IN THE SUPREME COURT OF IOWA
Supreme Court No. 17-1023

STATE OF IOWA

Plaintiff-Appellant,

vs.

IOWA DISTRICT COURT
FOR JONES COUNTY,

Respondent-Appellee.

ON WRIT OF CERTIORARI FROM THE IOWA DISTRICT COURT
OF JONES COUNTY (PCCV006155)
THE HONORABLE LARS G. ANDERSON, JUDGE

APPELLANT'S AMENDED FINAL BRIEF

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ROUTING STATEMENT

This case presents a substantial issue of first impression and should be retained by the Supreme Court. Iowa R. of App. P. 6.1101(2)(c). Specifically, this case concerns a 2016 change in Iowa Department of Corrections ("IDOC") policy interpreting Iowa Code § 903A as it relates to Sex Offender Treatment ("SOTP").

STATEMENT OF THE CASE

Nature of the Case: The State sought a writ of certiorari from a District Court grant of post-conviction relief. The District Court vacated an Administrative Law Judge decision declaring Marshall Miller ineligible for sentence reduction credit ("earned time") because of his failure to complete required sex offender treatment. Miller brought a post-conviction action challenging the ALJ decision and IDOC policy as it relates to Sex Offenders who fail to complete SOTP. The State denies any improper action as it relates to Miller, or IDOC SOTP policies. While IDOC updated its SOTP policy in January 2016, all policy changes were in conformity with the Constitutions of the United States and the State of Iowa, as well as the Iowa Code, specifically Iowa Code § 903A.2.

Course of Proceedings: This action arises from a post-conviction relief action filed by Marshall Miller. Miller is a convicted sex offender, and required to complete Sex Offender Treatment ("SOTP") as a result of his conviction. (App. 6). In June 2015, IDOC removed Miller from SOTP due to disciplinary issues, and an Administrative Law Judge upheld that removal. (App. 51). As a result, Miller was ineligible to accrue sentence reduction credit, commonly called "earned time."

In January 2016, the Iowa Department of Corrections ("IDOC") revised its earned time policy with respect to SOTP to better adhere to the plain text of the relevant code section, Iowa Code §903A.2. (App. 128). As a result of this policy change, IDOC revised Miller's sentence calculation to reflect that he had never been eligible to accrue earned time. As a result, his tentative discharge date from prison changed by three years. (App. 5) Miller was notified of the policy change and given the opportunity to appeal. Miller appealed to the Deputy Warden, and his appeal was denied on January 21, 2016. (App. 149). He was given a supplemental appeal to IDOC Central Office. Miller's supplemental appeal was denied on March 22, 2016. (App. 155).

Miller filed this post-conviction action on June 20, 2016, raising numerous challenges to IDOC's SOTP policy. The case was submitted to the District Court on a stipulated record. On June 29, 2017, the District Court issued a ruling that upheld Miller's removal from SOTP, but found the 2016 IDOC policy change was in violation of the ex post facto clause of the United States Constitution, and ordered the restoration of Miller's earned time.(Ruling).

The State filed this application for writ of certiorari, which was granted by the Iowa Supreme Court.

Facts: This case concerns a post-conviction relief action filed by Marshall Miller and the consequences of his removal from the Sex Offender Treatment Program ("SOTP"). Miller was convicted of Sexual Abuse in the Third Degree in August of 2011, and given a suspended sentence. (App. 6). On March 20, 2012, his probation was revoked and he was ordered to serve the remainder of his sentence incarcerated in the custody of the Iowa Department of Corrections ("IDOC"). (App. 19). Because he was convicted of a sex offense, Miller is a person required to take SOTP.

In August 2013, Miller transferred to the Mount Pleasant Correctional Facility ("MPCF"), the facility where IDOC conducted SOTP. However, he had multiple disciplinary problems and was transferred out of MPCF in October of 2014. (App. 31). IDOC transferred Miller back to MPCF in March 2015 for another attempt at completing SOTP. (App. 33). Within a day of his arrival, Miller was assaulted by another inmate, and was placed in protective custody. (App. 53). A month later, Miller committed another serious disciplinary violation, receiving a major report after forging the name of a correctional officer to a store order. (App. 27). Miller was disciplined with a loss of 30 days for the forgery, along with 30 days of disciplinary detention ("DD"). (App. 28). According to MPCF procedures, an inmate sanctioned with DD loses eligibility to participate in programming, including SOTP. (App. 54). Two days after the disciplinary report for forgery, Miller requested a transfer out of MPCF. (Conf. App. p. 1-3; App. 54). IDOC transferred Miller away from MPCF a second time, and the transfer was approved by IDOC central office due to the DD sanction from the major report and protective custody status. (*Id.)* The transfer notice notes "[t]his is a

negative transfer," resulting from Miller's own behavior and not his enemies issue. (*Id.)*

As a result of his disciplinary issues, Miller was removed from SOTP. (App. 25). In accordance with IDOC policy, Miller had an Administrative Law Judge hearing on the removal on June 12, 2015, and the ALJ issued a decision October 6, 2015. (App. 51). The ALJ upheld Miller's removal from SOTP, stating Miller's "serious misconduct foreclosed any chance for Miller to stay at MPCF," which in turn foreclosed his ability to complete SOTP. (App. 55). Therefore, Miller's misconduct was the main reason Miller was transferred and could not take SOTP. As a result, the ALJ found that Miller has "failed to 'satisfactorily participate in' an SOTP program." Consequently, the ALJ upheld the cessation of Miller's ability to accrue earned time and affirmed the removal of Miller from SOTP. (App. 57). Miller stopped accruing any further earned time, but his time computation continued to reflect earned time accrued prior to the removal. (App. 4).

In January 2016, the DOC changed its interpretation of Iowa Code § 903A.2 and instituted a new policy regarding the consequence of a SOTP refusal/removal. (App. 128). The new policy, OP-SOP-09,

adopts a plain text reading of the statute, which states that a person required to complete SOTP is ineligible to accrue any earned time. All convicted sex offenders are required to complete SOTP. (App. 131). Under the new policy, when a person "required to take sex offender treatment" is removed or refuses treatment, the person is deemed ineligible to accrue earned time. (App. 131).This ineligibility renders a person unable to accrue earned time for the entirety of the sentence, until such time as the person completes SOTP. Consequently, sex offenders enter IDOC custody ineligible to accrue earned time. Under the 2016 policy, an offender who completes SOTP upon initial placement in the program will receive earned time sentence reduction credit as if they were eligible for earned time upon they day they entered IDOC. (App. 130). On the other hand, an offender who fails to complete treatment, either through refusal or removal, receives no earned time sentence reduction at all until they complete SOTP. In that circumstance, the accrual of earned time commences only when the person completes SOTP, effective the date the person completes SOTP. Such an offender would not accrue any earned time up until the offender completes SOTP. (App. 131).

IDOC applied this policy to all individuals in IDOC institutions. This included those who had previously been determined by an ALJ to have failed to satisfactorily complete SOTP, and to those who had ALJ hearings pending. IDOC applied the change to Miller. (App. 5).

While the policy change did not lengthen the sentence the criminal court imposed on Miller, it did have an impact on Miller's "tentative discharge date" ("TDD"). Prior to the policy change, Miller's time computations showed a TDD of March 10, 2016. (App. 4). However, upon the change, Miller was ineligible to receive any earned time credit due to his failure to complete SOTP. This resulted in a recalculation of his time, and his TDD was changed to December of 2019. (App. 5).

Miller appealed to the Deputy Warden, and his appeal was denied. (App. 148-149). He was given a supplemental appeal to IDOC Central Office. (App. 150). Miller's supplemental appeal was denied on March 2, 2016. (App. 155).

ARGUMENT

I. MILLER'S EX POST FACTO CLAIMS SHOULD BE REJECTED BECAUSE THE POLICY CHANGE WAS FORSEEABLE AND CORRECTS THE MISAPPLICATION OF EXISTING LAW.

Error Preservation.

"It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *See Meier v. Senecaut*, 641 N.W. 2d 532, 540 (Iowa 2002). These issues were litigated at the District Court and error is preserved. (Ruling, filed June 29, 2017.)

Standard of Review.

Post-conviction relief proceedings are generally reviewed for correction of errors at law. *Waters v. Iowa Dist. Court for Henry County*, 783 N.W.2d 487, 488 (Iowa 2010). Questions of statutory construction, including the interpretation of Iowa Code section 903A.2, are reviewed for errors at law. *Dykstra v. Iowa Dist. Court for Jones Cnty.*, 783 N.W.2d 473, 477 (Iowa 2010). Claims involving constitutional rights are reviewed in the totality of the circumstances and the record upon which the post-conviction relief court's ruling was made; the functional equivalent of *de novo* review. *Id.*

Merits.

This Court should reverse the District Court's ruling on Miller's Constitutional complaints because the IDOC has adopted a plain text reading of Iowa Code § 903A.2 and changes to IDOC policy were entirely foreseeable. In finding the 2016 IDOC policy change violated the ex post facto clause, the District Court relied on a 2009 Iowa Supreme Court case interpreting the same statutory language, *Holm v. State*, 767 N.W.2d 409 (Iowa 2009). The District Court erroneously concluded that *Holm* precludes IDOC from revising its interpretation of Iowa Code § 903A.2. (Ruling, p. 8-9). While *Holm* is central to analysis of the present case, that decision actually supports IDOC's policy change, given developments in the case law surrounding SOTP since *Holm* was decided. Specifically, inmates are now required to complete SOTP upon conviction for a sex offense. *See State v. Iowa Dist. Court for Jones Cty.*, 888 N.W.2d 655, 664 (Iowa 2016); *Waters v. Iowa Dist. Court for Henry Cty.*, 783 N.W.2d 487, 489 (Iowa 2010). Under the plain language of the statute—enacted in 2005, six years before Miller was convicted—inmates who are required to complete SOTP are completely ineligible for earned time until they

have completed SOTP. IOWA CODE § 903A.2(1)(a). Because this statute was codified well before Miller's incarceration, there is no ex post facto or any other constitutional violation resulting from the IDOC policy change. IDOC is now simply applying the law as was written in 2005. As a result, this Court should reverse the District Court decision and remand this case for dismissal.

A. SOTP & Earned Time Overview.

The District Court incorrectly perpetuated a common misunderstanding of earned time. Inmates in Iowa are eligible to receive sentence reduction credit, commonly called earned time, pursuant to IOWA CODE § 903A.2. The purpose of earned time "is to encourage prisoners to follow prison rules and participate in rehabilitative programs." *Kolzow v. State,* 813 N.W.2d 731, 738 (Iowa 2012). IDOC is empowered to develop rules and policies as to what constitutes sufficient participation to earn the reduction. IOWA CODE § 903A.4. Inmates who break prison rules are subject to a loss of earned time following a disciplinary hearing in front of an Administrative Law Judge. IOWA CODE § 903A.3. Earned time is calculated on a monthly basis as it accrues, and inmates are provided

an "earned time report" which includes the amount of time actually served along with earned time credits not lost. IOWA CODE § 903A.4. After combining the credits earned with time actually served, the Department calculates a "tentative discharge date." Earned time is a prospective possibility, and inherent in the TDD is the assumption an inmate will receive all of the earned time to which he is eligible. If an inmate receives a disciplinary action, his sentence reduction credit is subject to forfeiture for a length of time. Earned time forfeiture will affect an inmates TDD. This is why the TDD is "tentative."

While inmates are provided with a time computation report ("time comp"), it is important to note that inmates are not vested with earned time. *See Montgomery v. Iowa Dist. Court for Jones Cty.*, 604 N.W.2d 37, 39 (Iowa 1999)(noting the time comp "is a record-keeping document, not a statement of department policy"). Inmates may lose any or all of their earned time credits if the violate prison rules. IOWA CODE § 903A.3 (noting the ALJ "may order forfeiture of any or all earned time accrued" upon a finding of a violation). Inmates only accrue earned time if they are eligible, and they only keep it if they fulfill the necessary conditions. IOWA CODE § 903A.2.

In 2000, the legislature amended the earned time statute to make sentence reduction credit conditional on "good conduct and satisfactory participat[ion] in any program or placement status identified by the director to earn the reduction." 2000 IA. LEGIS. SERV. CH. 1173 (WEST) (S.F. 2276). "The amendment also added a non-exhaustive list of programs, including a 'treatment program established by the director.'" *Holm*, 767 N.W.2d at 413. Following this change, the statute stated that inmates who satisfactorily participated in a treatment program identified by the director were *eligible* to earn a sentence reduction of 1.2 days for each day served. This was a significant change from the previous law, which provided for a sentence reduction for good behavior, AND the possibility of a further reduction for treatment participation. 2000 IA. LEGIS. SERV. CH. 1173 (WEST) (S.F. 2276). Under the amended statute, inmates were required to follow prison rules (good behavior) and also participate in any treatment programs identified by IDOC in order to earn the 1.2 day reduction.

In 2005, the Iowa legislature amended section 903A.2 again, adding a specific section regarding sex offender treatment and

eligibility for earned time credit. Following this amendment, the relevant language of the statute is:

> However, an inmate required to participate in a sex offender treatment program *shall not be eligible* for a reduction of sentence unless the inmate participates in and completes a sex offender treatment program established by the director.

IOWA CODE § 903A.2(1)(a)(2)(emphasis added). Essentially, the 2005 amendment added clarifying language to the 2000 amendment by stating a converse proposition: inmates who satisfactorily participate in treatment programs are eligible for earned time, but inmates who don't participate satisfactorily in SOTP (i.e. complete) are not *eligible*. The 2005 amendment was remarkable only in its clarity: it specified that sex offenders who do not complete SOTP are not eligible for earned time. The relevant portion of the statute has not changed since the 2005 amendment. IDOC's 2016 policy regarding SOTP follows the plain language of the statute. Inmates required to take SOTP are not eligible to receive any earned time credit until they complete SOTP.

The District Court erroneously held that IDOC's applying a 2005 law to an inmate convicted in 2011 violates the ex post facto law

because it creates a more onerous punishment than the one authorized when Miller was convicted. (Ruling, p. 6). In fact, the 2016 policy change simply corrects the long-standing misapplication of the 2000 law regarding earned time.

B. The 2016 Policy Corrects the Misapplication of Existing Law.

The Court should reverse the District Court because the 2016 policy change did not change the law, but rather adopted plain text reading of the 2005 law. The Ex Post Facto Clause is not implicated where an amendment corrects a misapplication of existing law. *Holm v. Iowa Dist. Court for Jones Cty.*, 767 N.W.2d 409, 416 (Iowa 2009), as amended (July 6, 2009). In *Holm*, the Iowa Supreme Court considered the statutory language at issue here-- the 2005 amendment to Iowa Code § 903A.2. However, the legislature first enacted the relevant provisions of § 903A.2 in 2001, tying earned time to satisfactory participation in "any program" identified by the IDOC director. *Id.* In 2005, the legislature added the current language specifically referencing inmates required to complete SOTP. Holm was convicted in 2002-- after the 2001 law, but before the 2005 change. *Id.* When Holm failed to complete SOTP, he was sanctioned

with a loss of earned time. *Id.* at 414. Holm appealed, asserting that applying the 2005 amendment to him (with a 2002 conviction) was in violation of the Ex Post Facto clause. *Id.* at 415. The *Holm* Court concluded that application of the 2005 amendment to prisoners convicted prior to 2001 did not violate the Ex Post Facto Clauses. *Id.* at 416-417. Notably, a few months prior to *Holm,* the Court did find an ex post facto violation involving the same statute. *State v. Iowa Dist. Court for Henry Cty.*, 759 N.W.2d 793, 802 (Iowa 2009). However, the inmate in that case was convicted in 1997, prior to the adoption of the 2000 amendment. The Court concluded that the fundamental change in the 2000 law was that "an inmate was rewarded for good behavior separately from the good-time credits he received for participating in programming." *Id.* As a result, the 2000 law made the inmate's punishment more onerous than it was at the time he was convicted. *Id.* The Court noted, even if the inmate "complies with institutional rules, he will not earn any reduction in his sentence unless he also satisfactorily participates in the SOTP." *Id.* The Court considered this to be a significant change in the law after

the time at which the inmate convicted, and thus an ex post facto violation. *Id.*

Conversely, a few months later, the Court found the same 2005 amendment—the law at issue in the present case— was not an ex post facto violation when applied to inmate convicted in 2002. *Holm*, 767 N.W.2d 409, 416. The *Holm* Court held there was no ex post facto violation because the 2005 amendment was a correction of misapplied existing law and did not result in a more onerous punishment. *Id.* In essence, the Court concluded that the 2005 amendment did not change the law as it written in 2000—inmates are only eligible for earned time if they satisfactorily participate in treatment programs identified by IDOC. The 2005 law only clarified that sex offenders must complete SOTP. Failure to complete SOTP means that the offender did not "satisfactorily participate," and is thus ineligible for earned time. This was the law at the time Miller was convicted. Since Miller was convicted after both the 2000 law and 2005 clarification, there is no ex post facto violation because the law has remained the same.

The District Court erroneously concluded that the *Holm* precludes IDOC from adopting the plain text reading of Iowa Code §903A.2. However, the *Holm* Court specifically held that the "Ex Post Facto Clause does not prohibit the correction of a misapplied existing law which disadvantages one in reliance on its continued misapplication." *Id.* at 416. Miller's mistaken belief that he should be eligible for earned time despite not completing SOTP does not preclude IDOC from changing its policy.

It should be noted that at the time of *Holm*, IDOC did not consider inmates as "required" to complete SOTP until such time as they were offered a bed in treatment. *Holm*, 767 N.W.2d at 417, n.2. Under the new policy, sex offenders are considered "required" to complete SOTP upon conviction. The change in the definition of "required" will be discussed in detail below, but the eligibility of sex offenders to accrue earned time is the same now as it was in 2005, and the same as it was in 2000. Inmates are only eligible to accrue earned time if they participate in IDOC required treatment programs, including SOTP. The IDOC 2016 policy change—which states that all sex offenders are required to take SOTP and are not eligible for

earned time until they complete SOTP— is a further correction of a misapplied law and does not implicate the ex post facto clause.

Between 2000 and to 2016, IDOC misapplied Iowa Code § 903A.2 to sex offenders in at least two ways. The 2005 law resulted in one change to IDOC policy, but still did not fully implement the statutory provisions. Prior to the 2005 change, IDOC "erroneously applied the 2001 amendment by only providing for a loss of 90 days earned time rather than ineligibility to accrue any future earned time as prescribed by the statute." *Holm,* at 416. Following the 2005 change, IDOC changed its policy, allowing inmates to earn sentence reduction credit until the point an ALJ determined that the inmate had failed to complete SOTP. At that point, the offender's time computation was recalculated to include the fact earned time did not accrue from the date of refusal/removal going forward. Offenders continued to be credited with earned time accrued prior to that point. This was the law at the time of *Holm*, and for the next several years IDOC policy continued to misapply the statute. IDOC erroneously credited inmates earned time to which they were not entitled. The 2016 policy change sought to correct this error by adopting a policy

that more closely mirrored the statutory language and the legislative intent. Once again, the statutory language of this section is critical. The relevant language of the statute is:

> However, an inmate required to participate in a sex offender treatment program *shall not be eligible for a reduction of* sentence *unless* the inmate participates in and completes a sex offender treatment program established by the director.

Iowa Code § 903A.2 (emphasis added).

The most significant words here are "required," "eligible" and "unless." A person required to take sex offender treatment cannot earn a sentence reduction under Chapter 903A because the person is *ineligible* to accrue earned time until the person completes SOTP. Only eligible inmates are entitled to accrue earned time. *State v. Allensworth*, 823 N.W.2d 411, 415 (Iowa 2012)(noting 903A.2 "limits eligibility for earned time to "inmate[s] committed to the custody of the director of the department of corrections" and holding an offender was not eligible for earned time during a period that he was not an "inmate"). The common ordinary meaning of eligible is "having the right to do or obtain something; satisfying the appropriate condition." *Oxford English Dictionary.* Thus, unless

SOTP is completed, the offender does not satisfy the necessary conditions to be able to earn a sentence reduction.

This ineligibility renders a person unable to accrue earned time for the entirety of the inmate's sentence, until such time as the person completes treatment. *See State v. Iowa Dist. Court for Webster Cty.*, 801 N.W.2d 513, 527 (Iowa 2011)(upholding mandatory SOTP as a condition of earned time against a 5th Amendment challenge, and stating "from the moment [Applicant] committed his crime, it was clear that if he was convicted and chose not to participate in the prescribed treatment program, he *would not be eligible* for earned-time credit" (emphasis added)). Only upon SOTP completion does a person meet the threshold for eligibility under the statute. This means that any "earned time" previously credited to an offender who had not completed SOTP was erroneous. As a result, under the old policy IDOC was misapplying the statute by incorrectly crediting inmates with earned time prior to their removal from SOTP. The 2016 policy change corrected a misapplication of existing law, and therefore does not violate the ex post facto clause. *Holm,* 767 N.W.2d at 416 (holding "the Ex Post Facto Clause does not prohibit the correction of a

misapplied existing law which disadvantages one in reliance on its continued misapplication"). The Court should find the 2016 policy change was a correction of a longstanding misapplication of existing law and reverse the District Court's erroneous holding that the correction was an ex post facto violation.

C. Miller was required to complete SOTP the Moment He Was Convicted of a Sex Offense.

The Court should further explicitly hold that all sex offenders are required to complete SOTP upon entry in IDOC. The District Court concluded that the State's arguments in *Holm* preclude the 2016 policy change. However, the difference between the law in *Holm* and the law now is the definition of "required." In *Holm*, the State argued that inmates were not "required" to complete SOTP until the moment they were offered a bed in treatment. *Holm*, 767 N.W.2d at 417. The District Court points to that argument as support for its holding regarding Miller's claims. (Ruling, p. 8). However, subsequent to *Holm*, the Iowa Supreme Court decided a trilogy of cases that define the due process rights of offenders with regard to earned time and SOTP. *See Dykstra v. Iowa Dist. Court for Jones Cty., 783 N.W.2d 473, 480 (Iowa 2010)*; *Reilly v. Iowa Dist. Court*

for Henry Cty., 783 N.W.2d 490, 495 (Iowa 2010); *Waters v. Iowa Dist. Court for Henry Cty.*, 783 N.W.2d 487, 489 (Iowa 2010). Taken together, these cases illustrate that inmates are "required to complete SOTP" when they are convicted of a sex offense.

Over the last 15 years, there has been a significant amount of law surrounding sex offenders. This Court has consistently held that the legislature may treat sex offenders differently than other offenders:

> Because sex offenders present a special problem and danger to society, the legislature may classify them differently. This court has previously held, that "[t]he legislature is free to single out sexually violent predators from other violent offenders. The particularly devastating effects of sexual crimes on victims ... provide a rational basis for the classification.

State v. Wade, 757 N.W.2d 618, 626 (Iowa 2008)(upholding 903B special sentence for sex offenders); (quoting *In re Morrow*, 616 N.W.2d 544, 549 (Iowa 2000) (upholding Sexual Violent Predator Act)).

A significant body of law has developed surrounding what constitutes a sex offender, given the stigma surrounding the label. *See*, e.g. *Dykstra,* 783 N.W.2d at 480. The *Dykstra* case discusses due

process rights when a non-sex offender is classified to participate in the SOTP. *Dykstra,* 783 N.W.2d at 480. Unlike Miller, inmate Dykstra was not convicted of a sex offense, but rather was classified as a sex offender based on the underlying facts in his assault conviction. The Iowa Supreme Court held that, given the lack of a sex offense conviction, IDOC could not classify Dykstra for SOTP without providing due process. The Court held that absent due process protection, IDOC could not classify someone as a sex offender. *Id.* Those general procedural due process requirements include advance notice, ability to present evidence, a written decision, and a neutral decision-maker. *See Dykstra*, 783 N.W. 2d at 481 (*citing Wolff v. McDonnell*, 418 U.S. 539, 557 (1974)).

However, persons convicted of sex offenses in criminal (or administrative) proceedings may be classified as sex offenders on the basis of those convictions alone. *Reilly,* 783 N.W.2d at 496. The *Reilly* case discusses due process rights when an inmate is removed from or refuses to participate in the SOTP and the inmate's accrual of earned time is affected. *Id.* While the loss of earned time resulting from SOTP removal implicates a liberty interest, "it is a lesser interest than

the initial classification decision requiring an inmate to participate in SOTP." *Id.* Consequently, while an inmate is entitled to due process protection before being sanctioned with a loss of earned time, an inmate convicted of a sex offense is classified as a sex offender by virtue of the conviction. *Id.* (noting "*where an inmate has not been convicted of a sex offense* or admitted to facts of a sexual nature, the necessity for specific procedural protections in SOTP classification is based on the search for specific fact"). In other words, the mere fact of a sex offense conviction is sufficient to require SOTP.

The notion that a sex offense conviction provides all the proof and process necessary to require SOTP was made more explicit in *Waters*, decided the same day as *Dykstra and Reilley*. *Waters v. Iowa Dist. Court for Henry Cty.*, 783 N.W.2d 487, 489 (Iowa 2010) (upholding SOTP requirement for inmate convicted of sex offense based on the conviction itself). As established by *Waters*, the sex offense conviction provides sufficient due process to sustain the SOTP classification. No further hearing or process is required. The SOTP classification is made solely on the basis of the criminal conviction. Like Miller, Waters was convicted of a sex offense and is currently

serving a sentence for a sex offense. Consequently, Miller's conviction, in and of itself, establishes the requirement that Miller participate and complete SOTP.

In short, Miller was required to complete SOTP the moment he entered prison as a convicted sex offender. Under the *Dykstra* trilogy of cases, the Supreme Court established that a conviction for a sex offense sustains classification as a sex offender:

> An inmate who has been convicted of a sex crime in a prior adversarial setting, whether as the result of a bench trial, jury trial, or plea agreement, has received the minimum protections required by due process. *Prison officials need do no more than notify such an inmate that he has been classified as a sex offender because of his prior conviction for a sex crime.*

Dykstra v. Iowa Dist. Court for Jones Cnty., 783 N.W.2d 473, 484 (Iowa 2010) (quoting *Neal v. Shimoda*, 131 F.3d 818, 831 (9th Cir. 1997)(emphasis added). *See also State v. Iowa Dist. Court for Webster Cty.*, 801 N.W.2d 513, 528 (Iowa 2011)(holding "[n]ow that he has been convicted as a sex offender, though, the State of Iowa may constitutionally establish an incentive for him to obtain treatment in prison by withholding earned-time credits if he declines

to participate"); *Holm,* 767 N.W.2d at 418 (holding inmate's conviction for sex offense provided sufficient due process protections to sustain IDOC classification of inmate for SOTP). Consequently, Miller was classified as sex offender the moment he was convicted of a sex offense, and was therefore "required to participate in SOTP" the moment he entered IDOC custody. Because he was required to complete SOTP, he was also ineligible to accrue earned time under the plain text of Iowa Code § 903A.2.

The Iowa Supreme Court recently expounded further on the nature of the SOTP requirement. *State v. Iowa Dist. Court for Jones Cty.*, 888 N.W.2d 655, 664 (Iowa 2016). In *Jones County,* an inmate challenged the requirement that he complete SOTP, because he had not been convicted of sex offense. The Court held that IDOC can make the classification, but the inmate must be given a *Wolff* due process hearing before being classified for SOTP if that inmate has not been convicted of sex offense. *See Wolff,* 418 U.S. at 557. However, the *Jones County* Court noted "the due process required by *Wolff* was satisfied *when the inmate had been tried and convicted of a sex offense*." *Jones County*, 888 N.W.2d at 664 (emphasis added). In

other words, IDOC classification hearings are required when an inmate is not convicted of a sex offense, but for convicted sex offenders, due process is satisfied through their prior criminal proceedings. Thus, Miller entered IDOC classified as a sex offender, and the requirement that Miller complete SOTP is part that classification. Along with the requirement to complete SOTP, Miller also entered prison with an ineligibility to accrue earned time. *See* IOWA CODE § 903A.2. His eligibility for earned time can only be realized by completing SOTP. Consequently, any earned time that appeared on Miller's time computation was erroneous, because he entered prison ineligible for any sentence reduction.

D. Given the Plain Language of the Statute, the Policy Change Was Entirely Foreseeable.

While it is understandable that Miller is distressed by the policy change and its effect on his discharge date, the new policy tracks exactly with the meaning of the statute, and this policy implementation was entirely foreseeable. A statutory interpretation should be sustained against an ex post facto challenge when "the current interpretation is foreseeable." *Stephens v. Thomas,* 19 F.3d 498, 500 (10th Cir. 1994). *See also Lustgarden v. Gunter*, 966 F.2d

552, 554 (10th Cir.), cert. denied, 506 U.S. 1008 (1992) (holding the plain language of the statute dictates the revised interpretation and therefore it is foreseeable). This analysis comports with the U.S. Supreme Court's pronouncement in that "lack of fair notice" is a critical element in ex post facto relief. *Weaver v. Graham*, 450 U.S. 24, 30 (1981). In this case, the change in policy regarding earned time and SOTP was wholly foreseeable and Miller's challenge should be rejected.

The Iowa Supreme Court adopted the foreseeability test in sustaining the statute at issue in 2009:

> Because the 2005 amendment did not result in more onerous punishment and because the loss of future earned time *under the correct interpretation was foreseeable*, the application of the 2005 amendment to Iowa Code section 903A.2(1)(a) to prisoners who committed their crimes before the amendment does not violate the Ex Post Facto Clauses of the United States and Iowa Constitutions.

Holm v. Iowa Dist. Court for Jones Cty., 767 N.W.2d 409, 416–17 (Iowa 2009), as amended (July 6, 2009). Specifically, the requirement that Holm participate in and complete SOTP was

foreseeable based on the law written in 2001. Moreover, the current policy interpretation—that sex offenders are not eligible for earned time until they complete SOTP— was clearly foreseeable: it was the statutory interpretation advanced by Holm to the Supreme Court in 2009. The District Court contends the Supreme Court rejected the current policy interpretation when it rejected Holm's ex post facto challenge. However, the District Court's interpretation ignores several significant points. In the first place, a close reading of the *Holm* and *Henry County* cases reveal that the significant change in the earned time statute came in 2000, when the legislature first tied earned time to treatment participation. *Compare Holm* with *State v. Iowa Dist. Court for Henry Cty.*, 759 N.W.2d 793, 802 (Iowa 2009). The 2000 law made earned time conditional on all treatment participation, while the 2005 amendment merely made the SOTP requirement more explicit. The link between treatment participation and eligibility for earned time had been on the books for two years when Holm was convicted, and 11 years by the time Miller was convicted in 2011. While IDOC may have misapplied the law in its previous policy, Miller's reliance on that error does not sustain his complaint.

Moreover, the *Holm* decision upheld the change in statute even though it focused on the change in law enacted after the inmate had been convicted. *Id*. The law was adopted in 2005, but Holm was convicted in 2002. When Miller was convicted, the relevant statute had been on the books for six years. Miller had "fair notice" that he would not be eligible for earned time until he completed SOTP. Furthermore, subsequent cases make clear that earned time eligibility is contingent on SOTP participation:

> Section 903A.2(1)(a), which established this requirement, was the law both when [the inmate] was alleged to have sexually assaulted his victim, and when he was convicted of doing so. Thus, *from the moment Harkins committed his crime*, it was clear that if he was convicted and chose not to participate in the prescribed treatment program, *he would not be eligible for earned-time credits*. That was the set of consequences for his conduct prescribed by the legislature.

State v. Iowa Dist. Court for Webster Cty., 801 N.W.2d 513, 527 (Iowa 2011)(denying Fifth Amendment challenge to SOTP requirement as a condition of earned)(emphasis added). The same is true of Miller. The statute was on the books when he was convicted. The 2016 change to IDOC policy was entirely foreseeable because it

simply adopts a plain language reading of the statute—the same interpretation Holm's counsel foresaw in 2009. While IDOC did not advance that interpretation in 2009, changes in the case law and IDOC administration led IDOC to revise its interpretation and implement the new policy. The Court should reject Miller's ex post facto challenge because the change in policy was foreseeable.

CONCLUSION

The District Court's Ruling granting application for post-conviction relief should be reversed. Marshall Miller is a convicted sex offender required to take SOTP the moment he was convicted. While the 2016 policy change which adopted the plain language of the statute had an impact of Miller's TDD, that change does not violate the ex post facto clause. The correct interpretation of the law was entirely foreseeable, and IDOC was simply correcting the misapplication of a law that was on the books well before Miller was convicted. The Court should reverse the order of the District Court and Miller's application for post-conviction relief should be denied.

REQUEST FOR ORAL ARGUMENT

Respondent requests the opportunity to be heard in oral argument.

Respectfully submitted,

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