

IN THE SUPREME COURT OF IOWA

NO. 17-0488

ROSS BARKER,

Petitioner - Appellant,

vs.

IOWA DEPARTMENT OF PUBLIC SAFETY,

Respondent - Appellee.

**APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY
HONORABLE MARK D. CLEVE, JUDGE**

**APPELLEE IOWA DEPARTMENT OF PUBLIC SAFETY'S
FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT**

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. WHETHER BARKER MUST REGISTER FOR LIFE AS A SEX OFFENDER UNDER IOWA CODE CHAPTER 692A BECAUSE HE WAS CONVICTED OF AN ENUMERATED “AGGRAVATED” SEX OFFENSE?

Authorities

Houck v. Iowa Bd. of Pharmacy Exam’rs, 752 N.W.2d 14 (Iowa 2008)

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Allen Vestal, *Preclusion/Res Judicata Variables: Adjudicating Bodies*,
54 Geo. L.J. 857 (1966)

Iowa Code § 692A.118

Restatement (Second) of Judgments § 28(2)

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Iowa Code § 692A.2(3) (2007)

Iowa Code § 17A.19(10)

Iowa Code § 17A.19(3)

ROUTING STATEMENT

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

STATEMENT OF THE CASE

Nature of the Case: Petitioner-Appellant Ross Barker [Barker] appeals from a ruling on Iowa Code chapter 17A judicial review entered by the Iowa District Court for Scott County. The Honorable Mark D. Cleve affirmed a final administrative determination by the Iowa Department of Public Safety that Barker shall register for life as a sex offender under Iowa Code chapter 692A.

Course of Proceedings and Disposition: On October 23, 2008, Barker registered with the Iowa Department of Public Safety [Department] as a sex offender based upon his 2008 conviction for violating Iowa Code section 709.11 – assault with intent to commit sexual abuse. (District Court Confidential Appendix [hereafter D.C. Con. App.] at 32-33 (Sex Offender Registration); Am. Con. App. 38-39). Barker filed a request for determination with the Department in October 2015, seeking clarification as to the length of his registration duty. (D.C. Con. App. at 36-67 (10/23/2015

Application for Determination); Am. Con. App. 42-73); *see* Iowa Code § 692A.116; 661 Iowa Admin. Code r. 83.3. Commissioner of Public Safety Roxann M. Ryan issued a determination on January 25, 2016, finding that Barker had been convicted of an “aggravated offense” for which lifetime registration as a sex offender was mandated by applicable code. (D.C. Con. App. at 68 (Decision of Determination); Am. Con. App. 74); *see* Iowa Code §§ 692A.101(1)(a)(5), 692A.106(5).

Barker subsequently filed for judicial review. (*See generally* Petition; Am. App. 8-17). While acknowledging that Barker had “received incorrect information as to his 692A registration requirements at multiple points during his criminal prosecution” the District Court ultimately found that the Department’s determination that Barker was required by Iowa law to register for life as a sex offender was indeed correct. (Ruling on Petitioner’s Petition for Judicial Review Under Iowa Code 17A.19 [Ruling] at 7; Am. App. 28). After quoting *State v. Bullock*, 638 N.W.2d 728 (Iowa 2002), the District Court specifically ruled that neither the criminal trial court nor the Iowa Court of Appeals had the authority to determine – correctly or incorrectly – the length of Barker’s registration requirement. (Ruling at 5-7;

Am. App. 26-28). Barker now appeals. (Notice of Appeal; Am. App. 30-31).

Statement of Facts: The Department is mandated by law to maintain a central registry of information collected from persons required by Iowa law to register as sex offenders. Iowa Code § 692A.118 (2015); *see* Iowa Code § 692A.10 (2007).¹ Sex offender registration is solely an administrative function delegated to the Department and is not a sentencing issue within the purview of a criminal court. *See, e.g., Kruse v. Iowa Dist. Court for Howard Cnty.*, 712 N.W.2d 695, 699 (Iowa 2006) (“[I]t is the operative command of the statutes . . . that impose the registration requirement on the convicted party rather than the judgment of the court.”); *State v. Bullock*, 638 N.W.2d 728, 735 (Iowa 2002); *State v. Mussmann*, No. 06-1173, 2007 WL 1827336 at *2 (Iowa Ct. App. June 27, 2007).

¹ Barker initially registered as a sex offender pursuant to Iowa Code chapter 692A on October 23, 2008 upon his release from incarceration and commencement of his special sentence. (*See* D.C. Con. App. at 32-33; Am. Con. App. 38-39). Barker does not contest that he is required to register in Iowa as a sex offender for a minimum of ten years based upon his 2008 conviction. During its 2009 session, the Iowa General Assembly substantially amended Iowa Code chapter 692A. *See* 2009 Iowa Acts ch. 119. The 2009 amendments to Iowa Code chapter 692A are applicable to persons convicted of a requisite criminal offense prior to July 1, 2009 who, like Barker, were “required to be on the sex offender registry as of June 30, 2009.” Iowa Code § 692A.125(2)(a). For this reason, unless otherwise noted, Barker’s claims are analyzed under the 2015 Iowa Code, the version of the Code applicable at the time Barker submitted his request for determination to the Department. *See* Iowa Code § 17A.19(8)(b).

Overview of Sex Offender Registry

Persons convicted of any of the statutorily delineated criminal offenses involving sexual misconduct shall register as sex offenders in the state of Iowa. Iowa Code §§ 692A.102, 692A.103; *see* Iowa Code § 692A.2 (2007). Assault with intent to commit sexual abuse is one such delineated offense. Iowa Code § 692A.102(1)(b)(6); *see* Iowa Code § 692A.1(1)(e) (2007).

In most cases, a person convicted of a qualifying sex offense is required to register for a minimum period of ten years. Iowa Code §§ 692A.103(1), 692A.106(1); *see* Iowa Code §§ 692A.1(1), 692A.2(1) (2007). Notwithstanding: “A sex offender shall . . . upon conviction of an aggravated offense . . . register for life.” Iowa Code § 692A.106(5); *see* Iowa Code § 692A.2(5) (2007). Among the crimes designated as an “aggravated offense” for registry purposes is assault with intent to commit sexual abuse in violation of Iowa Code section 709.11. Iowa Code § 692A.101(1)(a)(5) (defining “aggravated offense”); *see* Iowa Code § 692A.1(1)(e) (2007). A sex offender is not required to register as a sex offender while incarcerated. Iowa Code § 692A.103(2); *see* Iowa Code § 692A.2(6) (2007).

A person may petition the Iowa Department of Public Safety for a determination as to whether that person is obligated under Iowa law to register as a sex offender. Iowa Code § 692A.116; 661 Iowa Admin. Code r. 83.3(5); *see* Iowa Code § 692A.8 (2007). The Department is to, within 90 days of the filing of such a request and receipt of all required supporting documents, determine whether that person was in fact convicted of a registrable sex offense and whether the time period during which that person is required to register has expired. Iowa Code § 692A.116; 661 Iowa Admin. Code r. 83.3(6). A reviewing court lacks authority to determine the length of any registration requirement until after the Department has made an administrative determination as to the nature and extent of an offender's registration obligation. *Bullock*, 638 N.W.2d at 735.

Ross Barker

On March 14, 2008, Barker pled guilty to an aggravated misdemeanor charge of assault with intent to commit sexual abuse in violation of Iowa Code section 709.11. (District Court Public Appendix [hereafter D.C. Pub. App.] at 11-12 (Plea of guilty); Am. App. 42-43). The criminal court accepted Barker's guilty plea and sentenced him on April 10, 2008 to a two-year term of incarceration, a \$650 fine and assessed court costs. (D.C. Pub.

App. at 27; Am. App. 58). During the plea hearing, the sentencing judge told Barker that he would be “required to be on the Sex Offender Registry for a period of ten years.” (D.C. Pub. App. at 22-23; Am. App. 53-54). The sentencing court noted in its sentencing order that Barker had been advised of the “Notification of Registration Requirement.” (D.C. Pub. App. at 27; Am. App. 58). The sentencing order was later amended to also include the ten-year special sentence mandated by Iowa Code section 903B.2. (D.C. Pub. App. at 22, 29; Am. App. 53, 60).

Upon his October 23, 2008 release from prison custody, Barker began serving his special sentence. (*See* Movement Summary; Am. App. 179). Barker immediately registered with the Iowa Sex Offender Registry. (D.C. Con. App. at 32-33 (Sex Offender Registration); Am. Con. App. 38-39). At the time of his registration, Barker also acknowledged receipt of written notification of his duty to register as a sex offender under Iowa Code chapter 692A. (D.C. Con. App. at 34-35 (Notification of Registration Requirement); Am. Con. App. 40-41). Through this notification, Barker was specifically advised that “[a] person shall register for life . . . upon a conviction for an ‘aggravated offense.’” (D.C. Con. App. at 34; Am. Con. App. 40). This notification further advised Barker that assault with intent to

commit sexual abuse in violation of Iowa Code section 709.11 was one such “aggravated offense.” (D.C. Con. App. at 34; Am. Con. App. 40). This notification also informed Barker how he could seek a binding determination from the Department concerning his registration status. (D.C. Con. App. at 35; Am. Con. App. 41).

Barker returned to prison for two years upon the January 6, 2009 revocation of his special sentence. (*See* Movement Summary; Am. App. 179). Barker’s special sentence was again revoked on March 15, 2011. (*See* Movement Summary; Am. App. 179). Barker was eventually released from prison on July 9, 2013 upon the discharge of his special sentence. (*See* Movement Summary; Am. App. 179). Barker’s sex offender registration requirement was tolled while he was incarcerated. *See* Iowa Code § 692A.107; Iowa Code § 692A.2(3) (2007).

Barker has filed multiple applications for postconviction relief seeking to have his assault with intent conviction vacated. (D.C. Pub. App. at 32-47 (Scott Co. No. PCCE111471 – filed 8/7/2008), 53-66 (Scott Co. No. PCCE124901 – filed 4/4/2014); Am. App. 63-78, 84-97). Barker voluntarily dismissed his first postconviction application. (D.C. Pub. App. at 48; Am. App. 79). The district court dismissed Barker’s second

postconviction application as untimely. (D.C. Pub. App. at 72-79; Am. App. 103-110). Barker’s appeal of the district court’s dismissal order was affirmed by the Iowa Court of Appeals in part because it found that Barker failed to provide evidence that he was in fact subject to a lifetime registry requirement. (D.C. Pub. App. at 121-22 (*Barker v. State*, No. 14-1178, 2015 WL 5287142 (Iowa Ct. App. Sept. 10, 2015)); Am. App. 152-153). The Court of Appeals further speculated that Barker could not have been misled as to the length of his sex offender registration requirement by the sentencing court or his counsel because “under [Iowa Code] section 692A.106, Barker was required to be placed on the Sex Offender Registry for a period of ten years, not a lifetime” (D.C. Pub. App. at 121; Am. App. 152). Barker’s application for further review of the Court of Appeal’s ruling was denied by this Court on November 9, 2015. (D.C. Pub. App. at 146-47; Am. App. 177-178).

Although Barker had the right to seek a formal, binding decision concerning the length of his registration duty at any time after his initial sex offender registration by filing a request for determination with the Department, Barker waited until October 2015 to first do so. (D.C. Con. App. at 36-67 (10/23/2015 Application for Determination); Am. Con.

App. 42-73); *see* Iowa Code § 692A.116; 661 Iowa Admin. Code r. 83.3; *see also* Iowa Code § 692A.8 (2007). On January 25, 2016, Commissioner of Public Safety Roxann M. Ryan issued a written determination finding that Barker had been convicted of an assault with intent to commit sexual abuse in violation of Iowa Code section 709.11 – an “aggravated offense” for which lifetime registration as a sex offender was mandated. (D.C. Con. App. at 68 (Decision of Determination); Am. Con. App. 74); *see* Iowa Code §§ 692A.101(1)(a)(5), 692A.106(5).

Additional facts will be mentioned in the course of the Department’s argument as necessary.

ARGUMENT

I. BARKER MUST REGISTER FOR LIFE AS A SEX OFFENDER UNDER IOWA CODE CHAPTER 692A BECAUSE HE WAS CONVICTED OF AN ENUMERATED “AGGRAVATED” SEX OFFENSE.

Standard of Review: The Court’s standard of review is to correct errors of law committed by the district court. *E.g., Houck v. Iowa Bd. of Pharmacy Exam’rs*, 752 N.W.2d 14, 16 (Iowa 2008); *Greenwood Manor v. Iowa Dep’t of Pub. Health*, 641 N.W.2d 823, 830 (Iowa 2002). When scrutinizing the propriety of a district court’s judicial review ruling, the

Court applies the standards of Iowa Code section 17A.19(10) to the challenged agency action to determine whether its conclusions are the same as those of the district court. *Litterer v. Judge*, 644 N.W.2d 357, 360-61 (Iowa 2002); *see Greenwood Manor*, 641 N.W.2d at 830. Because this case does not arise from the Department’s conduct of a contested case hearing, the Court should apply the scope and standard of review applicable to the review of “other agency action.” *See Greenwood Manor*, 641 N.W.2d at 834.

Barker asserts prejudice on the sole ground that the Department failed to give appropriate preclusive effect to the sentencing court’s and the Court of Appeals’ mistaken statements regarding the length of Barker’s registration duty when the Department determined that Iowa Code chapter 692A mandates that Barker register for life as a sex offender. Reviewing courts are to give appropriate deference to those matters vested by a provision of law in the discretion of the agency. Iowa Code § 17A.19(10)(c), (l) & (m), 17A.19(11); *see, e.g., Renda v. Iowa Civil Rights Comm’n*, 784 N.W.2d 8, 10-14 (Iowa 2010). As the agency statutorily designated to determine a sex offender’s registration status, the Department’s application of law to fact is entitled to heightened deference

in this matter and may only be reversed if irrational, illogical, or wholly unjustifiable. Iowa Code § 17A.19(10)(m); *see* Iowa Code § 692A.116 (determination of requirement to register); *e.g.*, *Bullock*, 638 N.W.2d at 735 (“the determination of the length of any required registration is an administrative decision initially committed to the Department of Public Safety”).

Ultimately, “[t]he burden of demonstrating the required prejudice and the invalidity of agency action is on the party asserting invalidity.” Iowa Code § 17A.19(8)(a). It is, therefore, Barker’s burden to demonstrate that the Department’s determination was entered in violation of applicable law and prejudiced his rights. *See Hill v. Fleetguard, Inc.*, 705 N.W.2d 665, 671 (Iowa 2005).

Preservation of Error: The question of whether the Department correctly concluded that Barker was required to register for life as a sex offender as a result of his 2008 assault with intent to commit sexual abuse conviction was raised before and decided by the District Court, and is therefore preserved for appellate review. (*See* Petition; Ruling; Am. App. 8-17; 22-29).

Argument: Before addressing the merits, it is necessary to place this case into its proper context. This case is not about whether Barker was misled by his defense attorney or the criminal court prior to the entry of his guilty plea. Nor is this case about whether the Court of Appeals properly affirmed the dismissal of Barker’s postconviction relief action through which he questioned the voluntariness of his guilty plea. Despite Barker’s attempts to relitigate the fairness of his criminal conviction through this appeal, this case is solely about whether the Department correctly applied Iowa Code chapter 692A’s registration requirements to Barker when it issued its administrative decision in response to Barker’s Iowa Code section 692A.116 request for determination. As the District Court aptly noted in recognition of Barker’s ongoing efforts to invalidate his plea based upon his receipt of incorrect registration information: “Barker’s remedy, if he has one, must be litigated in a postconviction relief action.” (Ruling at 7; Am. App. 28).

In this case, Barker concedes that he was convicted of an “aggravated offense” for which lifetime sex offender registration is called for by Iowa Code section 692A.106(5). Instead, Barker argues that the Department is barred by *res judicata* from independently determining the length of

Barker's registration duty contrary to the earlier pronouncements of the sentencing court and the Court of Appeals.

Barker's arguments are misplaced as the legislature has ceded sole authority to determine the fact or length of a sex offender's registration requirement to the Department. The public safety objectives of the sex offender registry would be unreasonably undermined if the Department's independent authority to determine an offender's registration status could be usurped by court proceedings at which the Department was not a party nor had its interests represented. Intervening statutory amendments further draw into question the preclusive effect that any earlier judicial findings that purported to limit Barker's registration duty to only ten years are entitled.

Registration Intended to Protect, Not Punish

This Court has held that the purpose of Iowa Code chapter 692A is clear: "to require registration of sex offenders and thereby protect society from those who because of probation, parole, or other release are given access to members of the public." *In re S.M.M.*, 558 N.W.2d 405, 408 (Iowa 1997); *see also State v. Iowa Dist. Court ex rel. Story Cnty.*, 843 N.W.2d 76, 81 (Iowa 2014) ("the purpose of the registry is protection of the health and safety of individuals, and particularly children, from individuals

who, by virtue of probation, parole, or other release, have been given access to members of the public”); *State v. Pickens*, 558 N.W.2d 396, 400 (Iowa 1997) (“the statute was motivated by concern for public safety, not to increase the punishment”). Thus, Iowa Code chapter 692A’s registration requirements were not enacted to punish perpetrators, but to promote public safety through the dissemination of information. *See, e.g., Pickens*, 558 N.W.2d at 400; *In re S.M.M.*, 558 N.W.2d at 408.

Therefore, any alleged ambiguities in Iowa’s sex offender law or uncertainties as to its application to a particular offender should be resolved in favor of furthering public safety by requiring continued registration. Iowa Code § 4.4(5) (“Public interest is favored over any private interest”); *see Teamsters Local Union No. 421 v. City of Dubuque*, 706 N.W.2d 709, 717 (Iowa 2005).

Lifetime Registration Mandated

All persons convicted of an “aggravated” sex offense are subject to mandatory lifetime registration as a sex offender in Iowa. Iowa Code § 692A.106(5); *see* Iowa Code § 692A.2(5) (2007). It is uncontested that Barker was convicted of assault with intent to commit sexual abuse in violation of Iowa Code section 709.11. (D.C. Pub. App. at 27;

Am. App. 58). Assault with intent to commit sexual abuse is designated by code as an “aggravated offense.” Iowa Code § 692A.101(1)(a)(5); *see* Iowa Code § 692A.1(1)(e) (2007). Barker’s conviction has not been reversed or otherwise set aside. *See* Iowa Code § 692A.101(7) (“‘Convicted’ does not mean a plea, sentence, [or] adjudication . . . which has been reversed or otherwise set aside.”).

Thus, the Department’s section 692A.116 determination in this case that Barker was convicted of an aggravated offense for which lifetime sex offender registration is compulsory under Iowa law is unquestionably correct and should be affirmed.

Registration Solely an Administrative Function

Even though sex offender registration is not considered punishment, Barker contends that the issue of the length of his duty to register as a sex offender was resolved by the sentencing court and later reaffirmed by the Court of Appeals. Yet, this Court has long since held that outside the scope of juvenile proceedings, a sentencing court is without authority to determine the fact or length of a defendant’s obligations under Iowa Code chapter 692A to register as a sex offender. *See Bullock*, 638 N.W.2d at 735 (“the determination of the length of any required registration is an administrative

decision initially committed to the Department of Public Safety”). Rather, sex offender registration is solely an administrative function delegated to the Iowa Department of Public Safety and is not a sentencing issue within the purview of a criminal court. *See, e.g., Bullock*, 638 N.W.2d at 735; *Jensen v. State*, No. 12-1997, 2016 WL 718798, *3 (Iowa Ct. App. Feb. 24, 2016); *Garcia v. State*, No. 12-0510, 2013 WL 2368820 at *2 (Iowa Ct. App. May 30, 2013) (“The department of public safety, not the court, imposes the registration requirement.”); *State v. Mussmann*, No. 06-1173, 2007 WL 1827336 at *2 (Iowa Ct. App. June 27, 2007) (“The determination of whether a defendant is subject to chapter 692A and is required to register as a sex offender is the responsibility of the [Iowa Department of Public Safety], not the courts.”). The District Court rightly relied upon this line of precedent when it ruled that: “courts still cannot determine the length of an offender’s registration requirement.” (Ruling at 6; Am. App. 27).

A person convicted of a registrable sex offense is therefore not excused from registering as a sex offender simply because the sentencing court failed to adequately or correctly apprise that person of his/her duties under chapter 692A. *Kruse v. Iowa Dist. Court for Howard Cnty.*, 712 N.W.2d 695, 699 (Iowa 2006) (“[I]t is the operative command of the

statutes . . . that impose the registration requirement on the convicted party rather than the judgment of the court.”); *Bullock*, 638 N.W.2d at 735; *Jensen*, 2016 WL 718798 at *3. Instead, a sentencing court’s duty under the sex offender registry law is restricted merely to:

- (1) informing convicted defendants who are not sentenced to confinement of their duty to register and
- (2) the collection of specified information from such defendants.

Bullock, 638 N.W.2d at 735 (citing to then Iowa Code § 692A.5(1) (1999)); *see* Iowa Code § 692A.109. Neither duty was applicable in this case as Barker was sentenced to a term of incarceration. *See Bullock*, 638 N.W.2d at 735.

Res Judicata Inapplicable

Issue preclusion, or collateral estoppel, is a form of *res judicata* that prevents parties “from relitigating in a subsequent action issues raised and resolved in a previous action.” *Employers Mut. Cas. Co. v. Van Haaften*, 815 N.W.2d 17, 22 (Iowa 2012); *see Winnebago Indus., Inc. v. Haverly*, 727 N.W.2d 567, 571 (Iowa 2006) (“Under issue preclusion, once a court has decided an issue of fact or law necessary to its judgment, the same issue

cannot be relitigated in later proceedings.”). A party seeking to invoke issue preclusion must establish four elements:

- (1) the issue in the present case must be identical,
- (2) the issue must have been raised and litigated in the prior action, (3) the issue must have been material and relevant to the disposition of the prior case, and (4) the determination of the issue in the prior action must have been essential to the resulting judgment.

Employers Mut. Cas. Co., 815 N.W.2d at 22. The ruling of the Court of Appeals cited by Barker fails to meet all requisite elements to be entitled to preclusive effect in this case.

A review of the postconviction proceeding at issue reveals that the question of whether Barker was subject to lifetime registration as a sex offender was not truly litigated as it was not contested by the parties in the trial court or on appeal. *See Winnebago Indus., Inc. v. Haverly*, 727 N.W.2d 567, 572 (Iowa 2006) (“Iowa law is clear that issue preclusion requires that the issue was ‘actually litigated’ in the prior proceeding.”). The State of Iowa moved to dismiss Barker’s PCR application, not by claiming that Barker was wrong in his assertion that he was subject to lifetime sex offender registration, but by invoking the statute of limitations imposed by Iowa Code section 822.3. (*See* D.C. Pub. App. at 67 (State’s Motion to

Dismiss); Am. App. 98). The PCR court accepted the State's statute of limitations argument and it did not address – nor was it necessary to the court's ruling to address – the accuracy of Barker's claim that he was subject to lifetime sex offender registration. (*See* D.C. Pub. App. at 72-79 (Ruling on Motion to Dismiss); Am. App. 103-110).

All parties, the trial court, and even appellate counsel, simply accepted as true Barker's assertion in his PCR application that he was required to register for life as a sex offender as a consequence of his guilty plea. (*See* D.C. Pub. App. at 53-66 (Application for Postconviction Relief); 67 (State's Motion to Dismiss); 68-71 (Barker's Resistance to Motion to Dismiss); 72-79 (Ruling on Motion to Dismiss); 97-116 (Appellant's Final Brief); 86-96 (Appellee's Final Brief); Am. App. 84-97; 98; 99-102; 103-110; 128-147; 117-127); *see also* *Winnebago Indus., Inc.*, 727 N.W.2d at 572 (quoting approvingly from Restatement (Second) of Judgments § 27, cmt. e, in discussing whether an issue is actually litigated for purposes of invoking issue preclusion). Thus, no evidentiary record on the subject was ever developed in the underlying PCR proceeding.

The Court of Appeals ultimately found that it was this lack of an evidentiary record that precluded it from finding the requisite prejudice to

sustain Barker’s claim that PCR counsel was ineffective. *Barker*, 2015 WL 5287142 at *3 (“On this record, Barker cannot establish any error occurred. While he claims he was given a lifetime registry requirement, he has provided no evidence of this assertion.”) (Am. App. 152-153). The proper means for Barker to have developed such a record was through the filing and subsequent prosecution of a section 692A.116 application for determination before the Department. *E.g.*, *Bullock*, 638 N.W.2d at 735; *Jensen*, 2016 WL 718798 at *3; *Garcia*, 2013 WL 2368820 at *2. So while the Court of Appeals incorrectly pronounced in its ruling that Barker was only subject to a ten- year registration term, that finding was not essential to the Court’s resulting judgment to affirm the district court’s dismissal of Barker’s PCR application on statute of limitations grounds.

Furthermore, issue preclusion may be applied offensively against a party lacking mutuality with the prior litigants only if “the party sought to be precluded was afforded a full and fair opportunity to litigate the issue in the action relied upon and that no other circumstances justify affording [that party] an opportunity to relitigate that issue.”² *Hunter v. City of*

² While the State of Iowa was a party to both Barker’s criminal prosecution and his subsequent postconviction action, Barker cites to no Iowa case in which this Court has necessarily found that a state agency had sufficient mutuality with the State of Iowa so as to be treated as a single

Des Moines, 300 N.W.2d 121, 126 (Iowa 1981). The Department was not a party to Barker's underlying criminal case or his subsequent postconviction proceedings. There is nothing in the record before the Court to indicate that the Department had notice that the length of time Barker would be required to register as a sex offender would be litigated in these proceedings outside the applicable statutory determination process. Although it is an agency of the State of Iowa, the Department lacks authority to appear in either a criminal or postconviction proceeding and prosecute or defend such cases on the State of Iowa's behalf. *See generally* Iowa Code chapter 80.

Consequently, the Department had no opportunity to meaningfully litigate the question of Barker's registration status in those earlier court cases and it should not be precluded by the judgments entered in those cases from independently exercising its own determination authority in this case.

Regardless, recognized exceptions to the doctrine of *res judicata* are applicable to this case that justify the Department determining the length of Barker's registration term anew. One such exception provides that

entity or party for *res judicata* purposes. Neither *Heidemann v. Sweitzer*, 375 N.W.2d 665 (Iowa 1985), nor *Grant v. Department of Human Servs.*, 722 N.W.2d 169 (Iowa 2006), is instructive because the Court was able to reject the application of issue preclusion in those cases on alternative grounds without addressing the question of mutuality.

relitigation of the issue in a subsequent action between the parties is not precluded if: “A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them.”

Heidemann v. Sweitzer, 375 N.W.2d 665, 667-68 (Iowa 1985) (citing Restatement (Second) of Judgments, § 28(3)).

In applying this exception to the Department of Transportation in *Heidemann v. Sweitzer*, 375 N.W.2d 665 (Iowa 1985), and the Department of Human Services in *Grant v. Department of Human Servs.*, 722 N.W.2d 169 (Iowa 2006), this Court has found that prior judicial adjudications do not bind state agencies from issuing their own independent findings in those circumstances where the Legislature has specifically vested those agencies with specific jurisdiction to decide certain, defined controversies within those agencies’ “special competency.” *Grant*, 722 N.W.2d at 175-76; *Heidemann*, 375 N.W.2d at 668. This exception is equally applicable to the Department’s sex offender determinations rendered under Iowa Code section 692A.116.

As discussed above, this Court has interpreted Iowa Code section 692A.116 as vesting the Department with sole jurisdiction to initially

evaluate and determine whether any particular sex offender is subject to the registration requirements of Iowa Code chapter 692A and that adjudications entered prematurely by competing tribunals are of questionable validity. *E.g., Bullock*, 638 N.W.2d at 735 (“Until the Department has made a decision on the defendant’s term of registration, there is no concrete controversy. Any adjudication by the district court prior to an administrative decision and a request for judicial review of that decision is premature.”); *see also Jensen*, 2016 WL 718798 at *3; *Garcia*, 2013 WL 2368820 at *2; *Mussmann*, 2007 WL 1827336 at *2. The Department is uniquely qualified to evaluate criminal history data, investigate the facts and circumstances of an offender’s offense, and ultimately determine an offender’s compliance with registry requirements. Although legislative amendments enacted in 2009 require criminal courts to make limited factual findings as to whether certain criminal offenses were “sexually motivated” for registry purposes, the ultimate question of whether a particular offender must register as a sex offender under chapter 692A – and for how long – remains within the Department’s sole domain. *See Iowa Code §§ 692A.116, 692A.126; see, e.g., Jensen*, 2016 WL 718798; *see also Heidemann*, 375 N.W.2d at 668. “If the legislative branch of the government has given a

special power to an agency, it would seem that no court should be able to foreclose litigation of the issue before the agency.” *Heidemann*, 375 N.W.2d at 668 (quoting approvingly Allen Vestal, *Preclusion/Res Judicata Variables: Adjudicating Bodies*, 54 Geo. L.J. 857, 886–87 (1966)).

Much like the Department of Human Services and its child abuse registry, the Department has been statutorily vested with ensuring the accuracy of the information maintained on the sex offender registry. Iowa Code §§ 692A.116, 692A.118; *see Grant*, 722 N.W.2d at 178. The public safety goals for maintaining a sex offender registry will be unreasonably impeded and undermined if the Department finds itself unable to correct blatantly errant judicial pronouncements concerning an offender’s registration status. In this case, Barker seeks to unreasonably benefit from the errant pronouncement of the Court of Appeals as to the length of his sex offender registration to the detriment of the public’s statutory right to know whether they are living or working with a convicted sex offender.

Alternatively, offenders who were improperly found by sentencing and appellate courts to be subject to more onerous registration requirements than the code actually provides should not be precluded from seeking correction of those errors from the Department. Thus, the opinions of the sentencing

court and the Court of Appeals should have no preclusive effect upon the administrative determinations rendered by the Department under Iowa Code section 692A.116.

Nor should a party be barred from relitigating a matter subject to a prior judicial ruling if: “The issue is one of law and . . . a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws.” *See State v. Anderson*, 338 N.W.2d 372, 375 (Iowa 1983) (citing Restatement (Second) of Judgments, § 28(2)). As noted, the Iowa legislature substantially rewrote Iowa’s sex offender statute in 2009, a year after entry of Barker’s assault with intent conviction. The Department should be allowed to evaluate Barker’s registration situation within the context of these legislative amendments. Thus, if the sentencing court and subsequent appellate tribunals relied upon the earlier version of the code to render its judgment, the intervening law change justifies revisiting the question of Barker’s registration term. *See Anderson*, 338 N.W.2d at 375.

Because sex offender registration is remedial and not punitive in nature, the State of Iowa may retroactively apply amendments to Iowa Code chapter 692A to persons convicted of offenses that occurred prior to the

enactment date of those amendments. *See Pickens*, 558 N.W.2d at 400 (“Iowa’s sex offender registration statute, Iowa Code chapter 692A, is not punitive and therefore is not *ex post facto*.”). The United States Supreme Court has likewise found that retroactive application of sex offender registry laws does not violate the Constitution’s *ex post facto* clause. *Smith v. Doe*, 538 U.S. 84, 105-06 (2003) (holding that because Alaska’s sex offender registry act is non-punitive, its retroactive application did not violate the *ex post facto* clause). Thus, the Iowa Legislature could constitutionally impose longer registration periods upon persons previously convicted of qualifying sex offenses. Therefore, the criminal court’s guidance in this case as to the anticipated length of Barker’s sex offender registration requirement was merely advisory and could not bind the Department in the event of a future change in law. *See Garcia*, 2013 WL 2368820 at *2.

Both the Department and reviewing courts have an obligation to implement and administer the sex offender statute as written by the Legislature. As discussed above, Iowa Code chapter 692A explicitly requires that Barker register for life as a sex offender. A district court is only empowered to modify Barker’s registration status through the specific procedures delineated in Iowa Code section 692A.128. Barker did not seek

such a modification in the present case, nor can a reviewing court order such relief through a chapter 17A judicial review action.

The Department accordingly committed no errors in finding that Barker has an obligation to register as a sex offender in Iowa for life and the District Court ruling upholding that determination should be affirmed.

II. BARKER’S CLAIMS AGAINST THE IOWA DEPARTMENT OF PUBLIC SAFETY ARE NOT RIPE FOR REVIEW AS HE HAS YET TO COMPLETE TEN YEARS ON THE IOWA SEX OFFENDER REGISTRY.

Standard of Review: Judicial review of final agency action under Iowa Code chapter 17A is for corrections of errors at law. *E.g., Houck*, 752 N.W.2d at 16.

Preservation of Error: Having raised ripeness as a defense to Barker’s petition for judicial review in the District Court, the Department’s argument that Barker’s claims are premature is preserved for appellate review. Although the District Court did not specifically rule upon the Department’s ripeness argument, this Court may affirm for any reason urged below. *E.g., King v. State*, 818 N.W.2d 1, 11 (Iowa 2012) (“[W]e will uphold a district court ruling on a ground other than the one upon which the district court relied provided the ground was urged in that court.”).

Argument: Barker concedes that he is presently required to register as a sex offender in Iowa. Rather, Barker’s sole allegation is that he should only be subject to a ten-year registration term in lieu of the lifetime obligation found by the Department. Although Barker first registered with the Department as a sex offender in October 2008, he is only entitled to claim approximately four and one half years credit on the Iowa sex offender registry due to his multiple periods of incarceration arising from his special sentence revocations. (See D.C. Con. App. at 32-33; Movement Summary; Am. Con. App. 38-39; Am. App. 179); *see also* Iowa Code § 692A.107 (tolling incarceration time); Iowa Code § 692A.2(3) (2007). Because he has not completed ten full years on the sex offender registry, Barker’s present claim that the Department miscalculated his registration term is not yet ripe for judicial review and should be dismissed.

“A case is ripe for adjudication when it presents an actual, present controversy, as opposed to one that is merely hypothetical or speculative.” *Bullock*, 638 N.W.2d at 734 (quoting *State v. Iowa Dist. Court ex rel. Story Cnty.*, 616 N.W.2d 575, 578 (Iowa 2000)). The ripeness doctrine is intended to “prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over

administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized *and its effects felt in a concrete way* by the challenging parties.” *State v. Wade*, 757 N.W.2d 618, 627 (Iowa 2008) (emphasis added); *see Bullock*, 638 N.W.2d at 734.

With a minimum of five plus years to go before he exceeds the ten-year term to which he claims his registration should be limited, Barker has yet to suffer a definitive, concrete injury as a result of the Department’s determination that he is subject to lifetime registration and his case should be dismissed as premature. *See, e.g., Jensen*, 2016 WL 718798, *3 n.2 (“Since the ten-year period has not yet expired, we question whether the time is now ripe for [the offender] to pursue his administrative remedies.”).

Any claimed future injury on Barker’s part would be purely speculative and therefore is not ripe for adjudication. *E.g., Bullock*, 638 N.W.2d at 735; *Jensen*, 2016 WL 718798 at *3. Several unforeseen intervening factors could ultimately render Barker’s claims moot at any time during the next five years before he suffers a true injury in fact, including: his commission of a second or subsequent registrable sex offense that would independently necessitate lifetime registration; his return to prolonged

incarceration thus tolling any future obligation to register; a successful modification of his registration requirement pursuant to Iowa Code section 692A.128; or, a statutory repeal or other amendments to Iowa Code chapter 692A.

Additionally, a reviewing court is empowered to reverse, modify, or grant other appropriate relief to a petitioner under Iowa Code section 17A.19 only if that petitioner's substantial rights have been prejudiced by an agency action taken in violation of law. Iowa Code § 17A.19(10). Until Barker completes ten years on the sex offender registry, he cannot demonstrate that he has suffered any prejudice as a result of the Department's determination that he must register for life instead of a ten-year period. Absent a showing under Iowa Code section 17A.19(10) that Barker's substantial rights were in fact prejudiced, any error on the Department's part is presently harmless and Barker's petition should be dismissed.³ *City of Des Moines v. Public Emp't Relations Bd.*, 275 N.W.2d 753, 759 (Iowa 1979) ("It is a direction to the court that an agency's action

³ Because the Department's determination in this case constitutes "other agency action" and not a contested case, Barker would be free to re-file for judicial review at any time in the future once he is actually aggrieved or adversely affected by the Department's determination. *See* Iowa Code § 17A.19(3).

should not be tampered with unless the complaining party has in fact been harmed.”); *see also Hill v. Fleetguard, Inc.*, 705 N.W.2d 665, 671 (Iowa 2005) (“This form of analysis is appropriate because it would be inefficient for us to provide relief from invalid agency action when the particular invalidity has not prejudiced the substantial rights of the petitioner.”); *Belle of Sioux City, L.P. v. Iowa Racing & Gaming Comm’n*, No. 14–1158, 2016 WL 1129935 at *9 (Iowa Ct. App. March 23, 2016).

CONCLUSION

Iowa Code chapter 692A dictates that all persons convicted of an “aggravated offense” shall register with the Iowa Department of Public Safety as a sex offender for life. It is uncontested that Ross Barker was convicted of one such aggravated offense in 2008 – assault with intent to commit sexual abuse in violation of Iowa Code section 709.11. Because determining the scope of one’s sex offender registration duty is an administrative function delegated to the Department, the premature pronouncements of other tribunals to which the Department was not a party as to the length of Barker’s registration requirement are not entitled to preclusive effect. The District Court’s ruling upholding the Department’s

determination that Barker must register for life should accordingly be affirmed.

REQUEST FOR ORAL ARGUMENT

Appellee Iowa Department of Public Safety requests that it be heard at the time of final submission of this matter.

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 Times New Roman in 14-point font size and contains 6,534 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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PROOF OF SERVICE

I, John R. Lundquist, hereby certify that on November 20, 2017, I or a person acting on my behalf did serve Appellee Iowa Department of Public Safety’s Final Brief and Request for Oral Argument on all other parties to this appeal by EDMS to the respective counsel for said parties:

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CERTIFICATE OF FILING

I, John R. Lundquist, hereby certify that on November 20, 2017, I or a person acting on my behalf filed Appellee Iowa Department of Public Safety’s Final Brief and Request for Oral Argument with the Clerk of the Iowa Supreme Court by EDMS.

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