IN THE SUPREME COURT OF IOWA

No. 17-0488

ROSS BARKER,

Appellant,

v.

IOWA DEPARTMENT OF PUBLIC SAFETY,

Appellee.

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

APPELLANT'S FINAL BRIEF

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ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

On November 20, 2017, the undersigned certifies that a true copy of the foregoing instrument was served upon the Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Ross Barker.

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/s/ Philip B. Mears
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ROUTING STATEMENT

There is no reason under rule 6.401 of the Iowa Rules of Court for the Iowa Supreme Court to retain jurisdiction in this case. The claim involves the application of existing legal principles to Barker's case.

STATEMENT OF THE CASE

Nature of the Case

In this appeal Ross Barker seeks review of ruling from the District Court denying his petition for judicial review in the Scott County. In that petition Barker had sought review of a decision by the Department of Safety (DPS), regarding the length of his obligation to register as a sex offender.

After the Iowa Court of Appeals held in his postconviction appeal that he only had to register for ten years, Barker had filed an Application for Determination with DPS. He sought to have it accept the appeal court's determination that he only had to register on the Sex Offender Registry for ten years. DPS, without any discussion, denied that application, finding Barker should register for life. Conf. Appx. p. 74.

Barker filed a Petition for Judicial Review with the Scott County District Court. Pub. Appx. p. 8. After briefing and the submission of an agreed upon Appendix, the District Court denied relief in a ruling on March 6, 2017. Pub. Appx. p. 22.

Barker filed his Notice of Appeal on March 27, 2017. Pub. Appx. p. 30.

Course of Proceeding

There are several “proceedings” to identify and discuss, as will become clear from a discussion of the issue. Barker had a criminal case in 2008. He had a post

conviction in 2013. There was an appeal from the post conviction. After the Court of Appeals decision in that appeal, Barker filed an Application for Determination with the Department of Public Safety. That is the administrative method to seek a determination as to the length of his obligation to register. When he received a negative response from the agency, he filed his Petition for Judicial Review.

Proceeding on Judicial Review

Barker filed his Petition for Judicial Review under section 17A.19 on August 16, 2016. Pub. Appx. p. 8. On July 1, 2016, Barker had filed a third post conviction about his criminal case in Scott County. In that proceeding he argued that the outcome of his second post conviction was incorrect, and could be reconsidered in light of ineffective assistance of counsel. That case is Scott County PCCE127815.

As was expected, the State filed a Motion for Summary Dismissal in that case, noting that Barker had an earlier post conviction where essentially the same claim had been raised. The State argued the claim was time barred. Barker filed a Motion to stay further proceedings pending the outcome of the 17A action, which had just been filed. The State did not object to that stay. The postconviction case has been stayed pending the outcome of the 17A action, including this appeal.

After the DPS filed its Answer, the parties agreed upon a stipulation of record, submitting both a Public Appendix and a Confidential Appendix. The Confidential Appendix contained documents that DPS regarded as "not public".

Both parties submitted briefs and there was oral argument before Judge Mark Cleve, the judge who was assigned the case. (He is also assigned the new postconviction.)

On March 6, 2017, Judge Cleve entered his order denying relief Pub. Appx.p. 22. Barker filed a notice of appeal Pub. Appx. p. 30.

Original criminal case, Scott County FECR030582

Ross Barker was arrested on October 3, 2007, and charged with Third Degree Sex Abuse. Pub. Appx. p. 39. The Trial Information was filed on October 24, 2007, charging Barker with Sexual Abuse in the Third Degree in violation of §709.4 of the Code. Pub. Appx. p. 40. The subsection was not specified. The Minutes of testimony stated that the victim was fourteen years old at the time. The Minutes said the victim told the police that Barker, age nineteen at the time, had used force in his sexual assault. Conf. Appx. p. 9.

Barker was represented by a court appointed lawyer. After a number of continuances, the case was resolved with a plea bargain. On March 14, 2008, Barker filed a written plea of guilty to the aggravated misdemeanor of Assault of

Intent to Commit Sexual Abuse in violation of §709.11. Pub. Appx. p. 42.[1] A memorandum of plea agreement was submitted along with the written plea. A memorandum of agreement stated that it was an "open plea. The State may make any recommendation at sentencing." Pub. Appx. p. 44. In the written plea the consequences of the plea were explained as follows: "An aggravated misdemeanor, the court can sentence me to prison not to exceed two years and fine me between $625.00 and $6250.00 plus surcharge and court costs." Pub. Appx. p. 42.

In the written plea there was no reference to any special sentence to parole under 903B. There was no reference to the requirement to register as a sex offender or the length of any such registration requirement. Pub. Appx. p. 42.

In the plea Barker filed a consent to waive presence, indicating that the court could impose sentence without him being present. Pub. Appx. p. 42. Actually since it was an open sentencing that waiver did not make much sense.

On April 10, 2008, a sentencing hearing took place. The calendar entry for the sentencing[2] recited that Barker was sentenced to an indeterminate term not to exceed two years and required to pay a $625.00 fine plus surcharge and costs. The

[1] Judge Cleve in his discussion of background facts stated that the parties did not include a transcript of any plea colloquy. Ruling p. 1; Pub. Appx. p. 15. A transcript was not submitted because there was only a written plea of guilty. The transcript from the sentencing hearing was submitted as part of the record in the 17A proceeding. It had been submitted as part of the record in the second post conviction proceeding.

[2] The sentencing order in Scott County was just a calendar entry.

calendar entry recited that the defendant was advised of his registration requirement. Pub. Appx. p. 58.

Several weeks later, after Barker got to IMCC, a record's administrator noted that the sentencing order did not include the ten year special sentence under 903B.2. The administrator wrote to the sentencing judge, calling this apparent omission to her attention. Pub. Appx. p. 59.

On May 12, 2008, the judge, apparently without holding a hearing or giving notice to Barker, amended her sentencing order. Pub. Appx. p. 60. The court calendar entry from that date stated that the sentence should include the mandatory sentence required under 903B.2.[3]

At the time of the second postconviction the transcript from the sentencing before Judge Tabor was prepared. It is now part of this administrative record. Pub. Appx. p. 46. At the sentencing the State asked for two years in prison. The State made no reference to any special sentence under 903B. Pub. Appx. p. 48. Defendant's Counsel asked for probation. He did not mention any special sentence. Pub. Appx. p.48-50.

The Court sentenced Barker to two years in prison, adding the following sentences about §903B and the obligation to register.

[3] The calendar entry does not actually say what the length of the special sentence was. The reference to 903B.2, however, was in reference to code section with the ten year sentence.

> "This type of crime is also subject to the Iowa Legislature Special Sentencing Provision which provides that in addition to the sentence proposed above you shall at – it is hereby ordered that once the sentence of incarceration or probation should be released sooner will – ends you will be subject to be placed on the correctional continuum for a period of ten years which means that you will be under the supervision as if you are on parole for an additional period of ten years.
> You will also be subject to the Sex Offender Registry requirement and you will be required to be on the Sex Offender Registry for a period of ten years."
> (Trans. p.8 lines 14-23); Pub. Appx. p. 53).

First postconviction PCCE111471

Barker went to prison on his criminal sentence not long after April 10, 2008, when he was sentenced. About a month later on May 12, 2008, the judge imposed the special sentence of ten years to follow his two years of incarceration. Pub. Appx. p. 60.

Barker filed a postconviction. He complained about the imposition of the special sentence. After the appointment of counsel, he dismissed the postconviction.

Mostly this first postconviction is not important to this case.

2014 postconviction PCCE124901

After Barker went to prison in 2008 he was in and out of prison over the next five years for this sexual offense, including the ten year special sentence. He was released from prison having completed everything on July 9, 2013. Pub. Appx. p. 179.

According to his 2014 postconviction, when he got out of prison in 2013 he was told by the sheriff that according to the DPS he had to register for life. Barker then filed a pro se second postconviction in Scott County on April 4, 2014. Pub. Appx. p. 84. The case was given case number PCCE124901.

In the postconviction, Barker requested a new trial, complaining that his plea agreement had been changed, imposing lifetime on the Sex Offender Registry. He explained that had he known he would be receiving life on the Sex Offender Registry, he would not have pled guilty and would have demanded a trial. Pub. Appx. p. 96.

He also complained that lifetime on the Registry was a violation of the plea agreement. He claimed that the issues could not have been raised in a previous postconviction because he only learned of the lifetime requirement "after being released from prison." Pub. Appx. p. 97. Barker was released from prison on July 9, 2013.

After an attorney was appointed for Barker for the postconviction, Barker retained the services of Michael McCarthy, an attorney in Davenport. The State filed a Motion to Dismiss, based on the fact that the case was filed outside of the three year statute of limitations. Pub. Appx. p. 98.

Attorney McCarthy resisted the Motion to Dismiss, characterizing the postconviction as a challenge to an "illegal sentence". That was his way of trying

to avoid the statute of limitations. He did not argue that there would be an exception to the statute of limitations based on the discovery rule. Pub. Appx. p. 99. He did not argue that Barker had relied on the original statement from the sentencing judge that he would be on the Registry for only ten years.

On June 20, 2014, Judge Paul Macek dismissed the postconviction. He concluded that the case was not a challenge to an "illegal sentence". For that it was outside the statute of limitations. Pub. Appx. p. 103.

Barker appealed the dismissal.

Appeal from postconviction, case no. 14-1178

On postconviction appeal the Appellate Defender's Office was appointed and Maria Ruhtenberg was the designated attorney.

Ruhtenberg filed her brief for Barker and did not request oral argument. Pub. Appx. p. 128. In her brief, Ruhtenberg argued that the postconviction lawyer was ineffective in (1) characterizing the claim as a challenge to an "illegal sentence" and in (2) failing to address the statute of limitations. Pub. Appx. p. 139-146.

She pointed out that the plea would have been subject to challenge because Barker was clearly misled by the sentencing judge.

> The claim raised by Barker in his *pro* se filing was properly raised in an application for post-conviction relief. The sex offender registry requirement is not a sentence. It is a collateral consequence of the sentence. State v. Searing, 701 N.W.2d 655, 667 (Iowa 2005); State v. Mott, 407 N.W.2d 581, 583 (Iowa 1987).Therefore, it cannot be an illegal sentence. However, "if

> a defendant has been affirmatively misled by an attorney concerning the consequences of the plea, the plea may be held to be invalid even though the consequences are characterized as collateral." Mott, 407 N.W.2d at 583 (denying a defendant's application for post-conviction relief and finding counsel did not mislead the defendant but just failed to advise the defendant, of the deportation consequences of his guilty plea).This Court has held that if a court or an attorney mislead a defendant regarding the collateral consequences of the plea, the defendant cannot make a knowing and intelligent choice. Meier v. State, 337 N.W.2d 204, 207 (Iowa l983) (granting the defendant's application for post-conviction relief because the defendant was misled regarding eligibility for parole). "'One would not supposed that the collateral consequences rule ...would apply in a situation in which defendant's guilty plea was induced by actual misadvice respecting some collateral consequence when that consequence was of substantial importance to the defendant."'Id. (quoting Strader v. Garrison, 611 F.2d 61, 63 (4th Cir. 1979)).
>
> In this case, the defendant had a valid and viable claim that his plea was not knowing and voluntary under Iowa case law. However, he had to address the statute of limitations problem as to why he was not able to bring his claim within 3 years of his conviction. Counsel for the defendant did not present a proper defense to the Motion to Dismiss the Application for Post-Conviction Relief as untimely.
> Barker brief on appeal, pages 11-13; Pub. Appx. p. 143-145.

The Court of Appeals, without oral argument, denied the appeal, affirming the dismissal by the District Court in a ruling dated June 26, 2015. Pub. Appx. p. 148. The Court of Appeals noted that Barker, in his postconviction, had "sought a new trial claiming his plea was not knowing and voluntary as he was not informed that he would be on the sexual abuse registry for his lifetime." Ruling p.4. Pub. Appx. p. 151.

The Court of Appeals said Barker was incorrect in his assumption that there was anything wrong with the statement by the District Court about being on the Registry for ten years. Here is specifically what the Court of Appeals said.

> Because of the plea Barker entered under Section 709.11, an aggravated misdemeanor, the district court properly imposed the special sentence pursuant to Section 903B.2. In addition, under Section 692A.106, Barker was required to be placed on the Sex Offender Registry for a period of ten years, not a lifetime, as Barker mistakenly asserted in his postconviction application." See *id.* Section 692A.106(2)(2007).
> Ruling page 5, Pub. Appx. p. 152.

The statement was somewhat remarkable because Assault with Intent to Commit Sexual Abuse is defined, and has been defined since 1999, as an "aggravated offense" under the Sex Offender Registry Chapter. See 692A.1(1) (2000 code). Conviction for any aggravated offense has carried lifetime on the Registry since 1999. The Court of Appeals' conclusion was therefore incorrect.

Barker's lawyer, Ms. Ruhtenberg filed an Application for Further Review of the Court of Appeals decision. Pub. Appx. p. 155. In her application, she pointed out that the Court of Appeals decision was incorrect about whether Assault with Intent is subject to only ten years registration. See Application for Further review, page 1-2; Pub. Appx. p. 161-162.

On November 10, 2015, without discussion, the Supreme Court denied further review. Pub. Appx. p. 177.

Procedure in front of agency

Section 692A.116 provides an administrative remedy for individuals who have a complaint about their registration statute. Subsection 1 of that section specifically allows an offender to request that the Department determine whether the period of time determined by the agency is incorrect.

On October 23, 2015, after the Court of Appeals had come down in his postconviction, Ross Barker submitted an Application for Determination to the Iowa Department of Public Safety on one of their forms. Conf. Appx. p. 42. He pointed out that he had originally been told in his criminal case by both his attorney and the judge that he would be on the Registry for ten years. He explained that after he got out of prison he learned from the Scott County Sheriff that it would be registration for life.

He explained that he filed a postconviction complaining that, among other things, his attorney was ineffective and that the Court had misstated the length of time he would be on the Registry.

On January 25, 2016 DPS made its Decision of Determination. Conf. Appx. p. 74. That decision just stated that Assault with Intent to Commit Sexual Abuse is regarded as an aggravated offense. It then cited the applicable Code Section 692A.106(5) which states that a conviction for an "aggravated offense" requires a person to register for life.

The decision did not contain a written explanation beyond the conclusory statements. The decision did not make any reference to the Court of Appeals decision, which was the basis for Barker's Application.

STATEMENT OF FACTS

In this case, Barker seeks to have the ruling from the Court of Appeals on the length of his registration applied preclusively against the Department of Public Safety. As such, the case is mostly a legal argument with the facts presenting the background for the Court of Appeals decision.

There are a number of facts, however, that can be emphasized for purposes of understanding Barker's claim.

1. Ross Barker plead guilty in 2008 in Scott County to the crime of assault with intent to commit sexual abuse in violation of section 709.11.

2. At sentencing, the judge specifically stated on the record that Barker would be on the Sex Offender Registry for ten years (sentencing transcript page 8, lines 14-23; Pub. Appx p. 53).

3. After Barker had completed with his sentence in 2013, he was told by the sheriff in Scott County that the Department of Public Safety had told him that he had to register for life.

4. Barker then filed a pro se post conviction challenging the voluntariness of his original guilty plea, assuming the information from the Department of Public Safety was correct.

5. Barker lost the post conviction. At the District Court it was dismissed on statute of limitations grounds.

6. On appeal, his lawyer argued for some kind of discovery rule exception to the statute of limitations. She then argued that Barker had been affirmatively mislead in the original sentencing guilty plea proceeding and therefore his plea was invalid.

7. The Court of Appeals affirmed the District Court but not on statute of limitations grounds. Instead, the Court of Appeals specifically determined that Barker had not been misled about the length of his registration because in fact he only had to register for ten years.

8. Barker's lawyer filed an Application for Further Review pointing out that the Court of Appeals was in error in determining that he only had to register for ten years. The Supreme Court denied further review without comment.

9. Barker then sought to have the Department of Public Safety abide by the Court of Appeals decision. When the agency denied the request, Barker filed for judicial review.

DISTRICT COURT RULING

On March 6, 2017, Judge Mark Cleve entered his ruling in Ross Barker's Petition for Judicial Review. He upheld the decision of the Department of Public Safety that Ross Barker had to register for his entire life. Pub. Appx. p. 22.

Judge Cleve went through the history of Barker's trip through the criminal justice system. Judge Cleve noted that Barker was told first by the sentencing judge and later by the Iowa Court of Appeals that he only had to register for ten years. He correctly recited that Barker had alleged that when he was released from prison in 2013, the sheriff told him…he would have to register as a sex offender for life (Ruling page 2; Pub. Appx p. 23).

Judge Cleve noted that the issue on his post conviction appeal was whether he had been misled by his attorney and the sentencing court regarding the consequences of his plea. The issue before the Court of Appeals was whether the plea was involuntary in light of that misinformation.

Judge Cleve acknowledged that the Court of Appeals resolved Barker's post conviction appeal by the necessary conclusion that Barker was not mislead because he only had to register for ten years.

As a final somewhat factual matter, Judge Cleve noted that under Chapter 692A, the crime of Assault with Intent is an "aggravated offense" and therefore

Barker is required by that statute to be on the registry for life. That was the law in 2008. It was the law in 2014. And it is the law today.

Having found all of those facts, Judge Cleve still did not grant relief.

Instead he relied exclusively on an Iowa Supreme Court case of State v. Bullock 638 N.W. 2d 728, 735 (Iowa, 2002). Judge Cleve stated that Bullock had "squally held" the determination of the length of any required sex offender registration is an administrative decision initially committed to the Department of Public Safety. Ruling, p. 5, Pub. Appx. p. 26. Judge Cleve found that Bullock meant that courts simply cannot determine the length of an offender's registration requirement. Ruling p. 6, Pub. Appx. p. 27. Judge Cleve, concluded:

> "Although the sentencing court told Barker he would only have to register for ten years, the trial court had no authority to determine the length of Barker's registration requirement. Likewise, the Iowa Court of Appeals could not fix the length of Barker's 692A registration requirement either correctly or incorrectly and thus any such determination is a nullity for issue preclusion purposes".
> Ruling p. 6 and 7; Pub. Appx p. 27-28.

For that reasons, Judge Cleve denied the petition.

DISCUSSION OF LENGTH OF REGISTRATION FOR ASSAULT WITH INTENT TO COMMIT SEXUAL ABUSE

The length of a sex offender's registration is primarily set out in current section 692A.106. That provision provides:

692A.106. Duration of registration

1. Except as otherwise provided in section 232.54, 692A.103, or 692A.128, or this section, the duration of registration required under this chapter shall be for a period of ten years. The registration period shall begin as provided in section 692A.103.

2. A sex offender who has been sentenced to a special sentence under section 903B.1 or 903B.2, shall be required to register for a period equal to the term of the special sentence, but in no case not less than the period specified in subsection 1.

3. If a sex offender is placed on probation, parole, or work release and the probation, parole, or work release is revoked, the period of registration shall commence anew upon release from custody.

4. A sex offender who is convicted of violating any of the requirements of this chapter shall register for an additional ten years, commencing from the date the offender's registration would have expired under subsection 1 or, in the case of an offender who has been sentenced to a special sentence under section 903B.1 or 903B.2, commencing from the date the offender's registration would have expired under subsection 2.

5. A sex offender shall, upon a second or subsequent conviction that requires a second registration, **or upon conviction of an aggravated offense,** or who has previously been convicted of one or more offenses that would have required registration under this chapter, register for life.

6. A sexually violent predator shall register for life.

7. If a sex offender ceases to maintain a residence, employment, or attendance as a student in this state, the offender shall no longer be required to register, and the offender shall be placed on inactive status and relevant information shall not be placed on the sex offender registry internet site, after the department verifies that the offender has complied with the registration requirements in another jurisdiction. If the sex offender subsequently reestablishes residence, employment, or

> attendance as a student in this state, the registration requirement under this chapter shall apply and the department shall remove the offender from inactive status and place any relevant information and any updated relevant information in the possession of the department on the sex offender registry internet site.

Subsection 5 is the important provision for understanding the length of registration for a sex offender. That section specifically provides as follows:

> 5. A sex offender shall, upon a second or subsequent conviction that requires a second registration, **or upon conviction of an aggravated offense,** or who has previously been convicted of one or more offenses that would have required registration under this chapter, register for life.

A reasonable interpretation of that statute, one currently employed by DPS, is that there are two circumstances that can get you registration for life. First, you can have more than one offense that requires registration. Second, you can be convicted of a single offense that is included in the definition of 'aggravated offense.'

The definition of "Aggravated offense", a provision that has been in the Code since 1999, is found in 692A.101(1).

> As used in this chapter and unless the context otherwise requires:
> 1. a. "Aggravated offense" means a conviction for any of the following offenses:
> (1) Sexual abuse in the first degree in violation of section 709.2.
> (2) Sexual abuse in the second degree in violation of section 709.3.

(3) Sexual abuse in the third degree in violation of section 709.4, subsection 1, paragraph “a”.
(4) Lascivious acts with a child in violation of section 709.8, subsection 1, paragraph “a” or “b”.
(5) Assault with intent to commit sexual abuse in violation of section 709.11.
(6) Burglary in the first degree in violation of section 713.3, subsection 1, paragraph “d”.
(7) Kidnapping, if sexual abuse as defined in section 709.1 is committed during the commission of the offense.
(8) Murder in violation of section 707.2 or 707.3, if sexual abuse as defined in section 709.1 is committed during the offense.
692A.101. Definitions, IA ST § 692A.101

Eight statutes are listed. One of those listed is Assault with Intent to Commit Sexual Abuse in violation of 709.11.

Barker’s conviction fits within the definition of an ‘aggravated offense’. The law is/was reasonably clear the length of registration for Barker’s offense should be lifetime.

Barker asserts, of course, that the reason he should only register for ten years is fair in his case. He was told at the time of his plea that he only had to register for ten years. Perhaps, more importantly, the Court of Appeals said that in its decision in his postconviction appeal. The Court of Appeals stated that Barker was not misled at his sentencing by the judge, because in fact he only had to register for ten years.

He was not allowed to withdraw his guilty plea because he had not been misled about the length of his registration.

ARGUMENT

THE COURT SHOULD REVERSE THE DISTRICT COURT DETERMINATION THAT THE DEPARTMENT OF PUBLIC SAFETY DID NOT HAVE TO FOLLOW THE COURT OF APPEALS RULING WHICH HELD THAT BARKER SHOULD ONLY HAVE TO REGISTER FOR A PERIOD OF TEN YEARS.

Standard of Review

The standard of review of a District Court ruling on judicial review is governed by Chapter 17A. See Grant v. Iowa Department of Human Services 722 N.W. 2d 169 (Iowa 2006). The appeal court is bound by the agency finding of fact assuming that they are supported by substantial evidence. There are no facts in dispute in this case.

As the court said in the Grant case, "in contrast we are not bound by the agency's interpretation of law and may substitute our interpretation for the agency's." See Grant page 173. In Barker whether the elements of issue preclusion are satisfied is a question of law.

Preservation of Error

Barker exhausted his administrative remedies on the question of whether the Court of Appeals decision was preclusive.

The issue for this appeal was squarely presented to the District Court in a Petition for Judicial Review. There should be no question with regard to preservation of error.

The facts with regard to this claim are really not that complicated. While they have an extended procedural history, they really come down to eight factual and legal points.

1. Ross Barker was sentenced in 2008 for the aggravated misdemeanor of Assault with Intent to Commit Sexual Abuse.

2. He was told by at least the sentencing judge at that time he would only have to register for ten years.

3. Barker got out of prison, finishing his sentence and special sentence, in 2013. At that time, he was told by the sheriff that the DPS had determined that he had to register for the rest of his life.

4. Barker filed a postconviction in Scott County claiming that he had been misled by the Court and also by his lawyer about the length of registration. He sought to set aside his guilty plea.

5. His case was dismissed at the district court level because of the statute of limitations.

6. On appeal, the Court of Appeals affirmed the dismissal, finding that he had no claim for being misled <u>because he really only had to register for ten years.</u>

7. At that time, Barker brought the administrative action seeking to have the length of registration set at ten years.

8. The agency denied the request, continuing to assert that his registration was for life.

This 17A action has now been brought challenging that agency determination.

Summary of Argument

Barker's argument is fairly simple. The District Court at his sentencing and the Iowa Court of Appeals in 2015 have both said he had to register for only ten years.

Whether this conclusion was right or wrong, those were the important courts and judgments for purpose of this case.

While there may be some question about the authority of a sentencing court to make a pronouncement about the length of registration, there should be no question but that a postconviction court has the authority and the obligation to determine whether a guilty plea is voluntary, or whether there was ineffective counsel in advising a client about consequences, whether they be direct or collateral.

The Court of Appeals in Barker's case had the authority to make the determination whether he had been misled about the length of his sex offender registration.

Based on applicable principles of "issue preclusion" or "collateral estoppel", the Court of Appeals decision should be binding on the DPS. All of the prerequisites for issue preclusion are found in this case. Moreover, any suggestion that the determination of the Court of Appeals is not entitled to preclusive effect because of some exception to the issue preclusion doctrine should be rejected. The exceptions found in Heidemann v. Sweitzer, 375 N.W. 2d 665 (Iowa 1985) should not apply.

This Court should grant relief and order the Department of Public Safety to impose a ten year period of registration.

A. Their case is not governed by State v Bullock

Judge Cleve based his ruling on the case of State v. Bullock, 638 N.W. 2d 728 (Iowa 2002). That case, should not prevent consideration of the normal rules of preclusion in this case, particularly as applied to the Court of Appeals decision.

This subsection will do three things. First, it will discuss the principle that emerges from the Bullock case and the DOT case mentioned by Bullock. Second, it will describe the basic principles regarding guilty plea challenges where a defendant asserts that he was not advised or mislead about the consequences of his

plea. Finally, and this will logically follow from the first two points, Barker will explain how Bullock does not apply when a court resolves a guilty plea challenge, where the claim is that there was misadvise about consequences, even if they are collateral.

1. What did Bullock say?

It is important to understand what Bullock said.

First of all, Bullock was a direct appeal from a primarily sentencing case. At trial, a jury found Bullock guilty of first degree burglary and second degree sexual abuse. The District Court merged the two counts and sentenced into the burglary conviction. The District Court also ordered Bullock to register as a sex offender for the remainder for his life.

The State appealed the merger. The Defendant cross appealed the requirement that he register for his entire life.

The case is important for its discussion of the authority of a sentencing judge.

The State's argument was primarily ripeness. The Supreme Court agreed.

The court observed that the duty to register did not actually begin until a person is released from prison. The Court also noted that there was a statutory prevision allowing a person to file for a determination, to determine whether the period of time is expired.

The Supreme Court made these pronouncements about the Court's jurisdiction at the sentencing stage.

Bullock was a sentencing case. The Supreme Court said that the sentencing court had no business pronouncing or proclaiming the length of a defendant's obligation to register.

To the extent that Judge Cleve concluded that the pronouncement by the District Court was not enforceable, Judge Cleve was presumably correct. Had Barker filed his application for determination and then petitioned for judicial review on the strength on the sentencing judges pronouncements at his sentencing, Judge Cleve's analysis might have been sufficient.

The Court in Bullock cited Iowa Department of Transportation v. Iowa District Court for Bremer County 534 N.W. 2d 457, 460 (Iowa 1995). In the Bremer County case, the Court visited the somewhat awkward timeframe in the mid-90s when the legislature decided to impose a driver's license revocation for anyone convicted of a drug offense. See Hills v. Iowa Department of Transportation 534 N.W. 2d 640, 640-41 (Iowa 1995); Dressler v. Iowa Department of Transportation 542 N.W. 2d 563 (Iowa 1996); and most recently State v. Fisher 877 N.W. 2d 676 (Iowa 2016).

Those cases considered the legislative effort to impose a driver's license suspension for any possession of a controlled substance. The Court ultimately

found that such imposition was punitive and, therefore, a direct consequence of a guilty plea that required a court warning. The punitive statute also created *ex post facto* and double jeopardy problems

In the Bremer County case, a defendant was charged with Operating while Intoxicated and possession of a controlled substance. He pled to the possession charge and the OWI was dismissed. Somewhere during that timeframe, but before the date of the conviction, the law was enacted requiring the DOT to revoke the driver's license. The DOT applied the new statute to the defendant. The defendant went back to the criminal court, filing an application for a nunc pro tunc order. After the criminal court judge granted the motion, the DOT sought review by certiorari.

The Iowa Supreme Court eventually struck the order finding that the District Court had no authority to adjudicate the matter regarding the license suspension.

The Court also found the County Attorney had no authority to waive the applicability of the particular new statute as part of a plea bargain. The Court discussed the effect of the plea agreement on the legal question. The Iowa Supreme Court, however, did not mention in its discussion about the plea bargain whether the defendant would have been entitled to withdraw his guilty plea given the fact that the County Attorney had apparently offered a concession on the driver's license as part of the plea bargain.

Justice Snell dissented. Justice Snell was particularly troubled by the fact that the District Court in its nunc pro tunc order had simply been following the intentions of the parties in connections with the plea bargain and the guilty plea. Justice Snell noted that an important principle was holding the State to the promises made as part of a plea bargain. He included the following quotation from the case of State v. Kuchenreuther 218 N.W. 2d 621 (Iowa 1974).

> "There is more at stake than just the liberty of this Defendant. At stake is the honor of the government, public confidence in the fair administration of justice, and the efficient administration of justice in government." Kuchenreuther at 623-24.

Justice Snell would have held that

> "the DOT as well as the County Attorney in District Court are representatives in arms of the State of Iowa. As such, all are bound by the rules of honor and law stated in Kuchenreuther." Bremer County case 534 N.W. 2d at p. 464.

It is important to understand that this DOT decision and a few others like it mentioned in the case do not add much to the proposition that comes out of Bullock. The proposition is that there is limited jurisdiction in a sentencing court to adjudicating collateral consequences, particularly those entrusted to state agencies.

2. Courts have clear jurisdiction and authority to entertain post conviction claims. That includes jurisdiction to adjudicate claims that a guilty plea was involuntary because the defendant was mislead about collateral consequences.

While there could be some question as to the jurisdiction or authority of a sentencing court over the length of sex offender registry or sometimes the driver's license revocation, there is no question that there is authority and jurisdiction of the District Court to determine whether the guilty plea is voluntary. This can happen in the criminal case itself usually in connection with a Motion in an arrest of judgment. It can also happen on direct appeal given an adequate record. Most often the challenges to a guilty plea for a variety of reasons are raised in post convictions brought under Chapter 822.

A defendant can constitutionally challenge a guilty plea where the defendant was not informed or aware of the penal consequences of a plea. For the plea to be voluntary and knowing, the defendant must have "a full understanding of the consequences of a plea before constitutional rights can be waived knowingly and intelligently". State vs. Thomas 659 N.W.2d 217, 220 (Iowa 2003); Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)

One fact the defendant must know, that seems indispensible to a valid guilty plea, is the information concerning the possible penalties that can be imposed in a case. This requirement is reflected in Iowa Rule of Procedure 2.8(2)(b)(2).

In the world of consequences of a plea there are direct consequences and what are referred to as collateral consequences.[4]

As a historical matter, if something was a direct consequence, the Court had to itself inform the defendant about that consequence. Constitutionally, before the defendant could plead guilty he had to be aware of such consequences.

There were other consequences, not direct, that were referred to as "collateral". There were various consequences that have been determined to be "collateral". State v. Carney 584 N.W. 2d 907, 909 (Iowa 1998)(loss of driver's license with an OWI); Saadiq v. State, 387 N.W.2d 315, 324 (Iowa,1986) (loss of the right to bear arms). Mott v. State, 407 N.W.2d 581, 583–84 (Iowa, 1987)(immigration consequences) (overruled by Padilla v. Kentucky 559 U.S. 356, 130 S. Ct. 1473, 176 L.Ed.2d 284 (2010)). What has been clear for at least thirty years, however, is that if the collateral consequence was important to a defendant, the defendant could not be "mislead" about those consequences, presumably by his attorney. Misleading a defendant about an important collateral consequence would

[4] The United States Supreme Court questioned the appropriateness of that distinction in Padilla v. Kentucky, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed. 2d 284 (2010)

be ineffective counsel, which could be used to make a successful challenge to the voluntariness of a guilty plea.[5]

While there does not seem to be an Iowa case directly on point, it would appear that the length of sex offender registration would be a collateral consequence. See footnote 6 in Blaise v. State, 2011 WL 2078091, at *4 (Iowa App., 2011)

If that is the case, if Ross barker was affirmatively mislead in connection with his guilty plea in 2008 and could show that was material to his plea, that would be grounds to set aside the guilty plea.

If Barker can present a viable constitutional claim that he was mislead, there would therefore be clear jurisdiction and authority for a District Court to make a determination about the length of sex offender registration in deciding whether or not Barker was mislead about a collateral consequence. If there was jurisdiction in the District Court for such consideration, there would be jurisdiction for the Court of Appeals, in reviewing the District Court.

Two cases from other jurisdictions illustrate this principle. In Commonwealth v. Mattew, 2015 WL 7572949, at *1 (Pa.Super., 2015), defendant Mattew pled guilty to a lower level sex offense in Pennsylvania. Mattew lived in Delaware, which is adjacent to Pennsylvania. He was apparently concerned about

[5] Presumably if a court misled a defendant about a collateral consequence, this would allow a constitutional challenge as well.

whether the guilty plea would require registration in Delaware. He claimed in his post conviction case that he was misadvised by his lawyer about this collateral consequence.

The District Court dismissed his post conviction application without a hearing. The appeal court reinstated the case, ordering an evidentiary hearing.

The Court noted that registration consequences in another state would not be a direct consequence. The Court said, however, that Mattew did not allege that. This is what the Pennsylvania court stated:

> As clear as our case law is that counsel's omission to mention a collateral consequence of a guilty plea does not constitute ineffective assistance of counsel, it is equally clear that counsel's assistance is constitutionally ineffective when counsel misapprehends the consequences of a given plea and misleads his client accordingly about those consequences, without regard to whether the consequences in question are "direct" or "collateral."
> Com. v. Mattew, 2015 WL 7572949, at *4 (Pa. Super., 2015)

A quite similar case to Barker's, at least the post conviction part of it, was just decided by the Court of Appeals in Minnesota on June 19, 2017.

In State v. Ellis-Strong, 2017 WL 2625507, at *1 (Minn. App., 2017) the defendant also apparently pled guilty to a lower level sex offense. During the guilty plea colloquy, defense counsel had the defendant state that he knew he

would have to register for ten years. Apparently after the plea colloquy was accepted but before sentencing, trial counsel learned the error of his information.

Defendant filed a motion to withdraw the guilty plea at the time of sentencing. District Court denied the Motion to withdraw the plea and the defendant appealed. The Minnesota Court of Appeals discussed the case law regarding misadvise regarding collateral consequences. The Court noted recognition that misadvise concerning collateral consequences could form the basis of a plea withdrawal. It recognized that misadvise regarding collateral consequences may amount to ineffective counsel.

It concluded, as has the Iowa court of course, that misadvise regarding collateral consequences may amount to ineffective assistance of counsel assuming the other requirements of that challenge are shown. The Court noted that a guilty plea based on ineffective assistance of counsel creates a manifest injustice. The Court remanded the matter back to the District Court for a determination of whether the defendant could show prejudice.

3. Bullock does not limit a court's jurisdiction over Barker's postconviction appeal.

Bullock and the DOT cases say there is no authority or jurisdiction in a sentencing court to make certain determinations regarding collateral consequences.

The court, however, have clear jurisdiction to determine collateral consequences in a guilty plea challenge.

Barker stated a claim in his second post conviction. The determination whether the information he received, ten years on the registry, was misadvise or not clearly was an appropriate and necessary issue before the post conviction court and the Court of Appeals from the post conviction denial.

Bullock does not stand in the way of the ordinary rules of preclusion.

B. General principles of issue preclusion or collateral estoppel.

The Iowa Supreme Court has had a number of occasions to discuss the general principle of "issue preclusion" or "collateral estoppel". Here is how the principle was summarized in Grant v. Iowa Department of Human Services, 722 N.W. 2d 169 (2006).

> Issue preclusion, or collateral estoppel, "prevents parties from relitigating issues previously resolved in prior litigation if certain prerequisites are established." *Comes*, 709 N.W.2d at 117 (citing *Hunter v. City of Des Moines*, 300 N.W.2d 121, 123 (Iowa 1981)). We have identified four elements that must be satisfied in order for the prior determination to have preclusive effect in a subsequent proceeding. They are:
> "(1) the issue concluded 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 action; and (4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment."
> *Id.*, 709 N.W.2d at 118 (quoting *Hunter*, 300 N.W.2d at 123); *see also* Restatement (Second) of Judgments § 27, at 250 (1982) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."); *id.* § 29, at 291

Grant v. Iowa Dept. of Human Services, 722 N.W.2d 169, 173–74 (Iowa, 2006)

> In considering the application of the doctrine, it is important to observe that it applies to both legal and factual issues. We have said "where a particular issue or fact is litigated and decided, the judgment estops both parties from later litigating the same issue. The entire premise of issue preclusion is that once an issue has been resolved, there is no further fact-finding function to be performed." *Colvin v. Story County Bd. of Review,* 653 N.W.2d 345, 348–49 (Iowa 2002) (citations omitted); *see* Restatement (Second) of Judgments § 27 cmt. *c* ("An issue on which relitigation is foreclosed may be one of evidentiary fact, of 'ultimate fact' (i.e., the application of law to fact), or of law."). Grant v. Iowa Dept. of Human Services, 722 N.W.2d 169, 174 (Iowa,2006)

In Employers Mut. Cas. Co. v. Van Haaften, 815 N.W.2d 17, 22 (Iowa, 2012) the Iowa Supreme Court said:

> Issue preclusion, sometimes referred to as collateral estoppel, is a form of res judicata. *Winnebago Indus., Inc. v. Haverly,* 727 N.W.2d 567, 571 (Iowa 2006). Issue preclusion prevents parties " 'from relitigating in a subsequent action issues raised and resolved in [a] previous action.' " *Soults Farms, Inc. v. Schafer,* 797 N.W.2d 92, 103 (Iowa 2011) (quoting *Hunter v. City of Des Moines,* 300 N.W.2d 121, 123 (Iowa 1981)). The doctrine "serves a dual purpose: to protect litigants from 'the "vexation of relitigating identical issues with identical parties or those persons with a significant connected interest to the prior litigation," ' and to further 'the interest of judicial economy and efficiency by preventing unnecessary litigation.' " *Haverly,* 727 N.W.2d at 571–72 (quoting *Am. Family Mut. Ins. Co. v. Allied Mut. Ins. Co.,* 562 N.W.2d 159, 163 (Iowa 1997)). Issue preclusion also " 'tends to prevent the anomalous situation, so damaging to public faith in the judicial system, of two authoritative but conflicting answers being given to the very same question.' " *Grant,* 722 N.W.2d at 178 (quoting Robert C.

> Casad & Kevin M. Clermont, *Res Judicata: A Handbook on Its Theory, Doctrine, and Practice* 113 (2001)). A plaintiff may offensively use issue preclusion "in [a] second action [by relying] upon a former judgment against the defendant to establish an element of his or her claim." *Soults Farms, Inc.*, 797 N.W.2d at 104.
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> Employers Mut. Cas. Co. v. Van Haaften, 815 N.W.2d 17, 22 (Iowa,2012)

One part of that quote deserves to be said again, as it very much applies in this case.

> Issue preclusion also 'tends to prevent the anomalous situation, so damaging to public faith in the judicial system, of two authoritative but conflicting answers being given to the very same question.'
> Employers Mut. Cas. Co. v. Van Haaften, 815 N.W.2d 17, 22 (Iowa, 2012)

C. Application of that general principle to a different state agency.

Issue preclusion generally prohibits relitigating an identical issue with the same party or individuals who are in privy with the same party. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326, 99 S.Ct. 645, 649, 58 L.Ed.2d 552, 559 (1979). This has sometimes been referred to as a principle of mutuality of parties.

The Iowa Supreme Court discussed this principle in Harris v. Jones, 471 N.W.2d 818 (1991). In that case, a criminal defendant won a suppression hearing and had the criminal case dismissed. The court in the criminal case had concluded

that the search of his vehicle was unconstitutional. The defendant, Mr. Harris, then sued the officers who had conducted the search for damages.

The Supreme Court decided that there would not be preclusion in the damage suit as to whether the individual officers had violated the Fourth Amendment. This was because the officers really were not really a party to the criminal case. Their interest in defending their action was not the same in the criminal case and in the suit for damages. Here's what the Supreme Court had to say in Harris.

> Issue preclusion, also known as collateral estoppel, serves the "dual role of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326, 99 S.Ct. 645, 649, 58 L.Ed.2d 552, 559 (1979). In this context, a privy is "one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under *820 one of the parties, as by inheritance, succession or purchase." *Hunter v. City of Des Moines,* 300 N.W.2d 121, 123 n. 3 (Iowa 1981).
>
> Harris v. Jones, 471 N.W.2d 818, 819–20 (Iowa,1991)

> Formerly, the use of issue preclusion was restricted by the doctrine of mutuality of parties. *Parklane Hosiery*, 439 U.S. at 326, 99 S.Ct. at 649, 58 L.Ed.2d at 559. This doctrine held that neither party to an action could use a prior judgment to estop the other unless both were bound by the judgment. *Id.* This doctrine failed to recognize "the obvious difference in position between a party who has never litigated an issue and one who has fully litigated and lost." *Id.* We have abandoned the strict doctrine of mutuality in both offensive and defensive uses of

> issue preclusion. *Hunter,* 300 N.W.2d at 125. We are mindful, however, that it is a due process violation for a litigant to be bound by a judgment when the litigant was not a party or a privy in the first action and therefore never had an opportunity to be heard. *Parklane Hosiery,* 439 U.S. at 327, 99 S.Ct. at 649, 58 L.Ed.2d at 559. Thus, in general, issue preclusion should be applied only when the party against whom preclusion is asserted had a full and fair opportunity to litigate. *Parklane Hosiery*, 439 U.S. at 328, 99 S.Ct. at 650, 58 L.Ed.2d at 560. *See also Opheim v. American Interinsurance Exch.*, 430 N.W.2d 118, 121 (Iowa 1988) (issue preclusion was applicable where the issue was fully and fairly litigated even though the nonmutual party was not in the first action).
>
> Harris v. Jones, 471 N.W.2d 818, 820 (Iowa,1991)

One question that needs to be addressed in this case is the fact that DPS was not a party to the postconviction appeal.

In two cases the Iowa Supreme Court considered the relationship between an initial court judgment followed by an administrative action essentially addressing an identical issue. In the first case arguably the "State" was the party to both cases.

In Heidemann v. Sweitzer, 375 N.W.2d 665 (Iowa 1985), the Court dealt with the relationship between an OWI criminal case and the DOT administrative proceeding. In that case the same issue arose in the same basic facts.

Indeed, anyone who has been involved in any kind of OWI criminal litigation understands that there essentially are mutually parallel proceedings that accompany almost every case.

In the Heidemann case the common issue was whether the arresting officer has complied with the state's implied consent statute. The criminal case went first. The District Court granted a Motion to Suppress the fact the defendant had refused the test. The Court concluded that the sheriff had failed to comply with implied consent procedures. After the ruling the prosecutor dismissed the case.

The administrative license revocation case came next. The hearing officer refused to give preclusive effect to the ruling on the Motion to Suppress. The hearing officer then found there was compliance with implied consent, upholding the revocation. The appeal followed.

The Supreme Court agreed that preclusion was inappropriate. As an initial and important matter the Court did not consider there to be a problem with mutuality of parties. The State was the State, both in the criminal case and before the hearing officer. Instead the Court decided that the case fit within two recognized exceptions to the preclusion doctrine. Here is what the Supreme Court said specifically:

> We conclude that issue preclusion was not applicable here because the circumstances of this case fall within two exceptions to that doctrine. The Restatement (Second) of Judgments provides in section 28(3) and (4):
> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
> ....

> (3) 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; or
> (4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action....
> We adopt both exceptions and find both established under the circumstances of this case.
> Heidemann v. Sweitzer, 375 N.W.2d 665, 667–68 (Iowa, 1985)

The first exception recognized had to do with factors "relating to the allocation of jurisdiction between them." What that meant was:

> The exception pertaining to allocation of jurisdiction between two decision-making bodies applies because license revocation proceedings are separate and distinct from criminal charges arising from the same incident, and "[e]ach action proceeds independently of the other." *Krueger v. Fulton*, 169 N.W.2d 875, 877 (Iowa 1969); *see, e.g.*, *Severson v. Sueppel*, 260 Iowa 1169, 1176, 152 N.W.2d 281, 285 (1967) ("Acquittal of the criminal charge of operating a motor vehicle while intoxicated did not preclude [the department] from revoking plaintiff's driver's license [for refusing chemical testing]."); *Gottschalk v. Sueppel*, 258 Iowa 1173, 1180, 140 N.W.2d 866, 870 (1966) (question of whether evidence would be admissible in criminal proceeding for OMVUI is of no concern in driver's license revocation proceeding).
>
> Heidemann v. Sweitzer, 375 N.W.2d 665, 668 (Iowa, 1985)

> The legislature by enacting chapter 321B has specifically vested the department with jurisdiction to revoke a driver's license for refusal to submit to chemical testing under Iowa's implied consent statute, thereby recognizing that the department has

> special competency to resolve the relatively narrow issues which arise in such license revocation proceedings. The department's administrative decision-making authority should not be undercut by the fortuitous circumstance that a parallel criminal proceeding may result in an evidentiary ruling concerning compliance with implied consent requirements.
>
> Heidemann v. Sweitzer, 375 N.W.2d 665, 668 (Iowa, 1985)

It's important to understand, however, what the Supreme Court was saying. The Department of Transportation was "free to make an independent determination of whether the deputy sheriff followed proper procedures." That was a fact question. The legislature had delegated the resolution of that fact question to the DOT.

In addition, the Supreme Court found that preclusion was inappropriate because of a difference of burden of persuasion between the two proceedings. In the criminal case the State had the burden of proving the foundational facts necessary for the admission of the test results. In the license proceeding the driver had the burden of proving that he had complied with the implied consent statute.

This meant that on the fact question presented in Heidemann, the burden of proof between the two proceedings was different. The Court concluded as follows:

> Because the burden of proof was shifted to Heidemann in the license revocation proceeding, the suppression ruling on which the state had the burden of proof was not binding upon the department in this judicial review proceeding.
>
> Heidemann v. Sweitzer, 375 N.W.2d 665, 669 (Iowa, 1985)

The second and more recent case involving these same principles was Grant v. Iowa Department of Human Services, 722 N.W.2d 169 (Iowa 2006). That case concerned an ongoing dispute between Robert Grant and his wife Linda. While a divorce was pending, Linda filed a separate petition for relief from domestic abuse. By consent, a protective order was entered against Robert Grant. A few months something happened and there was a child abuse report against Robert Grant. That report was "founded" by Department of Human Services (DHS).

Based on the event set out in the child abuse report, Linda filed an application in the domestic abuse proceeding to modify the terms of visitation to require supervised visitation. That matter was heard by the District Court. The District Court modified the visitation accordingly, concluding that the incident with regard to the child abuse had taken place.

Three months later, Robert filed a request with DHS to correct the abuse report. Apparently that procedure is available for a particular period of time after the abuse report is founded.

The issue presented in the Grant appeal was whether DHS was precluded from reexamining their conclusion based on the factual finding by the District Court in the abuse proceeding.

The Supreme Court said no. The Court found that the Heidemann exception to the preclusion doctrine applied. The DHS action to correct the abuse report should proceed. Here is what the Court had to say.

> Considering the statutory scheme and important goals sought to be addressed, we think our legislature would not have given the DHS the responsibility to assess child abuse reports and maintain a central registry of the assessments without recognizing that the DHS possesses a special competency to carry out these duties consistent with the legislative goals. *See* Restatement (Second) of Judgments § 28 cmt. *d*, at 279 (stating that issue preclusion should not prevent relitigating an issue within the special competency of the decision maker in the second action). Likewise, the legislature would not have given the DHS the important duty to determine and correct errors in assessments without recognizing the existence of a special competency to perform this responsibility. Thus, it is evident that our legislature designed the correction process so that issues relating to the correction of erroneous matters in assessment reports would be decided by the DHS.
>
> Moreover, the nature of the statutory proceeding to correct an erroneous assessment reveals that the DHS should not be deprived of the ability to decide issues presented in the course of a correction hearing that it might otherwise be precluded from deciding under a judicial doctrine because the issue happens to have been decided in a previous proceeding before another adjudicative body.
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> Grant v. Iowa Dept. of Human Services, 722 N.W.2d 169, 177 (Iowa, 2006)

D. Application of these principles to the Barker case.

Barker wishes to have the Court of Appeals determination that he only has to register for ten years, apply preclusively to DPS's determination as to his length of registration.

The four elements for issue preclusion identified by the Iowa Supreme Court are satisfied in the Barker case.

Factor 1: The issue concluded must be identical.

The issue in both cases is the length of time Barker has to register for his 2008 conviction in Scott County.

Factor 2: The issue must have been raised and litigated in the prior action.

Barker argued in his second postconviction that his guilty plea was involuntary because he was misled about the length of registration. The length of registration, if it is not a direct consequence of a plea, is at least a "collateral" consequence. For a plea to be constitutionally valid a defendant cannot be misled by his lawyer about a "collateral" consequence. See Mott v. State, 407 N.W.2d 581 (Iowa, 1987) The Mott case was overruled as to whether immigration consequence are "collateral" by Padilla v. Kentucky U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010). Mott still stands for the proposition that a plea is invalid if there is misadvice from the lawyer about collateral consequences. In Barker's case the "misadvice" came from not only the lawyer, but also the sentencing judge.

If Barker was misled about the collateral consequence (the length of his registration) his plea would be involuntary and he should be entitled to postconviction relief. He would also have to show that he would have not entered the guilty plea had he correctly understood the collateral consequence. The Court of Appeals did not get that far in the analysis. For purposes of the appeal and the Motion to Dismiss, Barker's statement in his petition that he would have gone to trial would have been accepted

The Court of Appeals directly addressed whether the advice from the judge was correct. The appeal court stated the sentencing judge was correct in its statement that the length of registration was ten years.

Factor 3: The issue must have been material and relevant to the disposition of the prior action.

The Court of Appeals affirmed the dismissal of the postconviction. Court of Appeals recognized that the issue was whether Barker had been misled about the collateral consequence and if so, was there an available exception to the statute of limitations.

The Court of Appeals did not address whether there was an exception to the statute of limitations. They avoided that issue precisely because they decided that Barker had not been misled. The Court said Barker had not been misled when he

was told the length of registration was ten years. That determination was, in fact, material and relevant to the disposition of the prior action.

Factor 4: The determination made of the issue of the prior action must have been necessary and essential to the resulting judgment.

It is not clear how this is any different from Factor 3. The Court of Appeals affirmed the dismissal of his postconviction solely on the basis that he had not been misled by the Court when it told him he only had ten years to register. The determination that he only had to register for ten years was a necessary and essential part of the Court of Appeals' determination.

Assuming that collateral estoppel as a general principle would apply to Barker and the DPS, the question is whether there should be an exception to that application as was found in the Heidemann and the Grant case. There are several observations from Heidemann and Grant that are important for considering the application of those principles to Barker's case.

First, the question presented in Barker is solely a question of law. There is no question of fact as there was both in Heidemann and in Grant. The question of law is how long does a person have to register in Iowa for the crime of Assault with Intent to Commit Sexual Abuse. There is no fact deference anywhere in the resolution of that issue. Moreover there is no difference in the burden of proof with

regard to establishing that legal conclusion either in the postconviction or in the administrative proceeding.

In both in Heidemann and Grant the legislature had given the responsibility of resolving fact questions regarding the issues presented to the particular state agency. The DOT was entrusted with determinations as to whether the implied consent statute was satisfied. DHS was entrusted with the factual determination as to whether child abuse had taken place. How do those principles apply to Barker's case?

First of all, since the question is only one of law, the exception that exists where there is a different burden of proof does not apply in Barker's case. The burden of proving or establishing the length of registration for a particular statute is the same in both proceedings.

Has the DPS been entrusted with the determination as to the length of registration of a sex offender?

Where the issue presented is whether an Iowa conviction for a particular statute carries lifetime or ten years is not something that is not entrusted to the DPS. The Courts play an integral role in sex offender registration matters. First, the Court has a statutory obligation to notify a defendant that he has to register. Moreover, since 2009 the Courts are the ones to make the determination as to whether particular potentially ambiguous statutes on their face, such as burglary or

child endangerment, contain sexual motivation. See 692A.126. At one time, offenses of that nature might have been entrusted to the DPS to determine whether registration was appropriate. See for example Kruse v. Iowa District Court for Howard County, 712 N.W.2d 695 (Iowa 2006). Not any longer. It is the Court's obligation as part of sentencing to do that.

What about the length of registration? If a person in Iowa has only a single sex offense, and it is from Iowa, the determination of the length of registration is purely a question of law. The question really comes down to whether the offense is an aggravated offense under 692A.101(1). There is no particular reason to think there is any expertise on that issue. See Breeden v. Iowa Dept. of Corrections, 2016 WL 3556535, at *2 (Iowa App.,2016) (affirmed by the Supreme Court at Breeden v. Iowa Dept. of Corrections , 2016 WL6822870 (Iowa November 18, 2016)("We find no support for the proposition that the agency has been granted interpretive authority over these code sections, and therefore, we review the agency's decision under section 17A.19(10)(c) for correction of errors at law, giving no deference to the agency's interpretation and freely substituting our judgment for that of the agency. See Mycogen Seeds v. Sands, 686 N.W.2d 457, 464 (Iowa 2004).

It is perhaps the case that there may be some circumstances where there is a role for DPS in determining the length of registration that is not this case. That

would not be the case when you have a person with a single sex offense for an offense that is one of the offenses listed in the Iowa Code as carrying a particular length of registration.[6]

E. The fact that the Court of Appeals decision, as a legal matter, might have been wrong is of no matter.

Issue preclusion analysis as set out above, does not consider whether the first decision was correct or not. There is no exception to the issue preclusion doctrine where the first determination was wrong.

To some extent, once you recognize that the party in the second action in this case (DPS) stands in the place of the State in the first action (the postconviction appeal) the analysis is a little bit like consideration of a related principle called 'law of the case.' That principle provides that once you have an appeal decision essentially in the same case, that appeal decision is binding on remand and in any subsequent appeal regardless of whether the first appeal decision was wrong.

Here is what the Supreme Court said in Feller v. Scott County Civil Service Commission, 482 N.W.2d 154 (1992).

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[6] If the question is the length of registration for an out of state conviction, DPS has a role to play. If a defendant has or may have a prior offense that elevates the length of registration to lifetime, that may be a determination where DPS plays a role. It does not play a role here. There is no reason for this Court to find an exception to the issue preclusion rules as suggested in the Heidemann and Grant cases.

> However, on this question of law involving statutory interpretation, the court of appeals decision became the law of the case. As such, this decision was binding on remand and in any subsequent appeal. *See Wolfe v. Graether,* 389 N.W.2d 643, 651 (Iowa 1986) (when Iowa court of appeals has determined issue of law necessary to decision of a prior appeal and this determination is not vacated by the Iowa supreme court, the decision of the Iowa court of appeals is controlling as to issue for purpose of further proceedings in district court and subsequent appeals notwithstanding fact that subsequent appeal may be considered by Iowa supreme court). This is so even though the court of appeals may have been incorrect in its interpretation of the open meetings law. *See Lawson v. Fordyce,* 237 Iowa 28, 33-37, 21 N.W.2d 69, 74-76 (1945). These principles announced in *Wolfe* and *Lawson* are part of the "law of the case" doctrine.
>
> Feller v. Scott County Civil Service Com'n, 482 N.W.2d 154, 158 (Iowa, 1992)

F. Other equitable considerations

The Iowa Supreme Court has said that preclusion does have an equitable dimension.

> The decision whether there should be a preclusive effect of an earlier case "should be made with reference to the consequences of preclusions for the precluded party and the administration of justice."
>
> Hunter v. City of Des Moines Mun. Housing Authority, 742 N.W.2d 578, 586 (Iowa, 2007)

Ross Barker filed a third postconviction about the time that he filed this 17A action. It has been assigned case number PCCE127815. In that postconviction Barker seeks to reassert the claim that his guilty plea was invalid because he was

misled by the sentencing judge when she told him registration would be only for ten years. He asserts that the Court of Appeals decision in his case was wrongly decided.

That new postconviction has been stayed while this 17A action goes forward. It is to be anticipated that unless the Court of Appeals decision is modified or overruled or in some way changed by subsequent appellate action, the Court of Appeals decision from 2015 will be used preclusively to prevent Barker from relitigating his postconviction.

If any Court wants to say that the Court of Appeals was incorrect in its conclusion, and Barker has to register for life, that needs to be done in such a way as to undercut or eliminate the preclusive effect of the Court of Appeals as to his postconviction.

A District Court at this point in the postconviction or the 17A action would not appear to have the authority to overrule the Court of Appeals decision for the purposes of the postconviction. Precisely because of that reason, this Court should give preclusive effect to the Court of Appeals decision as against DPS.

Either Barker has to register for ten years or he should get to relitigate his postconviction. The Court of Appeals decision as an equitable matter cannot stand for some purposes but not others.

CONCLUSION

This is a complicated case. On some level however it is not complicated.

Ross Barker pled guilty in 2008, having been told by the judge and his lawyer that he would only have to register for ten years.

When he got out of prison and was informed that he would have to register for life, he filed a postconviction. He lost that case and the case was appealed. On appeal, the Iowa Court of Appeals addressed his constitutional claim about the voluntariness of the guilty plea. It held there was no voluntariness issue because he had not been misadvised by the sentencing judge. Necessary to that conclusion of was the specific determination that his length of registration was only ten years.

The conclusion of the Court of Appeals was apparently wrong. On the other hand, when Barker's lawyer sought further review based on the fact that the Court of Appeals was just wrong, the Supreme Court denied further review.

Barker is stuck. The postconviction seems final. The postconviction says he only has to register for ten years. The DPS says different.

This Court is called upon to make the difficult choice. In order to side with DPS, this Court has to find that the Iowa Court of Appeals was wrong in its opinion. To side with Barker would mean he has to register for less than the statute requires.

Whether the Court of Appeals decision was right or wrong however should not be an issue at this point. The question is whether the Court of Appeals determination is final and whether the Department of Public Safety is bound by it. As a judicial system agencies and defendants do not get to ignore decisions because they might think they are wrong.

This court should find the Court of Appeals in the postconviction case had jurisdiction and authority to determine the merits of Barker's challenge to his guilty plea. The determination that he only had to register for ten years was necessary to the Court's conclusion. The determination is binding at this point on the courts and the state agency.

This Court should find that the Department of Public Safety is bound by the Court of Appeals decision and should reverse the agency determination.

RESPECTFULLY SUBMITTED,

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REQUEST TO BE HEARD IN ORAL ARGUMENT

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

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ATTORNEY'S CERTIFICATE OF COSTS

I, Philip B. Mears, Attorney for the Appellant, hereby certify that the cost of preparing the foregoing Appellant's Page Proof Brief was $6.50.

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

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

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/s/ Philip B. Mears
Signature

November 20, 2017
Date