d 824 (Iowa 1996).
- B. *Burden of Proof*. Applicant bears burden of proof—preponderance of the evidence.
- C. *Ruling*—Court ruling must contain “findings of fact, conclusions of law and judgment”. §822.7.
  1. Court must address all issues raised, even pro se issues even if represented by counsel. §822.7; *Jones v. State*, 731

N.W.2d 388 (Iowa 2007).

2. Ruling is a “final judgment”. §822.7.

a. Party may ask for enlargement/amendment of court’s finding. Iowa R. Civ. P. 1.904(2).

b. Party may appeal. Same deadlines as a direct criminal appeal—30 days. §822.9; Iowa R. Civ. Pr. 6.101

**D. Appeals. §822.9**

1. Filing an appeal extinguishes district court of jurisdiction to rule on post-trial motions. See *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 628 (Iowa 2000); *Wilson v. State*, 860 N.W.2d 923 (Iowa App. 2014).

2. Appeal review is for “corrections of law”.

3. Where constitutional issues are alleged, appellate court’s review is on the “totality of the circumstances” the equivalent of a de novo review.

4. Substantial deference is giving to district court rulings on procedural motions. *Whitsetl v. State*, 525 N.W.2d 860 (Iowa 1994);

5. Only issues preserved by district court. *Lamasters v. State*, 821 N.W.2d 856 (Iowa 2012).

6. Appeal from ruling under 822.2(1)(f), unlawful reduction of sentence is by writ of certiorari. §822.7.

## VI. COMMON PCR ISSUES.

### A. *Ineffective Assistance of Counsel.*

1. Court or procedural errors with trial must be preserved on direct appeal.
2. Iowa Code §814.7 allows claims of ineffective assistance to be raised without preserving on direct appeal. *State v. Johnson*, 784 N.W.2d 192 (Iowa 2009).
3. Appellate courts may address the issue of ineffective assistance if the record is adequate.
4. Standard set out in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Applicant must show that his attorney was ineffective AND prejudice resulted. Prejudice may be presumed in certain limited circumstances; e.g. allowing client to plea where there is no factual basis. *State v. Schminkey*, 597 N.W.2d 785 (Iowa 1999).
5. May provide sufficient reason for preserving issues on appeal. *Jones v. State*, 479 N.W.2d 265 (Iowa 1991).
6. Resolution of ineffective assistance claims requires a hearing under most circumstances.
7. Counsel is presumed competent; applicant has the burden to show ineffective and prejudice. *Bettis v. State*, 547 N.W.2d 635 (Iowa App. 1996).

### B. *Guilty Plea Issues.* Ineffective Assistance of Counsel.

1. Iowa Rule Cr. P. 2.8(2)(b) must be followed.
  - a. Court must find factual basis, voluntary, knowing.
  - b. Court must inform of defendant of:
    - i. Nature of charges.
    - ii. Mandatory minimum and maximum sentence.
    - iii. Rights being given up.

- iv. There will be no trial.
2. Factual basis. Prejudice is presumed if attorney allows defendant to plea without a factual basis. *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001). Does the record, including minutes of testimony, the PSI, facts of the prosecutor, statements of defendant during colloquy, provide a factual basis for the charge that defendant is pleading to; this may be an amended charge. *State v. Finney*, 834 N.W.2d 46 (Iowa 2013); *State v. Schminkey*, 597 N.W.2d 785 (Iowa 1999).
  3. Waiver.
    - a. Guilty plea waives all defenses not intrinsic to the plea. *State v. Utter*, 803 N.W.2d 647 (Iowa 2011); *Manning v. State*, 654 N.W.2d 555 (Iowa 2002).
    - b. Guilty plea waives challenges to sufficiency of the state's evidence. *State v. Kobrock*, 213 N.W.2d 481 (Iowa 1973) (holding guilty plea resulted in waiver of all questions relating to admissibility or sufficiency of evidence).
  4. Withdrawal of Plea. Court has discretion to allow withdrawal of the guilty plea up to judgment. §813.2, Rule 2.8(2)(a); *State v. Speed*, 573 N.W.2d 594 (Iowa 1998).
  5. Failure to Investigate. Renders plea invalid only to the extent that it renders plea involuntary. *State v. Carroll*, 767 N.W.2d 638 (Iowa 2009). Analysis must be done on a case by case basis to show whether attorney breached a duty prejudice resulted. *State v. Risdal*, 404 N.W.2d 130 (Iowa 1987).
  6. Voluntariness. Due to mental health issues. *Castro v. State*, 794 N.W.2d 789 (Iowa 2011)(Must produce a medical expert to show.)
  7. Competency. Iowa Code §812.3. What issues raised before

the trial court?

8. Adequate record. The record sets out the true facts and trumps applicant's allegations. *Castro v. State*, 795 N.W.2d 789 (Iowa 2011); *Wise v. State*, 708 N.W.2d 66 (Iowa 2006).
9. PSI Issues. To waive or not to waive? Iowa R. Cr. P. 2.10 allows waiver of the "use", but not the preparation in most cases. See §901.2(2).
10. Consequences of Plea. Direct v. indirect or collateral. Ineffective if not advised of direct consequences (Rule 8.2(b)(2)) but not all indirect consequences. *Saadig v. State*, 387 N.W.2d 315, 325-326 (Iowa 1986). Counsel, however, is generally not considered ineffective for failing to inform a defendant of collateral or indirect consequences of a plea.<sup>1</sup> *Mott v. State*, 407 N.W.2d 581, 582–83 (Iowa 1987). "Counsel can hardly conceive all possible collateral consequences of a guilty plea and need not be a crystal gazer." *Saadig*, at 326. *State v. Romos*, 787 N.W.2d 480 (Iowa App. 2010).

### C. *Trial Issues*. Ineffective Assistance of Counsel.

1. The Record. Iowa R. Civ. P. 1.903(2)
  - a. Jury Selection. Iowa R. Civ. P. 1.903(2)

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<sup>1</sup> Numerous repercussions of a plea have been held to be collateral consequences that a defendant need not be informed of prior to entering a plea. See *State v. Carney*, 584 N.W.2d 907, 908–09 (Iowa 1998). These include limitations on a defendant's parole eligibility, deportation consequences, prohibitions on carrying firearms, ineligibility for deferred judgment or probation, consequences of related pending charges against the defendant, and how the conviction may impact future convictions. *Id.*; *Kinnersley v. State*, 494 N.W.2d 698, 700 (Iowa 1993) (limitation on parole eligibility); *Mott*, 407 N.W.2d at 583 (deportation); *Saadig*, 387 N.W.2d at 325 (prohibition from carrying a firearm); *State v. Woolsey*, 240 N.W.2d 651, 653–54 (Iowa 1976) (ineligibility for deferred judgment or suspended sentence and probation due to prior convictions); *State v. Warner*, 229 N.W.2d 776, 782 (Iowa 1975) (penal consequences of companion charge or effect of instant charge on the strength of prosecution's proof in companion case); and *State v. Christensen*, 201 N.W.2d 457, 459 (Iowa 1972) (effect of conviction upon future convictions). *Smith v. State*, 760 N.W.2d 211 (Iowa App. 2008).

b. Plea offers.

c. Whether defendant is testifying or not.

d. Jury instruction Record. Iowa R. Civ. P. 1.924

i. Eg. Defendant no inference of guilt. If defendant is using there must be a record. *State v. Kimball*, 176 N.W.2d 864 (Iowa 1970).

ii. Are the elements there and correct? *State v. Schuler*, 774 N.W.2d 294 (Iowa 2009)(Jury instruction on assault was incorrect statement of the law on whether victim “sustained” injury or it was “caused” by the defendant.

iii. Are objections and affidances on the record?

2. Victim/Spectator Issues. Victim’s crying and wearing photo buttons/shirts. 29 A.L.R.4th 659 (Originally published in 1984); Defendant must show prejudice.

3. Defendant’s Presence. Iowa R. Cr. P. 2.27

a. Felonies—Defendant “shall be present” at initial appearance, arraignment and plea, pretrial proceedings, every stage of “trial” including impaneling the jury, return of verdict and imposition of sentence.

b. Exceptions—Voluntary absence, disruption, reduction of sentence, issues involving purely legal questions.

4. Sentencing Issues.

a. PSI. May waive “use of PSI” not preparation of PSI. Iowa Code §901.2(2)(b); *State v. Brown*, 518 N.W.2d 351 (Iowa 1994).

b. Consideration of improper matters for sentencing.

c. Failure to articulate reasons for sentence. Iowa R. Cr. P. 2.23(3)(d).

5. Prosecutorial Misconduct. Must show prejudice and misconduct. “Thus, it is the prejudice resulting from

misconduct, not the misconduct itself, that entitles a defendant to a new trial.” *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003).

D. *Illegal Sentence Issues.*

1. May be corrected at any time. Iowa R. Cr. P. 2.24(5). No statute of limitations.
2. Sentence must be “illegal”, i.e. unconstitutional (including Fourth, Fifth and Sixth Amendments) or outside of the statutory limits. *State v. Bruegger*, 773 N.W.2d 862 (2009).
3. Juvenile Sentencing. *State v. Lyle*, 854 N.W.2d 378 (Iowa 2014). Remand for resentencing with updated PSI if defendant was under 18 at the time the offense was committed.
4. No due process violation if defendant was not under 18 when crime committed. *State v. Clayton*, 859 N.W.2d 672 (Iowa App. 2014).
5. Procedural issues are waived. *Tindell v. State*, 629 N.W.2d 357, 358 (Iowa 2001).

VII. MISCELLANEOUS ISSUES.

- A. *Survival of Claims.* PCR’s survive death of applicant. §611.20 (Unlike criminal cases.)
1. Still subject to mootness review. *Maghee v. State*, 773 N.W.2d 228 (Iowa 2009).
- B. *Retroactivity—Heemstra* Issues. Limited retroactivity of *Heemstra* does not violate due process. *Goosman v. State*, 764 N.W.2d 539 (Iowa 2009). *Nguyen v. State*, 829 N.W.2d 183 (Iowa 2013) raised within statute of limitations of *Heemstra*. Due Process Clause of Iowa Constitution did not require the

retroactive application, to individuals whose direct appeals were final prior to the *Heemstra* decision, of the holding in that case; federal Equal Protection Clause was not violated by prospective-only application of *Heemstra* decision. *Nguyen v. State*, 878 N.W.2d 744 (Iowa 2016), reh'g denied (June 2, 2016).

- C. *Wrongful Imprisonment*—Tort claim under Iowa Code Chapter 669.
- D. “*Qualified Attorneys*”. There are 150 Attorneys currently authorized to provide indigent representation in PCR cases, namely “Adult Criminal” case type. See table of PCR Authorized Attorneys below.

E. *Cost of Postconviction Cases:*

Fiscal Year	PCR Claims	Cost of PCR Claims
2010	292	\$399,402.57
2011	313	\$518,259.76
2012	300	\$500,942.42
2013	352	\$614,265.02
2014	357	\$588,007.12
<b>Grand Total</b>	<b>1614</b>	<b>\$2,620,876.89</b>