IN THE SUPREME COURT OF IOWA

No. 17-1023

STATE OF IOWA,

Plaintiff-Appellant,

v.

IOWA DISTRICT COURT FOR JONES COUNTY

Respondent-Appellee.

ON APPELLATE REVIEW FROM THE IOWA DISTRICT COURT IN AND FOR JONES COUNTY HONORABLE LARS G. ANDERSON, JUDGE

APPELLEE'S FINAL BRIEF

PHILIP B. MEARS

Mears Law Office
209 East Washington Street
Paul-Helen Building, Suite 203
Iowa City, Iowa 52240

ATTORNEY FOR RESPONDENT-APPELLEE- AND FOR MARSHALL MILLER

CERTIFICATE OF SERVICE

On August 25, 2017, the undersigned certifies that a true copy of the foregoing instrument was served upon the Respondent-Appellee by placing one copy thereof in the United States mail, proper postage attached, addressed to:

Marshall M Miller #6340924
Newton Correctional Facility
307 S 60th Avenue W
PO Box 218
Newton, IA 50208

/s/ Philip B. Mears
MEARS LAW OFFICE

209 E. Washington Street, Suite 203
Iowa City, IA 52240

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ROUTING STATEMENT

The case has been retained by the Supreme Court and already scheduled for oral argument.

STATEMENT OF THE CASE

Nature of the Case:

In this case the State seeks appellate review of a Jones County District Court ruling in a case challenging actions of the Department of Corrections (DOC).

The District Court did not vacate the decision of the Administrative Law Judge (ALJ), as stated by the State in its "Nature of the Case". (See Brief, page 8). Rather, the District Court vacated the action of DOC administrators months after the ALJ decision became final, which added years to Miller's sentence.

Whether this case is a direct appeal or a writ of certiorari does not really matter. It is sufficient to note that there has been some dispute in this case and some of the other related cases, as to whichsubsection of thepostconviction statute applies in these cases. See discussion at page 41.

The Supreme Court did granted the State’s request for writ of certiorari and presumably will address the merits of the dispute.

Course of Proceeding:

In January 2016, the DOC administratively reinterpreted a particular policy regarding all sex offenders and earned time. As a result, the DOC,without a hearing, increased Miller's prison sentence by more than three years.

On June 20, 2016, after taking his administrative appeals, Miller filed a post conviction in Page County. That venue was chosen because Miller was residing in the ClarindaCorrectional Facility, which is in Page County. He chose Page County to avoid any dispute about venue. Heunderstood that the DOC thinks that these cases should be filed in the county of incarceration.

In his postconviction he did two things. He challenged the decision in 2015 by an ALJ finding that he had “refused” sex offender treatment. He also challenged the January 2016 decision by the DOC reinterpreting its own rules and extending the length of his sentence by over three years.

Miller was subsequently transferred to the Anamosa State Penitentiary in Jones County. Venue was changed to Jones County where the case was heard by Judge Lars Anderson.

The parties submitted a stipulated record, including a Stipulation regarding the applicable DOC policies. See Appendix p. 156-159. (References to the Appendix are to the District Court Appendix).

On April 23, 2017, Judge Anderson ruled, granting relief with regard to Marshall's claims regarding the January 2016 increase in sanction. This relief would have released Miller from prison. He would have been released to beginserving his special lifetime parole under 903B.1.

The State sought immediate appellate review. The appeal was captioned Petition for Writ of Certiorari/Notice of Appeal. This complicated caption perhaps reflected some uncertainty as to exactly what kind of post conviction this was.

The Supreme Court granted certiorari, granted a stay of the District Court ruling, and set an expedited briefing schedule. While there is no appellate Appendix, there are the Appendices that the parties submitted to the District Court.

District Court ruling

Judge Lars Anderson decided the Miller post conviction on June 29, 2017. He granted relief, setting aside the January 2016 change in policy by the DOC that is the subject of this appeal. That is the new policy that had cancelledall of Miller's accrued earned time, prior to the point in time when it was decided that he had been "removed" from treatment.

Here are a few more details from the ruling.

In Miller's postconviction Application he challenged the decision from the ALJ that found he had "refused" sex offender treatment. Judge Anderson did not

find that the decision of the ALJ had been correct, as suggested by the State in its brief at page 10, lines 3-4.

Rather Judge Anderson rejected that portion of the application as untimely. Judge Anderson said that a direct challenge to an ALJ decision must be brought under section 822.2(1)(f), citing Pettit v. Iowa Department of Corrections, 891 N.W. 2d 189 (Iowa 2016). Such a complaint must be filed within 90 days of the denial of any administrative appeal. Since Miller's Application was filed more than 90 days after his appeal, Judge Anderson concluded that he was without jurisdiction to make any determination about whether the ALJ decision had been correct. Ruling pp. 5-7.[1]

Judge Anderson considered the several arguments presented by Miller about the DOC change in policy, finding in his favor on two claims.

First, Judge Anderson reasoned that while there might have been some ambiguity about the 2005 amendment to 903A.2 in 2005, any ambiguity was resolved by the 2009 Supreme Court case of Holm v. Iowa District Court for Jones County, 767 N.W. 2d 409 (Iowa 2009). In Holm the Iowa Supreme Court accepted the DOC position at the time, that under the 2005 amendment, sex offenders would retain their "earned time" up until the point of a “refusal.” The Supreme Court

[1]Miller did not cross-appeal with regard to the statute of limitations. Such an action would have undoubtedly slowed appellate consideration and is not necessary for Miller to obtain to the relief that he seeks.

accepted the DOC position that the offender was not actually "required" to take treatment until a bed was available.

Judge Anderson concluded that the Holm interpretation must be accepted as the interpretation of the statute. The 2016 policy change was contrary to the statute as interpreted by Holm, and as such was invalid.

Judge Anderson also addressed Miller's argument that the 2016 policy application violated the *ex post facto* prohibition. Judge Anderson said that if he were to be incorrect about whether the DOC could change their interpretation of the statute, the DOC should not be allowed to apply the change retroactively to someone such as Miller, who had already had an ALJ hearing. Such application would run afoul of the *ex post facto* prohibition.

With regard to Miller's other arguments against the new policy, Judge Anderson found it unnecessary to address them. Ruling page 12. This included Claims III and IV found in this brief.

STATEMENT OF FACTS

Understanding the facts in this case requires discussion about several things.

First, something should be said about the sentences that Miller was serving, including a brief explanation for how those sentences were affected by different actions taken by the DOC at different times.

Second, it is important to discuss in some detail the particular administrative proceeding Miller had in 2015, including the decision from the ALJ in October of 2015.

Facts relating to Miller's sentences

Marshall Miller came to prison in 2012 for five different felonies: four from Johnson County and one from Washington County. There were all concurrent. All charges were thefts except for the Class C Sexual Abuse case from Johnson County. All offenses had been committed when Miller was 21-22 years old. The Third Degree Sexual abuse was the non forcible variety. He had consensual sex with someone who was 14-15 years old. He originally received probation, which was later revoked. The non forcible Sexual Abuse still carried with it the required lifetime special sentence under 903B.1.

His tentative discharge date (TDD) as of early 2015 for all of those cases was somewhere between August and October of 2015. Appx. p. 3, 22. The TDD is the date projected by the DOC for the end of the person's sentence, assuming that the maximum amount of earned time is earned.

The Time Computation sheet also includes something called the “EDD”. That is the "Earned Discharge Date." That is the date when the inmate will discharge the sentence, assuming no more earned time is given after that particular

date. The respective dates under the EDD in the summer of 2015 were March and April 2016.

Because of the Sexual Abuse case Miller was going to have to take the DOC Sex Offender Treatment Program (SOTP) at some point.

The DOC did not schedule Miller to start treatment prior to 2015. He was transferred to the Mt. Pleasant prison (MPCF) in March 2015, to start treatment almost immediately. Conf. Appx. p. 1.

Within 24 hours of his arrival at MPCF Miller was attacked by another inmate. Appx. p. 60. He then picked up a disciplinary infraction. For both of those reasons he was going to have to transfer away from MPCF. Because of the transfer he was considered by the prison to have "refused treatment."[2]

He was given an administrative hearing about this refusal as was required by the Iowa Supreme Court. The hearing was in June, 2015. Miller told the ALJ he had not refused anything. Miller did not get a decision on the hearing until early October, 2015. Appx. p. 51. By that point, the sex abusecase had discharged. In fact, all four of the cases from Johnson County had discharged, leaving him serving a single theft conviction from Washington County.

[2]Particularly while SOTP was at the Mt. Pleasant prison, individuals were found to have "refused" SOTP because they got into disciplinary trouble. The inmate did not have to be in disciplinary trouble of a sexual matter. If you got into a fight, you might get transferred away from the prison. Since SOTP was only at MPCF that would be a treatment refusal. That should not happen as frequently now that SOTP is at Newton. Newton has more facilities for lock-up.

The ALJ found that he was properly classified as having been "removed or refused to do treatment". As a sanction the ALJ told Miller, the "accrual of his earned time stopped". Appx. p. 51.

His tentative discharge date (TDD) for that one Washington County case changed to March, 2016. Appx. p. 4, 23. That, almost by definition, would then have matched his EDD.

In January 2016, the IDOC changed its interpretation of 903A.2, the section of the Code relating to SOTP and earned time. The DOC applied that new interpretation to Miller, to the one case he was still serving, the property offense in Washington County. This changed his release date for that offense to December 22, 2019. Appx. p. 5. It essentially took away all earned time Miller had “earned” since he came into prison.

In his postconviction Miller complained about the change in interpretation in January 2016. He also challenged the determination of the ALJ that he “refused treatment.”

Facts relating to proceeding before ALJ in 2015

The DOC determined that a bed was available and Miller should start taking treatment in March 2015. For perhaps several reasons he was unavailable to take treatment at that time. This was regarded as a treatment refusal.

On May 26, 2015 the DOC gave Miller a formal Notice that he was to have an administrative hearing before an ALJ. Appx. p. 25. The ALJ would determine whether Miller had “refused treatment.”

The hearing took place on June 10, 2015.

The ALJ handed down his decision on October 6, 2015. Appx. p. 51. He found that Miller was properly “removed” from treatment. The judge specificallydetermined that the "accrual of his earned time" shouldstop.

The date of the decision was seven days before he was scheduled to be released from the only sentence he was still serving at that time, the Theft case from WashingtonCounty. He had already begun his special sentence under 903B.1. Upon discharge from the theft case he would have been released from prison to parole supervision on the Sexual Abuse case.

Miller took his administrative appeal, which was denied on October 21, 2015. Appx. p. 59.

Miller’s accrual of earned time was stopped as of the date of the hearing, June 10, 2015. That was consistent with the Department of Correction’s policy at the time. This led to his release date on the Washington County conviction being changed from October 13, 2015 to March 10,2016. Appx. p. 4, 23.

When the policy change occurred in January 2016 Miller's release date from prison was recalculated. While it had been March 10, 2016 (Appx. p. 4), it changed to December 22, 2019. (Appx. p. 5)

Details from the administrative paperwork

The hearing notice, a document required by the Iowa Supreme Court was dated May 18, 2015, and given to Miller on May 26, 2015. Appx. p. 25.

The notice is full of specific references to the fact that any time stoppage would only be prospective.

Under "Classification committee/Date" there is a reference that “this classification decision may affect your future accrual of earned time…”

Under "Classification Committee Justification/Evidence" there is a reference that “because Miller is not in mandatory sex offender treatment per Iowa Code 903A.3 his earned time will be suspended.”

On October 6, 2015 the ALJ found that Miller had not satisfactorily participated in SOTP. He found that “in light of Miller’s disciplinary record, he was properly removed from theprogram.” Appx. p. 51.

In the decision, the ALJ repeatedly stated “the offender’s accrual of earned time credits shall bestopped.”

a. At page 1 of the hearing decision, the ALJ says “affirmance of the classification decision removing Miller from SOTP suspends

Miller's accrual of earned timecredits."

b. Later in the same page, the ALJ said "If an offender is required to take SOTP and the offender does not complete the treatment, then that offender shall stop accruing earnedtime."

c. In the ALJ's conclusions of law at page 6, he makes the following statements:

> "An offender is not eligible to accrue earned time credits if he fails to satisfactorily participate in the SOTP program. Iowa Code 903A.2(1)(a).
>
> "Iowa Code Section 903A.2 permits IDOC to stop an inmate's ability to earn good time credits toward any sentence being served if the inmate is categorized as required to participate in SOTP and refuses or is removed." Waters v. Iowa District Court 783 N.W.2d 487, 289 (Iowa 2010) citing Dykstra v. Iowa District Court 783 N.W.2d 473 (Iowa 2010).
> Appx. p. 51.

The ALJ struggled in addressing Miller's defense that there was a good reason he could not take SOTP. The ALJ noted that the transfer had been initiated due to Miller's ongoing locked status. Decision p. 4. Appx. p. 51.The ALJ, however, noted that "the IDOC's central office had approved the transfer apparently based on the fact that he had also gotten DD time from the major report, as well as his PC status." Ruling p.4. Appx. p. 51.

History of earned time and sex offender treatment in the Iowa DOC

As long as anyone can remember, there has been some form of reduction in sentence for good behavior for inmates serving a sentence in Iowa.There are good policy reasons for such policies. Under every rendition of the statute, once the good behavior had occurred, the reduction was credited to the inmate. Another way of looking at this is the good or earned time, once earned, vested. There is a constitutionally protected liberty interest in that time, protected by Due Process. Sanford v Manternach, 601 N.W. 2d 360 (Iowa 1999)

Prior to 1983

Prior to 1983, Sections 246.38 and 246.43 of the Code provided for good time and honor time. An inmate received good time for following the rules. That inmate earned honor time by having an honor contract, whatever that meant. Good time already earned could be taken away at disciplinary hearings. If sanctions were imposed resulting in the loss of those reductions, the courts required the procedural protections as set out in Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L.Ed.2d 935 (1974). See Wilson v. Farrier, 372 N.W. 2d 499(Iowa 1985).

1983 change

In 1983 the Iowa legislature redid the early release credit provisions and adopted Chapter 903A of the Code. This would remain the primary method of early release time until 2001.

In 1983 the legislature created day-for-day good time for following the rules. In addition the legislature created what became known as “work bonus” credit. The legislature specifically provided the following in 903A:

> (A)n inmate of an institution under the control of the DOC ... is eligible for a reduction of sentence equal to one day for each day of good conduct while committed to one of the Department’s institutions.
>
> In addition, each inmate is eligible for an additional reduction for up to five days per month if the inmate participates satisfactorily in any of the following activities:
> 1.Employment in the institution;
> 2.Iowa State Industries;
> 3.An employment program established by the director;
> 4.A treatment program established by the director;
> 5.An inmate educational program approved by the director.

This law, like the prior law, had two types of credit. There was “good conduct time,” which gave day-for-day credit for following the rules of the institution. There was also work bonus credit that was available if you had a job or participated in treatment.

There was then a corresponding section, Section 903A.3, which dealt with the loss of good conduct time. The Section provided that upon a finding that an inmate had violated an institutional rule, an ALJ could order the forfeiture of good conduct time earned but not yet forfeited.

Work bonus credit that had been earned was not subject to forfeiture.

In Section 903A.4 the DOC was required to come up with a “policy and

procedural rules" to implement the section. The rules "could specify disciplinary offenses which may result in the loss of earned time and the amount of earned time which may be lost, as a result of each disciplinary offense."

Chapter 903A of the Iowa Code remained much the same from 1983 through 2000. In 2006 the legislature created two levels of earned time. Certain more serious offenses could earn only 15% eaened time.

Legislative Change in 2000, effective January 1, 2001

In 2000, the Iowa legislature passed Senate File 2276, reworking 903A. The legislature eliminated the the two different types of credit. The legislation created a single unified "Earned Time" credit. The following language was inserted as 903A.2(1) (a):

> An inmate ... is eligible for reduction in sentence equal to one and two tenths days for each day the inmate demonstrates good conduct and satisfactorily participates in any program or placement status identified by the director to earn the reduction. The programs include, but are not limited to the following:
> 1. Employment in the institution.
> 2. Iowa state industries.
> 3. An employment program established by the director.
> 4. A treatment program established by the director
> 5. An inmate educational program approved by the director.

To some extent, what the Legislature did was unify what previously had been two separate credits. What used to be good conduct time plus work bonus credit became one single unified earned time credit. The formula picked by the

Legislature, 1.2 days per day, was chosen to make sure that the new formula would not yield less than what inmates could get under the old formula.

What could have been seen as simply a bookkeeping change to make the mathematical calculation easier for prison record-keeping, had the practical effect of tying satisfactory participation in a treatment program to the entire amount of credit.

Under this new legislation in 2001 there was authority for the DOC to discipline inmates and take away earned time for refusing to participate in programming. In fact it did not take long for the DOC to apply the new statute from 2000 by disciplining sex offenders who were kicked out of or refused treatment.

Walter Schnoebelen case[3]

The question of the application of 2001 change to 903A to sex offenders already in prison in 2001 was addressed by a Henry County postconviction in the fall of 2001. Walter Schnoebelen, an inmate at the MPCF, brought a disciplinary postconviction after he received a discipline for refusing to participate in treatment.

Schnoebelen argued that the application of the change in the statute amounted to an *ex post facto* violation because he had been convicted and sentenced long before the statutory revision in 2000. Judge John Linn on

[3] A copy of the district court ruling in Schnoebelen's case and the subsequent appeal docket were submitted into the record in the Miller case with Miller's submission of "additional submission of case authority" filed on March 17, 2017.

November 5, 2001, found the discipline unconstitutional as applied to Schnoebelen. See Schnoebelen v. State, Henry County case PCLA 10330 (Ruling dated November 6, 2001)

The State sought certiorari which was granted. Prior to argument the State dismissed its appeal. For the most part, the DOC followed the Schnoebelen District Court ruling until 2005 and did not discipline inmates for refusing treatment or being removed from treatment.

To some extent, Schnoebelen does not add a lot to the later cases involving Denny Propp and Jordan Holm. The Schneobelen case said pretty much the same thing as the Propp case did, focusing on the change in the law in 2001. The DOC could not apply the 2001 change in the law to people who were already in prison as of 2001.

The Schnoebelen case somewhat explains what went on at the DOC between the time period from 2001 to 2005.

DOC policies 2001-2005

DOC policies 2001-2005 regarding treatment refusalsprimarily were found in the Disciplinary Policy IN-V-36. There was a disciplinary Rule that prohibited Refusal or failing to participate in treatment. It was a Class B violation. The Class B sanction limits are found at page 16 of IN-V-36. The loss of time is limited to 90 days.It should be remembered that Code section 903A.4 specifically provides that

the DOC could have rules that specify the amount of time which may be lost for violation of a particular rule.

It was this practice of limiting discipline to 90 days that was criticized by the Supreme Court in the Holm case.

House File 619, passed in 2005

In 2005, the Iowa legislature enacted House File 619. The bill was enacted largely in response to the Jetsetta Gage murder. The final bill included numerous new provisions relating to sex offenders. Sex offenders were required to submit DNA samples. Special Sentences under 903B were created. Sex offenders under supervision were required to have electronic monitoring. There was a new type of child endangerment under 726.6.

Section 32 of HF619 was the provision at issue in this case. It amended 903A.2 to add a provision to deal with earned time for sex offenders. The new language provided as follows:

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

Other than Division I having to do with DNA requirements, the statute was silent on its applicability date. That section only provided that it was to go into effect immediately. The rest of the statute presumably went into effect July 1,

2005.

DOC implementation of HF 619 in 2005

The DOC implemented the amendment in December 2005. The principal documentation for this new policy appeared on the Treatment Refusal Form, a copy of which was included in the Miller appendix at page 63.

The DOC decided that the new statute would apply it to inmates, present and future, in the following way, subject to exceptions identified. Here is what the DOC decided to do.

First under the new policy the DOC applied the statute to all inmates in the system, present or future. It did not apply however to anyone with a pre 1983 sentence, or to anyone with a Class B sentence, that is where the inmate only earns 15% earned time according to 903A.2(1)(b). It did apply to most inmates with sexual offense, including those who came in before 2001 or 2005.

For individuals not yet in SOTP, at some point, those individuals would be told that there was a bed available and it was time for them to participate in SOTP. They would get earned time up until that point. If the individuals refused treatment, they are given a copy of the refusal form. They were warned if they refuse treatment, they will have their earned time accrual turned off. If they refused treatment, their earned time stopped at that point.

For individuals who are already in SOTP, they would continue to get earned time. At a point in time when the individual was removed from the program, he would be given the same refusal form.

The policy would remain basically the same from 2005 to 2015.

State v. Iowa District Court for Henry County

The first case decided by the Iowa Supreme Court was State v. Iowa District Court for Henry County 759 N.W.2d 793 (2009). That case involved an inmate named Denny Propp. Propp had entered Mount Pleasant in 1997. When he came into prison, he was subject to the pre-2001 early release statute. That allowed day-for-day credit for good behavior and what was called 'bonus credit' for employment or treatment. Propp was removed from SOTP in 2006. The Supreme Court noted that "although Propp did not lose credits he had already earned, he was deemed ineligible to receive further earned time credits until he was reinstated in the program." 759 N.W. 2d at p. 796. The Supreme Court applied *ex post facto* analysis, primarily coming from the United States Supreme Court in Weaver v. Graham, 101 S. Ct. 960 (1981). Of note was the fact that the Weaver case had applied *ex post facto* analysis to a change in the Florida early release credit program, apparently to the detriment of the inmate.

The Iowa Supreme Court found application of the new statute of Denny Propp to be a violation of *ex post facto*. Here is what the Supreme Court had to say:

> Under the old statute, Propp was automatically entitled to one day of good-conduct time for each day he avoided a disciplinary violation. Now, he has to satisfy extra conditions-satisfactory participation in programming-to receive *any* earned-time credits. Stated differently, under the original statute, Propp lost eligibility for five days of good-time credit each month he did not satisfactorily participate in a treatment program, but he remained eligible for thirty days of good-conduct credit, assuming a thirty-day month, notwithstanding his unsatisfactory participation. Under the new statute, his failure to satisfactorily participate renders him ineligible to earn *any* reduction in his sentence, even if he has no disciplinary infractions. We are convinced this difference is a substantive change in the formula used to calculate a reduction in sentence because, as in *Weaver*, it "retroactively decreas[ed] the amount of [earned]-time awarded for an inmate's good behavior." *Lynce*, 519 U.S. at 441, 117 S.Ct. at 896, 137 L.Ed.2d at 72 (characterizing issue in *Weaver*). Therefore, application of the amended statute to Propp violates the Ex Post Facto Clause. *See Stansbury*, 960 P.2d at 236 (holding similar statutory amendment violated Ex Post Facto Clause when applied to inmate who committed his crime before enactment of amendment).
>
> State v. Iowa Dist. Court for Henry County, 759 N.W.2d 793, 801 (Iowa 2009)

As a result of the Propp case, the 2005 change in the law was found not to apply to anyone whose crime was committed prior to January 1, 2001.[4]

[4] The change in the statute in 2005 could not apply to inmates whose crimes occurred before January 1, 2001. While not an issue in Miller, if the Court finds an expost facto violation in this case, that would presumably prohibit the DOC from applying any change in policy to inmates whose crimes occurred before January, of 2016.

Holm v. Iowa District Court for Jones County

The second case decided after the Denny Propp case was Jordan Holm v. Iowa District Court for Jones County, 767 N.W. 2d 409 (Iowa 2009). In Holm, the Iowa Supreme Court held that the changes in the statute in 2005 could constitutionally be applied to inmates who had committed their crimes after January 1, 2001. That included Holm who came to prison in 2003.

The Holm case is important in a number of respects.

First, the Supreme Court decision identified and approved the policy adopted by the DOC in 2005. That is the policy used by the DOC until January 2016. The ineligibility for earned time began at the point in time when the "refusal" took place. The DOC practice did not affect any credits that Holm had earned prior to the date of his refusal.

The Supreme Court rejected Holm's argument that there was an *ex post facto* violation. The Supreme Court concluded that the 2005 amendment was "merely a clarification of the 2001 amendment and did not create any new obligations or duties." Here is what the Court specifically said:

> There is virtually no difference between what is required of inmates under the language of the 2001 amendment and what is required of them under the language of the 2005 amendment. "An amendment to a statute does not necessarily indicate a change in the law." *State v. Guzman–Juarez*, 591 N.W.2d 1, 3 (Iowa 1999). There is no ex post facto violation where a court merely clarifies the law without making substantive changes. (citations

> omitted.) **The DOC has 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.** If the amendment was nothing more than "the correction of a misapplied existing law," then there is no retroactive application, and the Ex Post Facto Clause is not implicated.[3] Stephens v. Thomas, 19 F.3d 498, 500 (10th Cir.1994). 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.* 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... does not violate the Ex Post Facto Clauses of the United States and Iowa Constitutions.
>
> Holm v. Iowa Dist. Court for Jones County, 767 N.W.2d 409, 416–17 (Iowa 2009)

As a result of the Holm case, the DOC applied the 2005 amendments to all individuals who had committed sex offenses from 2001 through 2005. This was specifically because the DOC convinced the Iowa Supreme Court that the 2005 change in the law was really nothing more than what was allowed by the 2001 statutory change. That change had conditioned earned time on good behavior and for participation in treatment.

Most importantly inmates retained earned time until the point in time when treatment was "refused", whatever that meant.

Change in interpretation of 903A.2 in January 2016

In January 2016, the DOC adopted a new interpretation of Section 903A.2, the section relating to earned time and sex offenders and completion of treatment. The DOC applied that new interpretation retroactively to persons such as Miller who had already had ALJ hearings before 2016.

Most of the DOC policies that have discussed this subject from 2005 to the present are included in the Appendix from the District Court. The policy change is succinctly summarized in the separate Stipulation filed by the parties iwhich appears in the Appendix at p. 156.

Under the new interpretation when someone refuses treatment or is "removed from treatment", instead of having his earned time accrual stopped at that point, the person would get no earned time whatsoever, going back to the person's admission to prison. Over a hundred inmates had years added to their sentences on one day in January 2016. There was no notice. There was no hearing.

Miller was one such person.

Note about Time computation documentation

The State in its brief talks about something called a Tentative Discharge Date, or TDD. State's brief pp. 18-19. The State makes much of the fact that the first word is "tentative". This is somehow supports the State's position that sex

offenders only had some kind of theoretical right to their earned time that had already accrued.

If you look at the time computation sheets that appear at pages 3-5 of the Appendix and again at pages 22-24, there is a column called TDD. This is in fact the "tentative discharge date". This is a DOC projection of when your release date based on an assumption that you get all the earned time possible.

The State does not mention that on all of these time computation sheets there a column for something called "EDD". That is the Earned Discharge Date." That is the date where you would finish your sentence if you got no more earned time from the date of the entry. That date changes, of course, assuming that the fact that the inmate has accrued earned time during any two points in time. If you look at the time computation sheet for Miller at page 5, you see that the EDD continually changes as he accrues more and more earned time. This is the release date crediting him with actual accrued earned time. That is time that is vested. It is time that can only be taken away through due process as required by the Constitution.

Most of this was discussed at paragraph #3 in the Stipulation regarding Policies submitted by the parties at pp.156-159 of the District Court Appendix.

What kind of case is this?

Miller challenged the earned time consequence of his sex offender treatment "refusal." He did that under the post conviction statute, chapter 822. Particularly,

since the new policy in January, 2016, there have been a number of post conviction cases filed given the significantly greater consequences the DOC is giving at the moment. While it does not matter in this case where the fits into Section 822.2, it may be important to understand what the consequences are for having the case be put into any particular subsection.

The Miller case is useful because it involves two different claims. First Miller directly complained about the ALJ decision. He also complained about the separate decision by the DOC to just add years to his sentence. Those cases may belong in different subsections.

Here is Section 822.2.

> 1. Any person who has been convicted of, or sentenced for, a public offense and who claims any of the following may institute, without paying a filing fee, a proceeding under this chapter to secure relief:
> a. The conviction or sentence was in violation of the Constitution of the United States or the Constitution or laws of this state.
> b. The court was without jurisdiction to impose sentence.
> c. The sentence exceeds the maximum authorized by law.
> d. There exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.
> e. The person's sentence has expired, or probation, parole, or conditional release has been unlawfully revoked, or the person is otherwise unlawfully held in custody or other restraint.
> f. The person's reduction of sentence pursuant to sections 903A.1 through 903A.7 has been unlawfully forfeited and the person has exhausted the appeal procedure of section 903A.3, subsection 2.

> g. The conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error formerly available under any common law, statutory or other writ, motion, petition, proceeding, or remedy, except alleged error relating to restitution, court costs, or fees under section 904.702 or chapter 815 or 910.

Quite frankly, 99% of the post conviction cases fit into the subsections without much discussion. First, the person can be complaining about the actual sentence or conviction they received in court. That would be a claim under anything but subsections "e" and "f". Second, the person can complain about the loss of earned time in connection with the specific prison discipline. They supposedly broke the rules, had a hearing with an ALJ, were found guilty and lost some accumulated earned time.

The particular subsection picked has implications for four particular procedural matters. First, there is the question of venue. Second, there is the question of the statute of limitations. Third, there is the question of appointment of counsel. Finally there is the availability of a direct appeal.

Venue is simple. If the claim is under "f" venue is in the county of incarceration. All other subsections are brought in the county of conviction. Section 822.3.

The statute of limitations tracks venue. If the claim is under "f" the case has to be filed within 90 days. All other postconvictions must be filed within 3 years. Section 822.3.

The right to appointed counsel is available for all subsections but "f" and "e". Section 822.5.

A direct appeal is available unless the claim is under "f". Section 822.9.

So what kind of case is Miller's? There are two cases that provide some guidance.

In Pettit v. Iowa District Court, 891 N.W. 2d 189 (Iowa 2017) this Court addressed whether a challenge to the classification decision about SOTP belonged in the post conviction statute at all. The case had been brought under chapter 17A.19, the judicial review provision for agency action.

The Court unequivocally stated that Pettit's case belonged in the post conviction statute. At that point it was not necessary for the Court to identify the subsection that would apply. For that reason the references to 822.2(1)(f) and 822.2(1)(e) (the latter in a footnote) should not be fixed in stone.

The Court said:

> Pettit's objection to SOTP classification is part of the disciplinary procedure because it would lead to a loss of the accrual of earned time. Section 822.2(1)(*f*)[3] addresses the loss of earned time and is the statutory basis for a postconviction-relief action under this set of facts.[4]
> 891 N.W.2d at 195

Footnote 4 from the case noted that Section 822.2(1)(e) may also apply.

After Pettit the challenge to the ALJ decision may be under "f" or maybe "e". Another case is useful in understanding the claim about the January 2016

action of the DOC. That case is Mears v. State Public Defender's Office 834 N.W. 2d 872 (Iowa 2013). I am familiar with that case.

In that case the specific issue was whether the particular post conviction was brought under a subsection where counsel could be appointed and paid. I had been appointed by the Henry County District Court for a post conviction. The State Public Defender would not pay me my small bill.

The underlying case concerned the DOC interpretation of the period of revocation under 903B. That issue was the same one that was resolved by the Supreme Court in Kolzow v State, 813 M.W. 2d 731 (Iowa 2012).

The issue in Kolzow had to do with special sentences and particularly the provision in 903B providing that upon the revocation of a special sentence, a person had to serve a two year term. The specific language of the provision was that an offender's first "revocation of release shall not be for a period greater than two years."

The DOC interpreted that provision to mean that this two year term was not reduced by earned time, which is otherwise available for a special sentence. The DOC also refused to credit any jail time spent, pending the revocation proceeding, to be applied to the two year term. The Supreme Court in Kolzow said there would be no earned time toward the two year term. The Supreme Court also said the

DOC had to credit any jail credit, however, for the time spent pending the revocation.

The question presented in the Mears v. State Public Defender's Office case was what subsection under 822.2 this "Kolzow" claim was brought under. (Kolzow itself did not involved court appointed counsel.) Depending on the subsection, appointed counsel might be paid.

The SPD argued the claim was brought under subsection "e" pointing to the language that the person was "unlawfully held in custody or other restraint." The Court of Appeals found that whether the challenge was to the failure to give earned time credit or jail credit the result was a claim about the "term of incarceration exceeding that authorized by law." This was a claim brought under 822.2(1)(c).

The decision of the DOC to change its interpretation of 903A.2 was not part of any disciplinary action. It was not really part of the ALJ decision either. It was simply a change in the consequence of the ALJ action, months or in some cases years later.

Under the Mears case, that claim in Miller should be determined to have been brought under 822.2(1)(c) or perhaps even (a). That would mean that appointed counsel, for example, would be available.

As has been mentioned, this does not matter in Miller where there is no dispute about venue, the statute of limitations, the method of appeal, or appointment of counsel.

Determination as to the particular subsection, however, would affect the appointment of council in other cases that might be pending raising similar claims to Miller.

ARGUMENT

CLAIM I - THE INCREASE IN THE SANCTION IN JANUARY 2016 WAS PROPERLY VACATED BECAUSE THE JANUARY, 2016 INTERPRETATION OF THE STATUTE WAS AN IMPROPER INTERPRETATION OF THE STATUTE

Standard of Review

The standard of review for questions of statutory construction is to review for errors of law. State v. Randle, 603 N.W. 2d 91, 92 (Iowa 1999)

Preservation of error

This claim was the basis for the District Court decision.

Summary of argument:

Judge Lars Anderson put at best when he looked at the alternative interpretations for the 2005 amendment.

> While there may have been ambiguities or questions about what the 2005 amendment meant prior to *Holm*, they were settled by the decision in *Holm*. In subsequent cases, the Iowa Supreme Court has not changed its interpretation. Thus, the DOC cannot

> by way of the 2016 policy now say 903A.2(1)(a)(2) means something contrary to what the Iowa Supreme Court has said it means.
> Ruling page 9

First and foremost for this appeal, the Court should conclude that this issue presented was resolved by the Jordan Holm case in 2009 and there is no reason to revisit that.

Moreover, the interpretation adopted by the Iowa Supreme Court in the Holm case has been consistently followed by the DOC from 2005 to 2015. Under the ordinary rules of construction, such a long standing administrative interpretation, particularly when supported by the decision from the highest court of the state, ought to govern any dispute about interpreting the statute.

Finally as the Court can tell by looking at the State's brief, nothing has changed since 2009. There has been no legislation with regard to this matter. Indeed with the advent of most sex offender's having special sentences, there is particularly no reason to change the Jordan Holm analysis.

Facts:

There are no facts regarding this claim. It is a question of law. What does the statute mean? Here is the statute:

> (2) However, an inmate required to participate in SOTP shall not be eligible for a reduction of sentence unless the inmate participates in and completes SOTP established by the director.
>
> 903A.2.

There are two interpretations for this statute from 2005.

First, there is the interpretation employed by the DOC from 2005 to 2015. It was the interpretation advanced by the DOC before this court in the Jordan Holm case. This interpretation was accepted by the Iowa Supreme Court in Holm v. Iowa District Court for Jones County, 767 N.W. 2d 409 (Iowa 2009).

Under this interpretation the “ineligibility” does not possibly begin until the inmate is "required" to take SOTP. That point is not reached until a bed was available in the program.

Under this interpretation the sex offender kept any earned time up until any point when he refuses or is removed from treatment. Since SOTP occurs near the end of the sentence, this usually amounts to years of earned time which is retained by the person who refuses or is removed.

This interpretation was consistently used by the DOC from 2005-2015. It was built into the notice given to inmates such as Miller who had their hearings during that time period. It appeared in all of the ALJ decisions during this time frame.

The second interpretation is the one adoptedby the DOC in January, 2016. It is the one that was then applied retroactively to all inmates still in prison, who had ever refused or been removed.

That interpretation declares an inmate would get no earned time from the beginning of the sentence, if the inmate is ever found to have refused or been removed from treatment. This meant that a refusal/removal costs the inmate years of accumulated earned time.

A. The Jordan Holm decision resolves any question about the interpretation of the statute.

The Iowa Supreme Court interpreted the2005 amendment in the Jordan Holm case. There is no reason to change that interpretation now. The reasoning of the court was sound. Nothing has changed.

Giving one a real sense of irony, Holm had argued that the statute could really only mean one thing. Sex offenders would get no earned time at all until they completed treatment. This, however, would have been a dramatic change from the pre-2005 law and could not be applied to Holm.

The DOC, whose primary interest at the time was applying it to as many people as possible, opted for the different interpretation, focusing on the term "required."

According to the DOC in Holm, a person was not "required" to take treatment until a bed was available. Many things could happen prior to that point. Because of an illness the inmate might not be able to participate in the program. A

polygraph might have cleared the person from committing the crime. Under those circumstances the treatment officials would not want the person in the program.

The Supreme Court accepted the DOC interpretation of the statute. It found that the statute was really not all that different from the statute adopted in 2001. Therefore the DOC could apply the statute to Holm. The Court upheld the DOC stopping the accrual of Holm's earned time, as of the date of the refusal.

Actually if you think about the DOC analysis, the DOC was saying that if it is not the person's fault that he does take SOTP when a bed is available, he should not suffer a dramatic time loss.

Miller had argued that it was not his fault that he could not take the program. Miller was assaulted before he could start the program. If there is an enemy situation it is unfair to punish the victim, when SOTP wsa only offered at a medium security facility.

The Court should follow Holm in interpreting the statute. That is inconsistent with the current DOC position.

B. Contemporaneous Construction

A second reason for finding the Holm construction of the statute to still apply, is based on a doctrine called the 'contemporaneous construction doctrine.' Under that doctrine, an administrative agency is prohibited from revoking a long held interpretation of a statute, at least while applying its new interpretation

retrospectively. Put another way, the doctrine of contemporaneous construction means that an agency has the responsibility of interpreting a statute to be consistent with longstanding construction of a statute it has made previously. See Pate v. Department of Corrections, 466 S.W.3d 480, 489 (Ky. 2015); City of Wau watosa v. Milwaukee County, 125 N.W.2d 386, 389 (Wis. 1963); Cesarini v. Board of Trustees of Illinois Mun. Retirement Fund, 491 N.E. 2d 9, 12-13 (Ill. App. 1 Dist. 1986).

Iowa has not had occasion to specifically adopt or reject the contemporaneous construction doctrine. The doctrine was discussed by the Iowa Supreme Court in Kordick Plumbing and Heating Co. v. Sarcone 190 N.W.2d 115 (Iowa 1971). In that case, the Iowa Supreme Court said:

> If we had found ambiguities in the ordinance, we might have employed the doctrine of contemporaneous construction in which the wording of an ordinance and the practical construction accorded thereto by enforcing officers is given great weight by the court. (citations omitted)
>
> Kordick Plumbing & Heating Co. v. Sarcone, 190 N.W.2d 115, 118 (Iowa 1971)

Something should be said about the reference to the necessity for "ambiguity". A rule of statutory construction is that you do not even have to consider construing a statute if the language is clear. Only if there is a question about interpreting the statute do you resort to construction. The contemporaneous

construction doctrine rule of construction applies where there is, in fact, ambiguity and you have to construe the statute.

In our case, there presumably is at least some ambiguity based on the fact that there are two plausible interpretations for the statute. Certainly the fact that the Iowa Supreme Court accepted one construction of the statute makes that construction "plausible".

This contemporaneous construction doctrine would limit the DOC in the Miller case when changing its interpretation of the 2005 amendment. It had adhered to that interpretation for ten years, particularly after the Iowa Supreme Court had placed its imprimatur on that interpretation. Clearly if the legislature or anyone had been unhappy with the interpretation of the statute in 2009 in the Holm case, there could have been subsequent legislative intervention.

C. Ordinary rules of Construction

Further analysis of the interpretation of the statute, as amended in 2005, requires consideration of the history of the earned time statute. To some extent, the analysis follows the discussion by the Iowa Supreme Court in the Jordan Holm case in 2009.

Prior to 2001, inmates in the Iowa prison system, with some exceptions, were eligible for a reduction of "one day for each day of good conduct." The statute was amended effective January 1, 2001. At that time, as an effort was made

to create a single, unified credit by combining the day-for-day good conduct credit previously found with the additional work bonus credit. Individuals would get 1.2 days for each day if “the inmate demonstrates good conduct and satisfactorily participates in any program or placement status identified by the Director to earn the reduction.” One of the programs listed in the statute was a “treatment program established by the Director.”

The new statute passed in 2005 as part of the bill containing additional restrictions on sex offenders, provided the all-important language at issue in the Jordan Holm case and the Denny Propp case which preceded it.

An additional statute was identified by the Supreme Court in the Holm case as important in the analysis. Section 903A.4 provided the following:

> The director of the Iowa DOC shall develop policy and procedural rules to implement sections 903A.1 through 903A.3. The rules may specify disciplinary offenses which may result in the loss of earned time, and the amount of earned time which may be lost as a result of each disciplinary offense. The director shall establish rules as to what constitutes “satisfactory participation” for purposes of a reduction of sentence under section 903A.2, for programs that are available or unavailable. ...
> 903A.4. Policies and procedures

The DOC argued successfully in the Holm case that the 2005 amendment just allowed them to do what they had been doing all along. Their 2005 interpretation of the 2005 amendment harmonized the language in that new provision with the preexisting statute. The person was not "required" to participate

in the program until a bed was available. Up until that point the person could accrue earned time for good behavior which would not be forfeited if they were removed or refused treatment.

That policy is certainly consistent with the statute.

It is still consistent with the statute. It is consistent with the fact that Miller accrued earned time from 2012-2015.

The Court should conclude that the interpretation adopted in 2005 was in fact the correct one. Under the language of the 2005 amendment, the ineligibility of sex offenders to get a reduction of sentence is dependent on the DOC "requiring" them to participate in SOTP.

D. Nothing has changed to justify revisiting Holm.

It should be clear that the DOC is asking this Court in this case to overrule the Jordan Holm decision from 2009. If the DOC had advanced the current policy in 2005 maybe that interpretation would have been accepted. That ibtrepretaion however could never however have been applied to Jordan Holm.

For the first year that Jordan Holm was in prison he followed the rules and did whatever programming was available. When the sex offender treatment was offered he declined because he could not admit that he had committed his crime.[5]

[5]You cannot take SOTP without first admitting that you did the crime.

As Judge Lars Anderson noted, such an interpretation would have been a drastic change.

> If the 2005 amendment meant no earned time was earned until completion of SOTP, it would have been a dramatic change from the 2001 amendment and not a case where there was no ex post facto violation because the new law "merely clarifies" the old.
> Ruling p.9

In order to justify overruling a prior decision, it is usually necessary to point to some change or some reason to overrule the prior decision. There had certainly been no new legislation that has any impact on any of this.

Since the Jordan Holm case, most sex offenders now have special sentences imposed under 903B. The existence of these special sentences is significant. If the Court gives Miller back his accrued earned time, the consequence will be that Miller will be released to his special parole. That parole may include restrictions such as where the person can live. Since every judicial district has SOTP there will be required participation.

Moreover, the DOC in its brief cannot really point to anything other than the fact that they think they made a mistake in 2005 and want to fix it.

This Court should find that nothing has changed and the Jordan Holm case should stand as the proper interpretation of 903.2.

CLAIM II - THE INCREASE IN THE SANCTION IN JANUARY 2016 VIOLATED THE EX POST FACTO PROHIBITIONS FOUND IN THE IOWA AND UNITED STATES CONSTITUTIONS.

Standard of Review

As this claim is based on a constitutional violation, review on appeal is *de novo*. Everett v. State, 789 N.W.2d 151, 155 (Iowa 2010).

Preservation of error

This claim was the basis for the District Court decision.

Summary of argument:

The DOC changed their interpretation of the 2005 amendment in January 2016. They applied that change retroactively to Miller and everyone else who had prior ALJ decisions concluding that they had either refused treatment or were properly removed from treatment.

Miller argues that if the DOC has the authority to adopt the new interpretation of the policy, they cannot apply it retroactively to prior administrative determinations because of the prohibition again *ex post facto* laws.

In this case, there is not a new statute. Rather there is a drastic change in the administrative interpretation of the statute. Miller argues that this administrative change is subject to *ex post facto* analysis.

That analysis is very simple. Certainly, there has been retroactive application of the policy. Moreover no one can dispute that the new interpretation acts to the significant detriment of Miller and others similarly situated.

Even if the DOC present interpretation is an acceptable interpretation of 903A.2, it cannot be applied to inmates already in the system, because of the *ex post facto* clauses.

A. The facts with regard to this argument are simple

In 2005 the Iowa legislature amended Section 903A.2(1)(a) to restrict earned time for sex offenders who did not complete sex offender treatment.

The IDOC adopted an interpretation of that statute at the time and applied that to individuals already in prison. According to that interpretation the operative term in the statute was "required." No inmate would be "required" to take treatment until a point in time when a treatment bed was available. This meant that any earned time up to that point was not affected.

The Supreme Court held that the statute could not be applied to inmates who had committed crimes before January 1, 2001. State v. Iowa District Court for Henry County, 759 N.W.2d 793 (2009). The Supreme Court held that it could be applied to inmates who committed crimes after that date. In upholding the statute in the Jordan Holm case, the Supreme Court accepted the interpretation advanced

by the DOC. Holm v. Iowa District Court for Jones County, 767 N.W. 2d 409 (Iowa 2009).

The DOC used this interpretation from 2005 to 2015.

In January, 2016 the DOC changed their interpretation, determining that any inmate who was removed or refused treatment would get zero days of earned time going back to the start of their sentence.

The DOC applied this new interpretation of the 2005 statute retroactively to individuals such as Miller who had ALJ hearings before 2016.

B. General Discussion of the Ex post facto prohibitions

There are three cases that provide a reasonably good background with regard to *ex post facto* in general, and more particularly, in Iowa.

The principal United States Supreme Court case is Weaver v. Graham, 450 U.S. 24 (1981).

That case involved a Florida statute that had altered the availability of early release credits. The Florida DOC applied the new statute to inmates already in prison. The Supreme Court struck the application of the statute as applied to individuals who were already in prison. It is a violation of *ex post facto*.

The two principal questions identified by the United States Supreme Court were 1) whether the statute was in fact applied retrospectively, or retroactively to

use a different term, and 2) whether the change in the statute made "more onerous the punishment for a crime committed before its enactment."

Whether something was retrospective, said the Court, depended on whether the "law changes the legal consequence of acts completed before its effective date." The question was apparently not a difficult one because Florida conceded it was using the new statute to calculate release credits for Weaver whose crime was committed before the new statute was enacted.

On the question of whether the change resulted in a more onerous punishment, the Court answered that question affirmatively because "the new provision constricts the inmate's opportunity to earn early release credits." Weaver was worse off under the new law.

Weaver was discussed by the two Iowa Supreme Court cases decided in 2009 that addressed the retroactive application of the 2005 statutes to inmates already in the prison system.

State v. Iowa District Court for Henry County, 759 N.W.2d 793 (2009) held that the 2005 statute could not be applied to inmates whose offenses were from prior to 2001. In the Holm case the Court found a statute could, however, be applied to individuals whose offenses took place after January 1, 2001.

In both cases, the Iowa Supreme Court determined that the DOC was applying the statute retroactively.

The Court concluded in the Propp case that the retroactive application was applied to Propp's detriment and therefore a violation of *ex post facto*. In Holm the Court concluded that the new statute had not materially changed anything about earned time in the prison. Therefore Holm was not adversely affected. Therefore there was no *ex post facto* violation.

C. Application of these cases to Miller

In 2016 the DOC changed their interpretation of the 2005 statute. If there had simply been a new statute passed by the legislature in 2016 contained the new interpretation, the analysis would be simple.

Clearly the DOC applied the 2016 change retroactively. As to the second inquiry, the change in the statute by taking away all earned time up to the point of refusal, the statute had a very negative impact on the person's sentence. If this all had been done by statute there would be a clear *ex post facto* violation.

The problem, however, is twofold. First, there was not a statutory change. All that happened was a change in interpretation of an old statute. Second, as the DOC will argue, the statute really meant their new interpretation all along, and any prior interpretation was just wrong. The DOC is likely to argue that this makes the case like Holm where the change just reflected what the statute was all along, and therefore the application was no more onerous than that which existed before.

D. Ex Post facto in administrative interpretations

There have been a few federal cases that have recognized that there can be an *ex post facto* violation by a change in administrative policy. In Knox v. Lenham, 895 F. Supp. 750 (D. Mary. 1995). The Court considered a Maryland DOC change in policy with regard to certain policies affecting individuals serving life sentences with the possibility of parole. Here is what the Court said about *ex post facto* and administrative rules:

> The Constitution prohibits ex post facto "laws." Thus, the first question before me is whether the policies challenged by plaintiffs are "laws"... The legal landscape of this issue is aptly set out in *United States v. Ellen,* 961 F.2d 462, 465 (4th Cir.), *cert. denied*, 506 U.S. 875, 113 S.Ct. 217, 121 L.Ed.2d 155 (1992):
>
> > As the text of the Clause makes clear, the ex post facto prohibition applies only to "laws." Accordingly, "[t]he constitutional prohibition against ex post facto laws ... is directed to the legislative branch of government rather than to the other branches." *Prater v. United States Parole Comm'n,* 802 F.2d 948, 951 (7th Cir.1986) (*en banc*). This is not to say, however, that all actions of administrative agencies are exempt from Ex Post Facto Clause scrutiny. "When Congress has delegated to an agency the authority to make a rule instead of making the rule itself, the resulting administrative rule is an extension of the statute for purposes of the [C]lause." *Rodriguez v. United States Parole Comm'n,* 594 F.2d 170, 173 (7th Cir.1979).... ...
>
> In short, whether the challenged policies are "laws" depends on whether they are legislative rules or merely interpretive guides. *Ellen,* 961 F.2d at 466.
>
> Knox v. Lanham, 895 F.Supp. 750, 755–56 (D.Md. 1995)

See also Rodriguez v. United States Parole Commission, 594 F.2d. 170 (7th Cir. 1979)

Under the circumstances presented in Knox, the Court concluded that the regulations were essentially administrative rules and therefore subject to *ex post facto* consideration.

Further support for the proposition that prison agency regulations are subject to *ex post facto* analysis comes from the United State Supreme Court case of Garner v. Jones 529 U.S. 244, 120 S. Ct. 1362, 146 L. Ed. 2d 236 (2000). In Garner, the Supreme Court considered the question of whether a Georgia parole board rule concerning the frequency of interviews, violated the *ex post facto* restriction.

The court concluded that it did not. It made that determination because the court could not conclude that the change lengthened the inmate's time of actual imprisonment. The Court had no difficulty in applying ex post facto analysis to the agency rule.

It is clear that what the DOC did in 2005 was exercise its authority under 903A.4. They determined, under that statute, what was satisfactory performance for earned time. This was the basis of the decision in the Holm case.

Individuals from 2005 to 2015 had an expectation based on policy that they would get earned time as long as they followed the rules up, until the point in time

when they were ready for a treatment bed. If they refused at that point, there was no more earned time.

That certainly seemed like an interpretation of Section 903A, as authorized under 903A.4.

The 2016 change seems to be another change in interpretation. The different administrative rules interpreting the statute can be compared for *ex post facto* analysis. Under Weaver, Holm and Propp, there was in fact retroactive application of the change to Miller and others. This certainly was to Miller's detriment. This constitutes an *ex post facto* violation.

E. Where there has been detrimental reliance the first decision should stand

In many ways, all the players in the prison “system” over the last ten years have relied on the 2005 interpretation by the DOC. Parole decisions have been made relying on that interpretation. Other release decisions have been made. Individuals have been denied transfers because there was not enough time to do treatment. The entire DOC release process has been based on the 2005 set of rules.

Miller chose, for example, not to file a postconviction complaining about the ALJ decision in October 2015. He did that knowing full well that if he filed a postconviction, the claim would be dismissed as "moot" when he discharged his sentence in March 2016.

Miller chose not to hire a lawyer for his administrative hearing. Had he known that years were at stake, he would have done that. Instead understood that all that was at stake was that his earned time accrual would be stopped. All that was at stake was about 6 months of time.

As a matter of due process the DOC should not be able to apply any change of law or policy in that kind of retroactive way to individuals already effected. It is not only a matter of due process. It violates the ex post facto prohibition as well. See Holm v. Iowa District Court for Jones County,767 N.W. 2d 409 (Iowa 2009)

This case presents a somewhat unusual situation where an agency has changed its interpretation of a statute after having followed that interpretation for ten years, through and including Supreme Court approval.

There are not many reported cases involving this kind of change in interpretation. One case that was found is a case from 1910 from the Iowa Supreme Court State v. O'Neill, 126 N.W. 454 (Iowa 1910). In that case, O'Neill was prosecuted for doing something having to do with the purchase, sale or delivery ofalcohol.

The particular statute involving his prosecution had been declared unconstitutional as a violation of the Interstate Commerce Clause by the Iowa Supreme Court in 1902 and 1906. As is often the case, the statute was not removed from the Code based on a determination of unconstitutionality. In 1909 the Iowa

Supreme Court reversed its previous holdings based on an intervening United States Supreme Court case. As of 1909 the statute was again constitutional.

As you might have guessed O'Neill was prosecuted between 1906 and 1909. The question was could he present a defense based on a declaration of unconstitutionality that was later reversed.

The Iowa Supreme Court said he could. Here are some of the Court's observations:

> One who is bound to obey the law ought not to be allowed to say that he was ignorant of it. He may show as a defense that he was mistaken as to a fact which, if it had been as he supposed it to be, would have rendered his act lawful, but he cannot say that if the law had been as he supposed it to be, his act would have been lawful and he should not be punished. This principle of public policy has become crystallized into the maxim, "Ignorance of the law excuses no one," and as applied to the present case, it might well be said, if we followed this maxim, that defendant is not to be excused because he did not know the law, that is, did not know that the previous decisions of this court holding the statute which he was violating to be unconstitutional were wrong and the statute was in fact valid and operative.
>
> State v. O'Neil, 126 N.W. 454, 456 (Iowa 1910)
>
> Respect for law, which is the most cogent force in prompting orderly conduct in a civilized community, is weakened, if men are punished for acts which according to the general consensus of opinion they were justified in believing to be morally right and in accordance with law. If we should sustain the conviction, we would do so in the belief that the case was one in which executive clemency ought to be exercised. But is it quite fair to throw upon the executive the responsibility of relieving from punishment on account of the very nature of the act committed which is made apparent to this court, and

> its nature as being innocent or guilty appears to depend upon the effect to be given to the decisions of this court? We think we would be shirking our responsibility if we should leave it to the executive to do what we believe to be manifest justice in this case, and should stigmatize the defendant with a conviction for crime when as it appears he was innocent of any real wrong.
>
> State v. O'Neil, 126 N.W. 454, 456 (Iowa 1910)
>
> These cases are cited not as directly in point for the solution of our present difficulty, but as illustrations of the fact that courts must, especially in the administration of the criminal law, make exceptions in the interest of justice and public policy to rules which it is very essential to maintain in ordinary cases. An exception to the rule that everyone is required to know the law is justified, we believe, when, as to the validity of a statute on constitutional grounds, a person has relied upon the expressed decisions of the highest court in his state. We do not believe such exception to be against public interest, but rather in the furtherance of justice.
>
> State v. O'Neil, 126 N.W. 454, 457 (Iowa 1910)

To some extent the reversal of interpretation in Miller is similar to what happened in O'Neill. The IDOC is now saying that the interpretation advanced in Holm and accepted by the Iowa Supreme Court was wrong.

O'Neill cautions, and in fact holds, that individuals should be allowed to base their decision on appeal cases, such as the Holm case. The Court recognized that they should be able to rely on the interpretation of the statute from the Iowa Supreme Court and the Iowa DOC from 2005 to 2015.

Based on O'Neill, this Court should find the DOC cannot apply this change in the law, if they can apply it at all, to individuals who have already had their hearings before 2016.

F. Specific Response to State's brief

The State in its brief say three things over and over. The brief says that all they did was adopt a plain text interpretation of the statute. The brief says that they were just "correcting a misapplication of existing law". The State says the change was entirely foreseeable. See brief at page 16, 34.

First, the "plain text argument" was rejected by the Supreme Court in Holm. The DOC did not want that interpretation. They successful got the Supreme Court to adopt the non-plain text interpretation, keeping Holm in prison years longer than he otherwise would have been. with the "plain text.".

The plain text interpretation is really not so "plain."

The DOC says they are just correcting its own misinterpretation of the earned time statute.. This language does appear in Holm decision. What is important however that is while the DOC interpretation in 2001 could be corrected, that is harder than changing an interpretation, followed by the DOC for ten years, and approved by the Supreme Court in Holm.

The DOC should not be empowered to correct a misintrepretaion once it has been affirmed by the Supreme Court.

The there is the notion that the change in policy was “entirely foreseeable.” The State devotes an entire section of its brief to this notion. See page 34-38 of the State’s brief.

Once again this argument is difficult after the Supreme Court interpreted the statute in Holm. The new interpretation is hardly "foreseeable" after the Supreme Court approved the other one, and in fact rejected the plain text position.

It is hardly foreseeable after the old version appears in both the notice given to Miller and shows up in the decision from the ALJ.

There is no plain text. There should not be any correction of this misapplication of law. There was no foreseeability.

CLAIM III - THE INCREASE IN THE SANCTION IN JANUARY, 2016 IS ILLEGAL BECAUSE THE ALJ DECISION THAT JUST STOPPEDTHE ACCRUAL OF TIME IS ENTITLED TO PRECLUSIVE EFFECT.

Standard of Review

Whether prelusion should apply is a question of law. Review would be for correction of error of law. Grant v Iowa Dept. of Human Services, 722 NW.2d 169, 173 (Iowa 2006). The claim that there was a due process violation would be reviewed *de novo*.

Preservation of error

This claim was raised in the original Application and was presented to the District Court. Judge Anderson chose not to decide this issue as the relief he

granted was sufficient. The Supreme Court will consider other grounds for the same relief even if not addressed by the District Court, so long as those grounds were presented to the District Court. DeVoss v. State, 648 N.W. 2d 56, 61 (Iowa 2002).

Summary of argument:

The argument with regard to this claim is simple.

The Iowa Supreme Court says that there has to be a due process hearing before it can be determined if a person has refused treatment or is removed from treatment. Dykstra v. Iowa Dist. Court for Jones County, 783 N.W. 2d 473 (Iowa 2010); Reilly v. Iowa Dist. Court for Henry County, 783 N.W.2d 490 (Iowa 2010)

Miller had his hearing in 2015. He was given his constitutional notice. He presented his argument. He got his decision. He received his sanction.

This is the important part. The ALJ decision, within the meaning of Chapter 17A, became "final."

Part of the notice of the hearing was that the consequence of a "refusal" was that the "accrual" of Miller's earned time would stop. The sanction as a result of the finding by the ALJ was also the stoppage of the "accrual" of earned time.

In January of 2016, despite the finality of the ALJ decision, the DOC increased the sanction that had been imposed by the ALJ by years.

Legal argument

In our system of governance, many functions are performed by ALJs. ALJs adjudicate cases much like courts. See 17A.11.See also Office of Citizen's Aide/Ombudsman v. Edwards, 825 N.W. 2d 8 (Iowa 2012).

Much like courts, decisions of ALJs become final and are binding on the parties, including any government agencies involved. ALJ decisions are entitled to preclusive effect, even sometimes when they conflict with courts addressing similar issues. See Heidemann v. Sweitzer, 375 N.W.2d 665 (Iowa 1985),

The Iowa Supreme Court discussed the roles of ALJs in the DOC in Office of Citizens Aid Ombudsman v. Edwards, 825 N.W. 2d 8 (Iowa 2012). In that case, the Iowa Supreme Court described ALJ proceedings within the DOC as part of a due process fundamental right to an impartial hearing. ALJ's were described as quasi judicial officers.

In Edwards this Court considered a particular prison discipline where the ALJ had to decide the level of assault that was involved. Once that decision was made, the Court noted, the warden may not increase sanctions. See Edwards p. 19.

The administrative hearing required by the Dkystra case requires the same independent hearing officer. In Dkystra, the Court held that Dykstra was entitled to due process.

> Dykstra was entitled to due process because his liberty interest in earned time was affected by his classification as required to

> participate in SOTP. Dykstra argues his due process rights were violated because he did not receive the protections of *Wolff*, specifically advance written notice, a written statement of reasons and findings by the factfinder, and a neutral facfinder. Because IDOC relied on unadmitted factual allegations that did not result in a sex-offense conviction, Dykstra is correct.
>
> Dykstra v. Iowa Dist. Court for Jones County, 783 N.W. 2d 473, 483 (Iowa 2010)

Once the administrative appeal is decided after the ALJ decision, the ALJ decision within the DOC is final. At that point it becomes like an opinion of a Court. See discussion of DOC ALJ's in Office of Citizen's Aide,/Ombudsman v Edwards, 825 N.W. 2d 8 (Iowa 2012).

The ALJ decision in Miller's case is entitled to the force of law. That decision includes the sanction of stopping the accrual of earned time. The ALJ decision should be enforced.

The finality of an ALJ decision is required as part of due process:

The previous section argues that essentially as a matter of administrative law, the decision of the ALJ in Miller's case is entitled to finality and a preclusive effect, even as to the DOC.

Miller also asserts that as a matter of due process there should be that finality.

The Constitution requires that Miller be given notice of the hearing. Constitutional notice includes notice of the fact that there is going to be a hearing.

It includes reference to what the hearing is about. It includes reference to what evidence will be considered. It should include what the consequences would be.

Miller was told that he was going to have a hearing in the Notice given by the DOC. He was told that the consequence of finding he was removed, would be that he would have the accrual of his earned time stopped. This was certainly consistent with policy at the time.

Having given him that notice and that hearing, the DOC should not be allowed to simply change the consequences. This is sort of like having aperson plead to a simple misdemeanor where the maximum punishment is 30 days. The legislature could not come along later and say the punishment is 60 days. That would certainly be an *ex post facto* problem. That would also be a problem with constitutional notice that the person was given in connection with the proceeding he was facing.

Certainly if the DOC is permitted to change the rules, Miller should be entitled to a brand new administrative hearing where he is told the correct consequence he is facing.

Once the hearing has taken place, complete with notice and decision, due process requires that the sanction as imposed and noticed be enforced. That also did not happen in this case.

CLAIM IV - THE 2016 INTERPRETATION OF THE STATUTE CANNOT BE APPLIED TO MILLER'S THEFT SENTENCE

Standard of Review

The standard of review for questions of statutory construction is review for errors of law. State v. Randle, 603 N.W. 2d 91.92 (Iowa 1999)

Preservation of error

This claim was presented in the original Application and was also presented to the District Court. Judge Anderson chose not to decide this issue as the relief he granted was sufficient. The Supreme Court will consider other grounds for the same relief even if not addressed by the District Court, so long as those grounds were presented to the District Court. DeVoss v. State, 648 N.W. 2d 56, 61 (Iowa 2002).

Argument

The newly adopted interpretation of the statute is particularly inappropriate in Miller's case, because it is being applied to Miller's sentence from Washington County for theft. He discharged the Sexual Abuse case prior to the ALJ decision in October, 2016. The only prison sentence he is currently serving is the Theft case from Washington County.

The principle case is Waters v. Iowa District Court for Henry County, 783 N.W. 2d 487 (Iowa 2010). Waters was one of the cases decided in

2009/2010 along with Holm, setting out some of the parameters for individuals required to take SOTP and the DOC policy/practice of stopping the accrual of earned time.

Waters came to prison on a five year OWI sentence. A few months after that sentence, he was sentenced to a concurrent two year sentence for Assault with Intent to Commit Sexual Abuse. The case was prior to 2005 so there was no special sentence.

The prison did not get Waters into SOTP before his Assault with Intent case discharged. That is not surprising since the sexual offense would have discharged in about eleven months with earned time.

While Waters was only serving the OWI, a bed became available and Waters was required to take SOTP. He refused. The DOC suspended the accrual of his earned time, on the OWI sentence. The Supreme Court upheld that decision.

Under the new DOC policy from 2016, once there is a determination there has been a "refusal", the DOC goes back to the point in time when Miller came in to prison on the sentence and took all of the accumulated earned time. They did that for all sentences, even the non sexual cases.

The basis for this policy change is that the inmate is required to take treatment from the beginning of the sentence. That logic however does not apply to

the theft charge. It would not have applied to Water's OWI. Miller and Waters could be required to take SOTP on the non sex case only when told it was time.

Consider a hypothetical. A person comes to prison on a theft case. One year later he sexually assault somebody in prison and received an Assault with Intent to Commit Sexual Abuse. At that point and going forward, the case is like Waters. The question is does the DOC have any authority to declare our hypothetical inmate ineligible for earned time for that first year when he was only serving a non-sex case. Presumably it does not. That is because of the nature of the non sex case. There was no requirement for SOTP from day one.

When the sentences begin at the same time the result should be the same. For the non sex case there must be a triggering event, such as a specific treatment refusal. Until that triggering eventthe ordinary rules under 903A for getting earned time would apply.

There simply is no authority for the DOC to deny our hypothetical inmate earned time on the non-sex case prior to him refusing to participate.

In Miller there is just no way to deny him earned time credit for time on the theft conviction prior to the "refusal" in the fall of 2015.

CONCLUSION

In March of 2015 it was time for Marshall Miller to take sex offender treatment. He had gotten within about seven months of his discharge date. The Department of Corrections transferred him to Mt. Pleasant where he was immediately attacked. It was clear the Department of Corrections could not safely have him take a sex offender treatment program at Mt. Pleasant. Before he could be transferred away, Miller picked up a disciplinary case.

Based on the discipline, the Department of Corrections had decided that he had, under their policies, "refused" treatment and put him in front of an Administrative Law Judge.

The Administrative Law Judge in October 2015 suspended the accrual of his earned time. That was consistent with the policy at the time. This put his discharge date somewhere in March of 2016.

In January 2016, the Department of Corrections changed their interpretation of what happened if a sex offender "refused" treatment. This added years to over one hundred inmates' time. It added over three years in Miller's case.

Miller challenged the determination by the Administrative Law Judge that he refused treatment. The Judge found he had missed the statute of limitations for that claim. He also challenged the change in interpretation in January, 2016, and particularly the retroactive application of that change to his case.

Judge Lars Anderson granted relief. He ordered the restoration of the earned time that was taken by the January change in policy. This would have released Miller from prison, to begin his lifetime parole, which was part of his sentence.

Miller requests that the court affirm Judge Anderson's decision. It should do that for the reasons identified by Judge Anderson. It can also affirm the decision based on the grounds he did not reach.

Fairness is important in our society. Fairness is even more important in the prison system. What happened to Miller was not fair. The Department of Corrections should be required to follow the Supreme Court decision in the Holm case. It should be required to follow the ruling of the Administrative Law Judge in Miller's own case.

The Court should affirm the decision to release Miller from prison.

RESPECTFULLY SUBMITTED,

/s/Philip B. Mears

PHILIP B. MEARS
MEARS LAW OFFICE
209 E. Washington Street
Paul-Helen Building, Suite 203
Iowa City, Iowa 52240
(319) 351-4363 Office
(319) 351-7911 Fax
philmears@mearslawoffice.com
AT0005330

ATTORNEY FOR RESPONDENT-APPELLEE AND FOR MARSHALL MILLER

REQUEST TO BE HEARD IN ORAL ARGUMENT

The Respondent-Appellee hereby requests to be heard in oral argument in connection with this appeal.

RESPECTFULLY SUBMITTED,

/s/Philip B. Mears

PHILIP B. MEARS
MEARS LAW OFFICE
209 E. Washington Street
Paul-Helen Building, Suite 203
Iowa City, Iowa 52240
(319) 351-4363 Office
(319) 351-7911 Fax
philmears@mearslawoffice.com
AT0005330

ATTORNEY FOR RESPONDENT-APPELLEE- AND FOR MARSHALL MILLER

ATTORNEY'S CERTIFICATE OF COSTS

I, Philip B. Mears, Attorney for the Respondent-Appellee, hereby certify that the cost of preparing the foregoing Respondent-Appellee's Final Brief was $7.70.

RESPECTFULLY SUBMITTED,

/s/Philip B. Mears

PHILIP B. MEARS
MEARS LAW OFFICE
209 E. Washington Street
Paul-Helen Building, Suite 203
Iowa City, Iowa 52240
(319) 351-4363 Office
(319) 351-7911 Fax
philmears@mearslawoffice.com
AT0005330

ATTORNEY FOR RESPONDENT-APPELLEE- AND FOR MARSHALL MILLER

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

August 25, 2017
Date