

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 **REPLY** BRIEF

THOMAS J. MILLER
Attorney General of Iowa

JEFFREY THOMPSON
Solicitor General of Iowa

JOHN McCORMALLY
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-8080
(515) 281-4902 (fax)
john.mccormally@iowa.gov

ATTORNEYS FOR PLAINTIFF-APPELLANT

FINAL REPLY

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**STATEMENT OF THE ISSUES PRESENTED FOR
REVIEW**

**I. WHETHER IDOC'S INTERPRETATION OF THE
RELEVANT CODE SECTION IS CONSISTENT WITH
THE PLAIN LANGUAGE OF THE STATUTE AND
CASE LAW?**

Holm v. Iowa Dist. Court for Jones Cty., 767 N.W.2d 409
(Iowa 2009)

State v. Iowa Dist. Court for Henry Cty., [Propp] 759 N.W.2d 793
(Iowa 2009)

IOWA CODE § 903A.2(1)(a)

IOWA CODE § 903A.2(1)(a)(2)

**II. WHETHER ALL SEX OFFENDERS ARE REQUIRED TO
COMPELTE SOTP?**

Holm v. Iowa Dist. Court for Jones Cty., 767 N.W.2d 409
(Iowa 2009)

Dykstra v. Iowa Dist. Court for Jones Cty., 783 N.W.2d 473
(Iowa 2010)

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State v. Iowa Dist. Court for Webster Cty., 801 N.W.2d 513
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III. WHETHER IDOC IS CORRECTLY IMPLEMENTING THE ALJ DECISION?

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(Iowa Feb. 24, 2017)

State v. Iowa Dist. Court for Jones Cty., 888 N.W.2d 655 (Iowa 2016)

Office of Citizens' Aide/Ombudsman v. Edwards, 825 N.W.2d 8
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(Iowa 2010)

IOWA CODE 903A.3

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IV. WHETHER MILLER IS INELIGIBLE FOR ANY EARNED TIME UNTIL HE COMPLETES SOTP?

IOWA CODE § 903.4

Dykstra v. Iowa Dist. Court for Jones Cty., 783 N.W.2d 473
(Iowa 2010)

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(Iowa 2010)

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**V. WHETHER THIS CASE PROPERLY FALLS UNDER IOWA
CODE §822.2(1)(f)?**

Iowa Code § 822.2(1)(f)

Pettit v. Iowa Dep't of Corr., 891 N.W.2d 189, 196 (Iowa 2017)

REPLY ARGUMENT

**I. IDOC'S INTERPRETATION OF THE
RELEVANT CODE SECTION IS
CONSISTENT WITH THE PLAIN
LANGUAGE OF THE STATUTE AND CASE
LAW.**

This Court should reject Miller's contention that this Court's decision in *Holm* precludes the current IDOC interpretation of Iowa Code §903A.2(1)(a)(2). In *Holm*, this Court sustained the statutory language at issue in this case against an ex post facto challenge. *Holm v. Iowa Dist. Court for Jones Cty.*, 767 N.W.2d 409, 416 (Iowa 2009). Miller contends that if the state had advanced the current interpretation—that sex offenders are ineligible for earned time until they complete SOTP-- in 2005, that policy could not have been

legally applied to Jordan Holm. IDOC disagrees. The significant change in the statutory language happened in 2001, and there is no ex post facto violation in applying the plain language of the statute to an inmate convicted in 2002 (Holm), let alone 2011 (Miller).

The *Holm* case must be considered in tandem with a case from the same time, and considering the same statute, in which the Court did find an ex post facto violation, *State v. Iowa Dist. Court for Henry Cty.*, [Propp] 759 N.W.2d 793, 802 (Iowa 2009). This case involved an inmate named Denny Propp, who was convicted of a sex offense in 1997. The Supreme Court decided the *Propp* case just a few months before *Holm*, finding that applying the amended 2005 statute to an inmate convicted in 1997 was an ex post facto violation. *Id.* However, the *Propp* holding centered around a change in the earned time law that took effect in 2001. *Propp*, 759 N.W.2d at 801. When Propp was sentenced in 1997, inmates could accrue sentence reduction credit for good behavior and accrue another credit for successful completion of treatment. *Id.* Thus, when Propp was sentenced, it was possible to earn two separate credits. *Id.* In 2001,

the legislature merged these two credits into one. After 2001, the statute read:

An inmate...is eligible for a reduction of 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.

IOWA CODE § 903A.2(a)(1). Notably, in order to earn credit, an inmate must “satisfactorily participate” in any program identified by the Director (emphasis added). *Id.* This statutory language has remained unchanged since 2001. The *Propp* Court found that applying this change to Propp violated the post facto clause because at the time Propp came to prison, he did not have notice of the dual requirement of treatment participation and treatment completion. *Propp*, 759 N.W.2d at 802. When Propp entered prison, they were two separate credits, and Propp could not have foreseen that treatment completion would be required in order to accrue any earned time.

Conversely, when Jordan Holm came to prison in 2002, treatment participation and good behavior were already both required to earn the sentence reduction credit. The central issue in *Holm* was whether IDOC could apply 2005 change in the earned time

statute to an inmate who was convicted in 2002. The 2005 amendment did not change the statute at issue in *Propp*, but rather added a subsection directly under the one at issue in *Propp*. That section read (and still reads):

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). The *Holm* Court held that this section “merely clarified” the existing law and that “[t]here 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.” *Holm v. Iowa Dist. Court for Jones Cty.*, 767 N.W.2d 409, 416 (Iowa 2009). That is, when *Holm* came to prison in 2002, the law required him to both participate in treatment and avoid discipline in order to be eligible for earned time. That did not change when the legislature added the 2005 amendment. Instead, the new section emphasized the importance of SOTP in the eyes of the legislature. While participation in all treatment programs is required to earn the sentence reduction credit,

SOTP is of particular importance. While the legislature highlighted the importance of SOTP by singling it out, the underlying requirements for Holm did not change: inmates get earned time only by showing good behavior and participating in treatment—especially SOTP. Consequently, the *Holm* Court found that there was no ex post facto violation because the statutory requirements for earned time—treatment completion and good behavior—were the same in 2005 as they were in 2002 when Holm was convicted. While the State did not advance the current policy interpretation in *Holm*, it certainly could have—earned eligibility was contingent on treatment participation when Jordan Holm was convicted in 2002, and remained contingent on treatment completion when Marshall Miller was convicted in 2011. That the State erroneously gave inmate credit for earned time to which they were not entitled does not change the fact that the underlying statute has been the same since 2001. The 2005 amendment serves only to highlight the importance of SOTP. As a result, this Court should find there is no ex post violation in Marshall Miller’s ineligibility to accrue earned time due to his failure to successfully participate in SOTP.

II. ALL SEX OFFENDERS ARE REQUIRED TO COMPLETE SOTP.

This Court should explicitly hold that all sex offenders are required to satisfactorily complete SOTP, and that IDOC has the discretion to determine what constitutes successful completion. The principal difference between current IDOC policy and the policy as it stood in *Holm* centers around the definition of the word “required.” 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.

For this change in policy, IDOC points to several Iowa Supreme Court cases decided 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. The Court should take this opportunity to explicitly hold that all sex offenders are required to take SOTP based on their conviction. The State advanced this argument in its brief, and will not repeat it here, other than to reply specifically to Miller.

IDOC generally has discretion in determining what treatment offenders may require. However, sex offenders are automatically required to complete SOTP. IDOC can require SOTP for offenders who have not been convicted of a sex offense. *See State v. Iowa Dist. Court for Jones Cty.*, 888 N.W.2d 655, 664. In those cases, the SOTP requirement for earned time purposes would commence on the date of the classification, or the date of the ALJ decision. However, for offenders convicted of a sex offense, their classification as a sex offender and SOTP requirement commences at the moment of conviction. *See State v. Iowa Dist. Court for Webster Cty.*, 801 N.W.2d 513, 527 (Iowa 2011) (stating “*from the moment [the inmate] 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*”); see also *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); *Dykstra*, 783 at 484 (stating "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"). The Court should explicitly hold what is already evident from the case law: all sex offenders are required to complete SOTP.

The Court should reject Miller's suggestion that requiring all sex offenders to complete SOTP is problematic. While all sex offenders are required to complete SOTP, IDOC has discretion to determine what constitutes satisfactory participation. Miller offers several possibilities as to why some offenders may not be able to complete required SOTP, such as health concerns or someone who might be cleared of committing a crime by the polygraph. In these cases, IDOC has discretion to determine what constitutes satisfactory participation for purposes of earned time. See IOWA CODE § 903.4 ("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"). These offenders would

still be “required” to complete, but IDOC has the discretion to determine their individual participation success on a case by case basis. Such an individual could be deemed to achieved maximum treatment benefit, and therefore to have successfully completed.

Miller contends that it was “not his fault” that he didn’t complete treatment. Leaving aside that Miller had multiple disciplinary issues and had two different opportunities to begin SOTP, IDOC has discretion to determine whether or not he successfully completed SOTP. IDOC removed Miller him from the program because of multiple disciplinary issues, a removal that was fully in keeping with IDOC’s discretion. *Reilly*, 783 N.W.2d at 496 (Iowa 2010) (holding “the discretion to determine what constitutes ‘satisfactory participation’ in a treatment program necessarily includes the discretion to remove those who do not satisfactorily participate”). Miller’s removal was upheld by an ALJ, which provided him with sufficient process. None of Miller’s complaints change the fact that he was required to complete SOTP and failed to do so. The statute on the books the day he was convicted clearly set forth the

consequences of that failure. Sex offenders who fail to complete SOTP are not eligible for earned time until the day they complete SOTP.

The Court should also reject Miller's claims of detrimental reliance. Miller contends that he made his choices regarding SOTP participation and the ensuing PCR based on SOTP policy at the time. However, Miller's reliance on IDOC's misapplication of the law does not entitle him to earned time. "The Ex Post Facto Clause does not prohibit the correction of a misapplied existing law which disadvantages one in reliance on its continued misapplication." *Holm*, 767 N.W.2d at 416. Miller may have thought IDOC would continue to credit him with earned time to which he was not eligible, but his mistake does not create an ex post facto violation. The Court should reverse the District Court and remand this case for dismissal.

III. IDOC IS CORRECTLY IMPLEMENTING THE ALJ DECISION.

This Court should reject Miller's claim that the language of the 2015 ALJ decision limits IDOC's ability to apply the 2016 policy change to Miller. Miller contends the ALJ decision precludes IDOC from applying the 2016 policy change to Miller. Essentially, Miller's contention is that since the policy change happened after Miller's

hearing, IDOC is estopped from increasing the sanction against him. However, the ALJ decision that removed Miller from treatment provided Miller with sufficient due process to uphold IDOC's sanctions. Miller points to Iowa Code Chapter 17A the proposition that ALJ decisions are tantamount to judicial decisions and entitled to the force of law. However, the Iowa Supreme Court recently held Chapter 17A is not applicable to SOTP classification issues. *Pettit v. Iowa Dep't of Corr.*, No. 16-0582, 2017 WL 728124, at *6 (Iowa Feb. 24, 2017) (“SOTP classification hearing is not other agency action. Accordingly, an inmate must file a postconviction-relief action under section 822.2(f) to obtain review by the courts of a SOTP classification).” Under this code section, the District Court reviews the decision of an IDOC ALJ, and both the District Court and the ALJ utilize the “some evidence” standard. *State v. Iowa Dist. Court for Jones Cty.*, 888 N.W.2d 655, 669 (Iowa 2016) (holding “we reaffirm that the ‘some evidence’ standard applies to making and reviewing factual findings in prison proceedings, including SOTP classification hearings”). Under this standard, the IDOC classification decision is afforded substantial deference.

IDOC ALJs are independent and impartial adjudicators. *Office of Citizens' Aide/Ombudsman v. Edwards*, 825 N.W.2d 8, 17 (Iowa 2012). ALJ's undoubtedly serve a quasi-judicial function in these cases, but their authority is limited. In the case of an inmate's removal from SOTP, IDOC has great discretion in determining both when removal is warranted, and when the inmate is readmitted to SOTP. *Reilly v. Iowa Dist. Court for Henry Cty.*, 783 N.W.2d 490, 497 (Iowa 2010). Neither the removal decision, nor readmittance are in the province of ALJ. See *Reilly*, 783 N.W.2d at 496-97. The ALJ's only role is to examine the decision of the classification committee and determine, once the inmate is removed, whether that removal was supported by any evidence. See *Jones Cty.*, 888 N.W.2d at 669. The ALJ is not responsible for imposing the sanction on an inmate required to complete SOTP, and any language to the contrary in the ALJ decision does not have the ability to override the statute. In general, ALJ's have the authority to impose sanctions. See IOWA CODE 903A.3. However, in the case of removal for SOTP, the sanction is prescribed by statute. The statute states inmates are not eligible for earned time until they complete required SOTP. IOWA CODE

903A.2(1)(a)(2). Thus, upon a finding that an inmate was properly removed from SOTP, the statute takes over and the inmate loses all eligibility for all earned time.

Furthermore, the language of the ALJ decision in Miller's case actually supports applying the 2016 policy change to Miller. The relevant part of the ALJ decision reads:

Miller was required to complete SOTP. He was removed from the program before successfully completing the SOTP program. In light of Miller's disciplinary record, he was properly removed from the program. Based on those facts and the language of Iowa Code 903A.2(1)(a), the cessation of Miller's ability to accrue earned time was appropriate. Therefore the decision of the classification committee is affirmed.

(Ruling, p.33). Notably, the ALJ decision specifically references the statutory language of 903A. As such, the plain language of the statute should be incorporated into the ALJ decision. While the decision does reference Miller's "ability to accrue earned time," (as opposed to his *eligibility* for earned time), this language discrepancy does not foreclose the IDOC's application of the policy change as applied to Miller. The ALJ reviewed the decision of the classification committee, which referenced the possible "suspension" of Miller's earned time.

This is significant because the classification committee is the entity vested with the discretion under the statute, and therefore the decision the ALJ reviewed is *not the sanction, but rather Miller's SOTP status*. That is, the ALJ was charged with reviewing whether there was “some evidence” to support the classification committee’s decision removal Miller from treatment. See *State v. Iowa Dist. Court for Jones Cty.*, 888 N.W.2d 655, 669. The critical ALJ holding is affirmation of SOTP removal. Because Miller’s removal from SOTP was held lawful, the statutory sanction should be imposed: Miller is not eligible for earned time until he completes SOTP.

Miller contends that the language discrepancy in the decision entitles him to a new ALJ hearing following the policy change. However, such a proceeding is unnecessary because Miller has already been provided sufficient process. The Iowa Supreme Court has held that removal from SOTP requires less process than initial classification. In *Reilly*, the Court stated:

Although removal from SOTP implicates a liberty interest, it is a lesser interest than the initial classification decision requiring an inmate to participate in SOTP. The removal decision is a discretionary decision by prison officials based on any number of

considerations whereas the initial inmate classification addressed in *Dykstra* amounts to a specific factual determination that the inmate has engaged in sexually inappropriate behavior... The full panoply of protections that would accompany a formal hearing are unnecessary for removal from SOTP because of the nature of the liberty interest at stake, the discretion granted to IDOC employees, and the professional judgment behind any removal decision.

Reilly, 783 N.W.2d at 496. In other words, Miller received sufficient due process through the *Wolff* hearing that affirmed his removal from SOTP. Given that the liberty interest in removal is less than that of classification, providing further process following a proper removal hearing would not protect any additional right. Moreover, upon implementation of the policy change, affected inmates (including Miller) were provided an administrative appeal process. The appeal was first reviewed by the deputy warden of the prison, and a second level of appeal through review by the Inspector General of IDOC. These appeals were denied in Miller's case because the evidence clearly shows that Miller was required to complete SOTP, he was removed from SOTP and failed to complete the program. As a result, the statutory language makes him ineligible to earn a 903A.2

sentence reduction. Miller was provided with sufficient due process, and this Court should reject any claim otherwise. The policy change did not increase Miller's sentence as imposed by the criminal court, but rather held him accountable for his sex offense conviction and failure to complete required treatment.

IV. MILLER'S IS INELIGIBLE FOR ANY EARNED TIME UNTILE HE COMPLETES SOTP .

This Court should affirm longstanding Iowa precedent that an inmate required to complete SOTP may not accrue earned time on any sentence until he completes SOTP. Miller contends that he should be entitled to accrue earned time on a sentence being served on a non-sex offense. However, Miller is ineligible to earn any 903A.2 sentence reduction credit until he complete SOTP, and that ineligibility applies to all sentences he is serving or will serve until such time as he completes SOTP. See *Dykstra v. Iowa Dist. Court for Jones Cty.*, 783 N.W.2d 473, 479 (Iowa 2010) (“Section 903A.2 does not require that the ‘sentence’ be one connected to the reason IDOC has required the inmate to attend SOTP”). See also *Jones Cty*, 888 N.W. 2d at 663-4 (“[In *Dykstra* we] held that the IDOC had authority to stop all accrual of earned time for refusal to participate in SOTP,

even on sentences that were not served for a sex-offense conviction”) (emphasis added); *Waters v. Iowa Dist. Court for Henry Cty.*, 783 N.W.2d 487, 489 (Iowa 2010) (“Waters’ most recent conviction was for a sexual offense, he was required by the sentencing judge to attend SOTP and register as a sex offender, and he entered prison to serve the sentence for that offense concurrently with an OWI sentence. IDOC acted within its statutory authority to stop Waters’ ability to earn good-time credits toward his OWI sentence”). Under this line of cases, the ineligibility for earned time accrual applies to all sentences an inmate is serving, not just sex offenses. Allowing an inmate to accrue earned time on other sentences is contrary to the plain language of 903A.2, which states an inmate required to complete SOTP “shall not be eligible for a reduction of sentence” unless the inmate completes SOTP. IOWA CODE § 903A.2(1)(a)(2). This ineligibility extends to all sentences being served. This Court should hold Miller may not accrue any earned time on any sentence until he completes SOTP.

V. THIS CASE PROPERLY FALLS UNDER IOWA CODE §822.2(1)(f).

Miller spends several pages in his brief discussing the procedural nature of this case, attempting to construct a way for this action to fall under various code sections. However, this case arises out Miller's failure to successfully complete SOTP and centers around his eligibility for earned time. Under recent Iowa Supreme Court case law, SOTP proceedings are considered prison disciplinary proceedings, and fall under Iowa Code § 822.2(1)(f). *See Pettit v. Iowa Dep't of Corr.*, 891 N.W.2d 189, 196 (Iowa 2017). ("We find that SOTP classification is part of the disciplinary procedure because it would lead to a loss of the accrual of earned time if the inmate does not comply... an inmate must file a postconviction-relief action under § 822.2(1)(f) to obtain review by the courts of a SOTP classification"); IOWA CODE § 822.2(1)(f) (allowing post-conviction proceedings when an inmate'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"). Following *Pettit*, it is clear that SOTP and related earned time issues fall under Iowa Code § 822.2(2)(1)(f). While Miller raises numerous

hypothetical and scenarios and potential ramifications, the reality is much simpler: When challenging an IDOC decision involving SOTP, the proper course of action is post-conviction relief pursuant to Iowa Code §822.2(1)(f). This court should reject Miller's arguments and hold this action falls under Iowa Code §822.2(1)(f).

CONCLUSION

The District Court's Ruling granting application for post-conviction relief should be reversed. Miller contends that what happened to him was not fair. However, it would not be fair to Miller's victims or the people of Iowa to allow an untreated sex offender to accrue earned time and get out of prison sentence years before he should rightfully be discharged. Miller attempted to game the system by self-sabotaging his treatment, and expected to be rewarded with three years of earned time. While he may find it inequitable, it was lawful for IDOC to determine that he had incorrectly been credited with earned time for which he was not eligible. Miller is a convicted sex offender and was required to take SOTP the moment he was convicted. As a result, he entered IDOC ineligible for sentence reduction credit, and he should have never

been credited with any earned time. The Court should reverse the order of the District Court and Miller's application for post-conviction relief should be denied.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

JEFFREY THOMPSON
Solicitor General of Iowa

/s/ John B. McCormally
JOHN McCORMALLY (AT09602)
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-8080
john.mccormally@iowa.gov

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:
 - This brief contains 3,706 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).
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Dated: September 11, 2017

/s/ John B. McCormally
JOHN McCORMALLY (AT 09602)
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-8080
john.mccormally@iowa.gov