IN THE SUPREME COURT FOR THE STATE OF IOWA
NO. 16-1290

BRIAN JAMES MAXWELL,
Petitioner-Appellant

vs.

IOWA DEPARTMENT OF PUBLIC SAFETY,
Respondent-Appellee

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY,
HONORABLE LAWRENCE P. MCLELLAN

PETITIONER-APPELLANT'S FINAL REPLY BRIEF

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I e-filed the Defendant-Appellant's Final Reply Brief with the Electronic Document Management System with the Appellate Court on the 3rd day of January 2017.

The following counsel will be served by Electronic Document Management System.

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I hereby certify that on the 3rd day of January 2017, I did serve the within Defendant-Appellant's Final Brief on Appellant, listed below, by mailing one copy thereof to the following Defendant-Appellant:

Brian James Maxwell
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I. In re S.M.M. Was Abrogated by the Legislature in 2009; It Does Not Govern This Case

The State's statutory argument, (St. Br. 20–21), is premised on broad statutory language that the legislature has removed from the statute. The State roots its argument on a quotation from the 1997 case *In re S.M.M.*, 558 N.W.2d 405, 408 (Iowa 1997): "The purpose of chapter 692A is clear: to require registration of sex offenders and thereby protect society from those who because of probation, parole, or *other release* are given access to members of the public." (emphasis added by the State throughout its brief). Based on that language, the *S.M.M.* Court held that "the sense in which 'release' is used in section 692A.2(1) . . . is simply the antithesis of incarceration." *Id.*

But in stating the purpose of the statute and in defining the word "release," the *S.M.M* Court was relying upon a now-repealed provision of the Chapter 692A:

> A person . . . shall register as provided in this chapter for a period of ten years commencing from the date of placement on probation, parole, work release, or *other release from custody*.

Iowa Code § 692A.2(1) (1995) (emphasis added). The Iowa legislature repealed Chapter 692A in its entirety in 2009 and replaced it with sections 101 through 130. 2009 Iowa Acts, ch. 119 §§ 1–31. The over-hauled statute

delineated six specific triggers for the registration requirement, supplanting the prior list that included the catchall of "other release from custody." Iowa Code § 692A.103(1).[1] None of the six specific triggers includes a catchall akin to "other release from custody."

Accordingly, the State is flatly incorrect when it asserts, "Even though Iowa Code chapter 692A as a whole was substantially amended in 2009, the relevant language interpreted by the Court in *In Interest of S.M.M.* was not materially altered." (St. Br. 21). Quite the opposite: Here, the legislature opted to remove the "other release from custody" language that the Iowa Supreme Court relied upon in *S.M.M.* And "[w]hen the legislature amends a statute, it raises a presumption that the legislature intended a change in the law." *Star Equip., Ltd. v. State, Iowa Dep't of Transp.*, 843 N.W.2d 446, 455 (Iowa 2014). The State's contention that the legislature acquiesced in the holding of *S.M.M.*, (St. Br. 21–22), thus makes little sense.

Instead of including the catchall of "other release," the legislature specified six events that trigger registration. The legislature's replacement of the catchall language is indicative of its intent to limit the triggering events and narrow the types of "release" that would trigger registration. Several of

[1] The legislature has not amended Iowa Code § 692A.103 since 2009.

these triggering events involve a "release." In each alternative that involves a "release," the legislature specified exactly what type of release it meant:

§ 692A.103(1)(b) – "release on parole or work release"

§ 692A.103(1)(c) – "release from incarceration"

§ 692A.103(1)(d) – "release[] from placement in a juvenile facility"

These specifications abrogate the *S.M.M.* holding that release is nothing more than "the antithesis of incarceration." 558 N.W.2d at 408. If the legislature was satisfied with the Iowa Supreme Court's broad interpretation of the triggering events, it could have left the statute alone. The legislature's decision to remove the language relied upon by *S.M.M.* and replace it with more restrictive language demonstrates that the legislature intended to limit the trigger events. *See State ex rel. Miller v. Vertrue, Inc.*, 834 N.W.2d 12, 30 (Iowa 2013) (recognizing maxim that "'legislative intent is expressed by omission as well as inclusion'" and legislature's adoption of specific list indicative of intent to exclude additional items).

A holding based on a law that has been repealed cannot be considered good law today. *See Iowa Dep't of Transp. v. Iowa Dist. Court for Scott Cty.*, 587 N.W.2d 781, 787 (Iowa 1998) ("[R]epeal of a statute renders the rescinded act as if it never existed."). The holding in *S.M.M.* was the Court's statutory interpretation in light of the broad, now-repealed catchall language

of Iowa Code § 692A.2(1). Thus, *S.M.M.* is no longer good law and the State's reliance on its language is misplaced.

The Court's decision in this case must turn upon the current statutory language. The State's argument is based primarily upon policy and dodges the actual language of Iowa Code § 692A.103(1). But here, the "statute's language is clear" and the Court therefore must "look no further for its meaning than its express terms." *State v. Beach*, 630 N.W.2d 598, 600 (Iowa 2001). The Court should not reach for policy to broaden the statute beyond its plain language. *State v. Nicoletto*, 845 N.W.2d 421, 427 (Iowa 2014) ("[T]he role of a court is to apply the statute as it is written—even if [it] think[s] some other approach might accord with good policy." (alterations and internal quotation marks omitted)); *Hawkeye Land Co. v. Iowa Utilities Bd.*, 847 N.W.2d 199, 210 (Iowa 2014) ("We 'may not extend, enlarge or otherwise change the meaning of a statute' under the guise of construction.").

II. Iowa Code § 692A.103 Must Be Strictly Construed Due to Its Penal Consequences

The Iowa Supreme Court has recognized that Chapter 692A imposes criminal liability and thus has "construed strictly" the duties imposed by Chapter 692A. *State v. Reiter*, 601 N.W.2d 372, 373 (Iowa 1999) (rejecting State's argument that Chapter 692A should be "liberally interpret[ed]" due

to the public safety concerns underlying registration process). The State distinguishes *Reiter* as a case about a "specific penalty clause." This is a distinction without a difference.

There can be no doubt that Iowa Code § 692A.103(1) has direct criminal consequences. Mr. Maxwell has already been charged for violations of Iowa Code Chapter 692A. If he is not required to register under Iowa Code § 692A.103(1), then he has no obligation to comply with the restrictions of Iowa Code Chapter 692A. *See* Iowa Code § 692A.101(26) (defining "sex offender" as "a person who is required to be registered under this chapter"); *id.* § 692A.111 (imposing criminal liability on "[a] sex offender who violates any requirements of [several sections of Chapter 692A]").

The State has not identified any ambiguity in the language of Iowa Code § 692A.103(1). The unambiguous language does not capture criminal appellants who have stayed their sentence like Mr. Maxwell. Yet even if the Court identifies any ambiguity in Iowa Code § 692A.103(1), any ambiguity must be construed narrowly and in favor of Mr. Maxwell. *State v. Hearn*, 797 N.W.2d 577, 585 (Iowa 2011) ("The rule of lenity requires that ambiguous statutes imposing criminal liability be strictly construed in favor of the defendant.").

III. Tolling the Registration Requirement for Individuals Who Have Appealed Is Not Absurd

The appeal process exists to ensure that criminal convictions are valid. It exists to weed out error. It should go without saying that registration on the sex offender registry is a severe collateral consequence. It is not absurd for the legislature to write Iowa Code § 692A.103(1) in a fashion that would not subject an individual to this sanction until after the individual's conviction has been confirmed as valid by an appellate court. This is the exact same reason why the legislature allows an individual to stay judgment pending appeal. Iowa Code § 814.13. It is logical for the legislature to have drafted Iowa Code § 692A.103(1) in such a way that an individual could, by obtaining a stay via the procedures of Iowa Code § 814.13, also stay the requirement to register as a sex offender.

Certainly, the allegedly "troubling" scenarios identified by the State, (St. Br. 23–24), "are not so absurd as to permit us to disregard the plain language of the statute." *Anderson v. State*, 801 N.W.2d 1, 8 (Iowa 2011) (admonishing that "'the absurd results doctrine should be used sparingly because it entails the risk that the judiciary will displace legislative policy on the basis of speculation that the legislature could not have meant what it unmistakably said'"). Again, this is a case where the plain language must govern—and that plain language requires the Court to reverse the decision of

the lower court and enjoin DPS from placing Mr. Maxwell on the sex offender register during the pendency of his criminal appeal.

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This brief does complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) (no more than 7,000 words), because this brief contains 1,371 words, excluding the parts of the brief exempted by Rule 6.903(1)(g)(1), which are the table of contents, table of authorities, statement of the issues, and certificates.

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P.6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in font size 14, Times New Roman.

I hereby certify that on January 3, 2017, I did serve Defendant-Appellant's Final Reply Brief on Appellant by mailing one copy to:

Brian Maxwell
Defendant-Appellant

___/S/ *Gina Messamer*_____

Dated: January 3, 2017
Gina Messamer