

**IN THE SUPREME COURT OF IOWA**

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**SUPREME COURT NO. 17-0783  
(Muscatine County No. OWCR044943)**

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**RICHARD EUGENE NOLL  
Plaintiff-Appellant**

**vs.**

**IOWA DISTRICT COURT FOR MUSCATINE COUNTY  
Defendant-Appellee**

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**APPEAL FROM THE DISTRICT COURT OF MUSCATINE  
COUNTY**

**THE HONORABLE GARY P. STRAUSSER PRESIDING AT  
HEARING ON DEFENDANT'S APPLICATION TO VACATE  
ILLEGAL SENTENCE**

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**FINAL BRIEF OF APPELLANT**

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**CERTIFICATE OF FILING**

I hereby certify:

That I filed the attached typewritten Appellant's Final Brief by electronic filing on the 2<sup>nd</sup> day of May, 2018, to the Clerk of the Supreme Court, Iowa Supreme Court, 1111 E. Court Avenue, Des Moines, Iowa 50319.

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I hereby certify:

On the 2<sup>nd</sup> day of May, 2018, the undersigned did serve the within Appellant’s Final Brief on all other parties to this appeal by electronic service thereof to the following respective counsel for said parties:

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**CERTIFICATE OF COMPLIANCE WITH TYPEFACE**

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**ATTORNEY'S COST CERTIFICATE**

I, Thomas Hurd, hereby certify that the actual cost of reproducing the necessary copies of the preceding Appellant's Final Brief was \$0.00 and that amount has been paid in full by this attorney's firm.

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## **STATEMENT OF ISSUE PRESENTED FOR REVIEW**

- I. Did the district court err in denying Defendant-Appellant’s Motion to Correct an Illegal Sentence, based on the language of Iowa Code Sections 902.9 and 321J.2?

### ***Cases***

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## **ROUTING STATEMENT**

This case should be retained by the Supreme Court, as it presents a substantial issue of first impression. R. App. P. 6.1101(2)(c). This issue is whether a Defendant convicted of a third OWI offense may be sentenced to up to 15 years in prison as a habitual offender under Iowa Code Section 902.9(1)(c) based on two prior felony OWI's, or whether he may only be sentenced to a maximum term of confinement of five years and a maximum fine of \$9,375.00 for a third OWI offense, as prescribed by Iowa Code 902.9(1) (indicating the punishment for a crime shall be "as proscribed by statute") and Iowa Code 321J.2 (specifically proscribing the sentence for OWI 3<sup>rd</sup> to be five years). The Court's decision in this matter will provide important clarity for future sentencing decisions.

## STATEMENT OF THE CASE

Defendant-Appellant was charged with OWI third offense in violation of Iowa Code Section 321J.2(2)(c) on April 14, 2011. Trial Information, App. 6. He was convicted by a jury on October 27, 2011 in a bifurcated trial. Order Setting Sentencing, App. 11. During the enhancement phase of the trial the Defendant stipulated to having “two prior convictions” within the previous 12 years. Trial Tr. at 134, ln. 5-6. On January 6, 2012, he was sentenced to a term not to exceed 15 years, with a mandatory minimum term of three years, and ordered to pay a \$5,000.00 fine and court costs.

Sentencing Order, App. 12. A Motion to Correct Illegal Sentence was filed by Defendant-Appellant on January 23, 2017, arguing he could not be sentenced as a habitual offender because Iowa Code Section 321J.2 prescribes a specific punishment for an OWI third offense. Motion to Correct Illegal Sentence, App. 15. The State filed a resistance to the motion on February 27, 2017. Resistance, App. 19. An order denying the motion was filed on May 18, 2017. Order Denying Motion to Correct Illegal Sentence, App. 25. A notice of appeal was filed by Defendant-Appellant that same day. Notice of Appeal, App. 33.

## **STATEMENT OF THE FACTS**

Given that the Defendant-Appellant is solely challenging the legality of the sentence imposed following his conviction, there are no facts at issue here outside of the procedural matters set forth above in the Statement of the Case.

## **ARGUMENT**

- I. *Defendant-Appellant's sentence must be vacated, as Iowa Code Section 321J.2 prescribes a specific fixed punishment for an OWI third offense and thus sentencing him as a habitual offender under Iowa Code Section 902.9 was illegal.*

### *Issue Preservation*

“A defendant is permitted to challenge an illegal sentence at any time. An illegal sentence is void, which permits an appellate court to correct it on appeal without the necessity for the defendant to preserve error by making a proper objection in the district court.” State v. Parker, 747 N.W.2d 196, 212 (Iowa 2008) (*citing* State v. Woody, 613 N.W.2d 215 (Iowa 2000)) In addition, pursuant to Iowa R. App. Pro. 6.107(1)(d) the Appellant raised the issues raised herein before the District Court, and his interest in securing relief is that he remains in prison under an illegal sentence. The grounds for granting the relief are thoroughly discussed elsewhere in this Petition.

### *Scope and Standard of Appellate Review*

This Court reviews claims of improper or illegal sentencing for correction of errors at law. State v. Runge, 824 N.W.2d 562 (Iowa Ct. App. 2012) (*citing* State v. Bower, 725 N.W.2d 435, 440 (Iowa 2006)).

## *Argument*

### **Introduction**

At the time of Defendant-Appellant's sentencing, Iowa Code Section 321J.2(2)(c) prescribed that a person convicted of a third OWI offense was guilty of a Class "D" felony for a third offense and each subsequent offense.<sup>1</sup> Iowa Code 321J.2(5) specifically prescribes the punishment for a third offense OWI to be a maximum term of confinement not to exceed five years, with a mandatory minimum term of thirty days. *See also*, Iowa Code 902.9 (stating the penalty for a felony offense shall be that prescribed by statute). Despite the maximum sentence for a third OWI offense being prescribed by Iowa Code Section 321J.2, Defendant-Appellant was sentenced as habitual offender pursuant to Iowa Code Section 902.9(c) and subjected to a maximum sentence of 15 years, well beyond what the law allowed for his offense.

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<sup>1</sup> Both parties and the Trial Court erroneously cited to the 2009 Iowa Code throughout the trial court proceedings. Iowa Code 321J.2 (2009 Ed.) was amended by 2010 Acts, ch 1124, §1, 9 with an effective date of December 1, 2010 and it is this version of the Code which appears in this Petition for Certiorari.

Because Defendant-Appellant's sentence as a habitual offender pursuant to Iowa Code Chapter 902 was illegal, this Court must remand the case for sentencing as prescribed in Iowa Code Section 321J.2.

**Based on the Plain Meaning of Iowa Code Sections 321J.2 and 902.9, Defendant-Appellant's Maximum Sentence was a Term of Confinement of Five Years with a Mandatory Minimum of 30 days.**

Iowa Code Section 902.9 read in relevant part at the time of Defendant-Appellant's sentencing:

1. The maximum sentence for any person convicted of a felony *shall be that prescribed by statute or, if not prescribed by statute*, if other than a class "A" felony shall be determined as follows:

...

3. An habitual offender shall be confined for no more than fifteen years.

...

5. A class "D" felon, not an habitual offender, shall be confined for no more than five years, and in addition shall be sentenced to a fine of at least seven hundred fifty dollars but not more than seven thousand five hundred dollars.

...

Iowa Code Section 902.9 (2011) (emphasis added). Iowa Code Section 902.8 defined an habitual offender as any person convicted of three or more Class "C" or "D" felonies. Also at that time, and as discussed more fully below, Iowa Code Section 321J.2 read in relevant part:

1. A person commits the offense of operating while intoxicated

if the person operates a motor vehicle in this state in any of the following conditions:

...

2. A person who violates subsection 1 commits:

...

*c. A class “D” felony for a third offense and each subsequent offense.*

...

**5. A third offense is punishable by all of the following:**

***a. Commitment to the custody of the director of the department of corrections for an indeterminate term not to exceed five years, with a mandatory minimum term of thirty days.***

...

Iowa Code Section 321J.2 (2011) (emphasis added). When read together, it is clear Iowa Code Section 321J.2 specifically prescribes the punishment for a third and subsequent OWI offense as a maximum term of confinement of five years, with a mandatory minimum term of thirty days. Because reference to the maximum sentences for felonies set forth in Iowa Code Section 902.9 is appropriate only where the statute at issue does not prescribe a maximum sentence (*See*, Iowa Code 902.9), and because Iowa Code Section 321J.2 does prescribe a specific punishment for the offense for which Defendant-Appellant was convicted, reference to Iowa Code Section 902.9 and sentencing Defendant-Appellant as a habitual offender pursuant to that section was illegal.



Despite the maximum sentence for a third OWI offense being prescribed by Iowa Code Section 321J.2, Defendant-Appellant was illegally sentenced as habitual offender pursuant to Iowa Code Section 902.9 and subjected to a maximum sentence of 15 years, well beyond what the law allowed for his offense.

**The Facts and Holding of *Bown v. State*.**

One issue before the trial court was what impact the holding of Bown v. State, 475 N.W.2d 3 (Iowa 1991) may have on this case. In Bown, the Defendant pled guilty to a third OWI offense, a Class “D” felony. Bown, 475 N.W.2d at 4. He had two prior felony burglary convictions, and was subsequently sentenced as a habitual offender pursuant to Iowa Code Section 902.9. *Id* at 4. He argued the maximum sentence he should have received was five years as a Class “D” felon. *Id*. The trial court agreed that the enhancement of the OWI offense to a Class “D” felony “should not have been used as a trigger to the habitual offender sentencing provisions” in Iowa Code Section 902.9. *Id*. The State appealed. *Id*. The issue before the *Bown* court was limited: whether an enhancement of a third OWI offense to a Class “D” felony can in turn trigger enhanced punishment due to that person now having the requisite felony convictions to meet the definition of

“habitual offender” under Iowa Code Chapter 902. Bown at 4. Neither of the felony convictions at issue in Bown were felony OWIs.

The Bown court began its analysis by examining Iowa Code Section 321J.2. At the time the Defendant was sentenced in Bown, Iowa Code Section 321J.2 read in relevant part:

1. A person commits the offense of operating while intoxicated if the person operates a motor vehicle in this state in either of the following conditions:

...

2. A person who violates this section commits:

...

c. A class "D" felony for a third offense and each subsequent offense and shall be imprisoned in the county jail for a determinate sentence of not more than one year but not less than thirty days, or committed to the custody of the director of the department of corrections, and assessed a fine of not less than seven hundred fifty dollars. The minimum jail term of thirty days cannot be suspended notwithstanding section 901.5, subsection 3, and section 907.3, subsection 3, however, the person sentenced shall receive credit for any time the person was confined in a jail or detention facility following arrest. If a person is committed to the custody of the director of the department of corrections pursuant to this paragraph and the sentence is suspended, the sentencing court shall order that the offender serve the thirty-day minimum term in the county jail. If the sentence which commits the person to the custody of the director of the department of corrections is later imposed by the court, all time served in a county jail toward the thirty-day minimum term shall count as time served toward the sentence which committed the person to the custody of the director of the department of corrections. A person convicted of a second or subsequent offense shall be ordered to undergo a substance abuse evaluation prior to sentencing. If a person is convicted of

a third or subsequent offense or if the evaluation recommends treatment, the offender may be committed to the custody of the director of the department of corrections, who, if the sentence is not suspended, shall assign the person to a facility pursuant to section 246.513 or the offender may be committed to treatment in the community under the provisions of section 907.6.

Iowa Code Section 321J.2 (1989). The Bown court noted Iowa Code Section 321J.2(2) clearly provided that a third or subsequent OWI offense was a class “D” felony. Bown at 5. It also noted that Iowa Code Section 321J.2(2) allowed a sentencing judge the option of either a county jail sentence with a minimum and maximum time period or a state prison sentence. *Id.* It thus reasoned that reference to Iowa Code Section 902.9 was necessary to determine the length of a state prison sentence, as Iowa Code Section 321J.2 did not contain a maximum sentence for the offense. *Id.*

Bown argued the Legislature did not intend Iowa Code Section 902.8 to apply in the case of a third OWI. *Id.* He cited to cases from Arkansas and Nebraska, states that also had OWI statutes enhancing punishment based on the number of prior convictions and habitual offender statutes with even greater penalties. *Id.* (*citing Lawson v. State*, 746 S.W.2d 544 (Ark. 1988); *State v. Chapman*, 287 N.W.2d 697 (Neb. 1980)). The Lawson court – relying on the principles of statutory construction that specific acts trump general acts and doubts in constructing criminal sentences must be resolved

in favor of the defendant - held that its legislature did not intend for the two enhancements to be coupled. *Id.* The *Chapman* court relied on similar reasons, noting its OWI statute “specifically provides for a penalty within the terms of the statute.” *Id.*

The Bown court, in holding for the State, found Iowa Code Section 321J.2(2) to be distinguishable from the Arkansas and Nebraska statutes above. Bown, 475 N.W.2d at 5-6. It determined that, because there were no specific sentencing guidelines for a prison sentence under Iowa Code Section 321J.2(2) and thus reference to Iowa Code Section 902.9 was necessary to determine sentencing guidelines, the length of a person’s sentence following a third OWI conviction is determined just once, thus there is no “stacking” or “double punishment” as in Lawson and Chapman. *Id.* at 6. It thus determined the rule of statutory construction that specific statutes trump general statutes was not applicable. *Id.* The Court further determined that resolving ambiguities in the statutes at issue was unnecessary, as the Legislature’s passage of the habitual offender statute and classification of third and subsequent violations of Iowa Code Section 321J.2(2) as a Class “D” felony shows it “clearly intended” to more harshly punish OWI offenders who were not deterred by previous penalties. *Id.* The

Court ultimately held Iowa Code Section 321J.2(2) allows for the application of the habitual offender provisions of chapter 902 in the case of a defendant convicted of a third OWI offense. Bown at 7.

**Bown is Not Controlling on this Matter, as it does Not Address the Issue Presented.**

The holding of Bown is limited: Iowa Code Section 321J.2(2) allows for the application of the habitual offender provisions of Iowa Code Chapter 902 in the case of a defendant convicted of OWI third offense, thus allowing for “stacking” of enhancements. *Id.* Bown was essentially arguing his crime could not be enhanced twice: first, to a Class “D” felony pursuant to Iowa Code Section 321J.2, and second, to a habitual offender under Iowa Code Section 902.8.

The issue presented here is different: whether Iowa Code Section 321J.2 prescribes a specific punishment for OWI third offenses and thus sentencing Defendant-Appellant as a habitual offender under Iowa Code Section 902.9 was illegal. *See*, Iowa Code 902.9 (directing that the punishment shall be as prescribed by statute). Bown does not address this issue; in fact, the portion of Iowa Code Section 902.9 addressing whether a statute prescribes punishment does not appear anywhere in the opinion.

**The to Extent Bown may be Applicable to the Issue Presented, its Reasoning is No Longer Sound Due to Subsequent Legislative Action.**

Even if Bown does have some precedential value to the issue presented here, the reasoning of the Court at the time of Bown is no longer sound due to subsequent amendments to Iowa Code Section 321J.2. As noted in the decision itself, at the time of the Court decided Bown reference to Iowa Code Section 902.9 was necessary because Iowa Code Section 321J.2 did not specify the length if the Court opted for a state prison sentence. As noted above, at the time the Defendant was sentenced in Bown, Iowa Code Section 321J.2 read in relevant part:

1. A person commits the offense of operating while intoxicated if the person operates a motor vehicle in this state in either of the following conditions:

...

2. A person who violates this section commits:

...

c. A class "D" felony for a third offense and each subsequent offense and shall be imprisoned in the county jail for a determinate sentence of not more than one year but not less than thirty days, ***or committed to the custody of the director of the department of corrections***, and assessed a fine of not less than seven hundred fifty dollars. The minimum jail term of thirty days cannot be suspended notwithstanding section 901.5, subsection 3, and section 907.3, subsection 3, however, the person sentenced shall receive credit for any time the person was confined in a jail or detention facility following arrest. If a person is committed to the custody of the director of the department of corrections pursuant to this paragraph and the sentence is suspended, the sentencing court shall order that the

offender serve the thirty-day minimum term in the county jail. If the sentence which commits the person to the custody of the director of the department of corrections is later imposed by the court, all time served in a county jail toward the thirty-day minimum term shall count as time served toward the sentence which committed the person to the custody of the director of the department of corrections. A person convicted of a second or subsequent offense shall be ordered to undergo a substance abuse evaluation prior to sentencing. If a person is convicted of a third or subsequent offense or if the evaluation recommends treatment, the offender may be committed to the custody of the director of the department of corrections, who, if the sentence is not suspended, shall assign the person to a facility pursuant to section 246.513 or the offender may be committed to treatment in the community under the provisions of section 907.6.

Iowa Code Section 321J.2 (1989) (emphasis added). However, at the time Defendant-Appellant here was sentenced, Iowa Code 321J.2 *did* prescribe a maximum prison sentence for a third OWI offense.

1. A person commits the offense of operating while intoxicated if the person operates a motor vehicle in this state in any of the following conditions:

...

2. A person who violates subsection 1 commits:

...

c. A class “D” felony for a third offense and each subsequent offense.

...

5. A third offense is punishable by all of the following:

a. Commitment to the custody of the director of the department of corrections for an *indeterminate term not to exceed five years*, with a mandatory minimum term of thirty days.

...

Iowa Code Section 321J.2 (2011) (emphasis added). As such, reference to Iowa Code Section 902.9 was no longer necessary, as was deemed by the Bown court in reviewing the 1989 conviction in that case. Not only was reference to that section unnecessary, it was unlawful to sentence Defendant-Appellant to a longer term of confinement than what was specifically prescribed in Iowa Code Section 321J.2, given the language of Iowa Code Section 902.9 mandating that “the maximum sentence for any person convicted of a felony shall be that prescribed by statute...”

**Searching for Legislative Intent in this Case is Inappropriate, as the Language of the Statute is Clear.**

Whether the Court can evince whether the Iowa Legislature intended to undermine the reasoning of Bown by subsequently specifically prescribing punishment for third and subsequent OWI offenders in Iowa Code Section 321J.2 is immaterial, as the language of the statutes at issue is clear.

The Court resorts to the rules of statutory construction only when the terms of a statute are ambiguous. State v. Wiederien, 709 N.W.2d 538, 541 (Iowa 2006). Here, the statutes are clear. Iowa Code Chapter 902 is entitled “Felonies.” Among other things, it sets forth sentences for various offenses and defines what constitutes a “habitual offender” for purposes of



sentencing. Iowa Code Section 902.9 sets forth the maximum sentences for Class “B” through “D” felonies and habitual offenders. Importantly, and as noted above, that section provides that the “maximum sentence for any person convicted of a felony shall be that prescribed by statute....” A second clause reads, “...or, if not prescribed by statute, if other than a class ‘A’ felony shall be determined as follows....”. Iowa Code 902.9.

A straightforward reading of this statute demonstrates that the maximum sentence for a person convicted of a felony is whatever is prescribed in the statute at issue. Only if the maximum sentence *is not* prescribed by the statute at issue is reference to Iowa Code Chapter 902 appropriate. When read together, the operation of the statutes is not ambiguous and thus does not require inquiry into the Legislature’s intent: the punishment for a third or subsequent OWI offense is clearly prescribed by Iowa Code Section 321J.2, and as such, reference to Iowa Code Section 902.9 is inappropriate and subsequent sentencing as a habitual offender is illegal.

It is also a well-settled principle of statutory construction that “an interpreting body may not extend, enlarge, or otherwise change the meaning of a statute” under the guise of construction. Auen v. Alcoholic Beverages

Div., 679 N.W.2d 586, 590 (Iowa 2004) (citing State v. Wedelstedt, 213 N.W.2d 652, 656 (Iowa 1973)). By looking to the intent of the Legislature when the meaning of the statutes is plain and suggesting the Legislature’s alleged intent of more harshly punishing repeat OWI offenders justifies ignoring that plain language, the State contravenes well-settled principles of statutory interpretation.

Not only is the meaning clear, but the modern legislative trend in Iowa in drafting statutes is to specifically proscribe the punishment for misdemeanors which are enhanced to felonies based on prior convictions. *See e.g.* Iowa Code 321J.2 (specifically proscribing the punishment for an OWI enhanced by prior convictions to be 5 years); *see also* Iowa Code 708.2A(4) & 708.2A(7)(b) (specifically proscribing the punishment for Domestic Abuse enhanced by prior convictions to a felony be punishable only under Iowa Code “902.9, subsection 1, paragraph “e””).

In addition, the District Court’s reliance on State v. Maxwell is misplaced. 743 N.W.2d 185 (Iowa 2008). The District Court notes the language of Iowa Code 124 and 321J differ but fails to meaningfully analyze the difference. In Maxwell the Court reached the conclusion Iowa Code Chapter 124 “clearly was not intended to stand on its own because Iowa

Code chapter 124 only defines the nature of the offense without determining the what sentence the court can impose.” Maxwell, 743 N.W.2d 185 at 191. Here, Iowa Code 321J defines both the nature of the offense and the punishment. In addition, the Court in Maxwell noted the importance of the ‘unless otherwise specified by another statute’ language of Iowa Code 902.9. *Id.*

If the Court applies Maxwell to this case the interpretive approach of *Maxwell* was to first look to the specific chapter Iowa Code 321J “to determine the classification of the offense.” *Id.* The Court should then look to Iowa Code 902 to determine the appropriate sentence. *Id.* The Court should give recognition to the “unless otherwise specified by statute” language of Iowa Code 902.9 and look back to Iowa Code 321J to determine if the specific punishment is proscribed. *Id.* Here it is. Iowa Code 321J.2. Applying a *Maxwell* analysis, the maximum sentence allowed by law is five years.

**Interpreting the “Prescribe” Language of Iowa Code Section 902.9 as Having No Meaning is Contrary to Well-Settled Principles of Statutory Construction.**

The State ostensibly asserts the relevant clauses of Iowa Code Section 902.9 have no meaning; that whether the statute at issue prescribes a

maximum sentence is immaterial, and the State may sentence a person in Defendant-Appellant's position as a habitual offender whenever it chooses. This is not only contrary to the clear language of the statute but violates well-settled principles of statutory construction that the Court "will avoid an interpretation of a statute that renders a portion of it superfluous." Holiday Inns Franchising v. Branstad, 537 N.W.2d 724, 729 (Iowa 1995). Interpreting the "prescribe" language of Iowa Code Section 902.9 to have no bearing on whether a person convicted of a third OWI offense can be sentenced as a habitual offender under 902.9 renders that language superfluous.

### **CONCLUSION**

WHEREFORE, for the reasons stated, Defendant-Appellant requests this Court reverse the order of the Trial Court denying the Motion to Correct Illegal Sentence and correct the Defendant-Appellant's sentence to a legal sentence of five years or remand for resentencing of Defendant-Appellant as prescribed by Iowa Code Section 321J.2.

**ORAL SUBMISSION REQUEST**

Applicant requests to be heard at oral argument.

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