

and ex post facto claims were not valid, since the commitment was a civil, not a criminal, proceeding.

In *McKune v. Lile*, 536 U.S. 24 (2002), Mr. Lile, a convicted sex offender in Kansas, refused to participate in a sexual abuse treatment program that required written admission of responsibility and disclosure of all prior sexual activities, including those that could potentially qualify as uncharged criminal offenses. He claimed that participation in the program violated his Fifth Amendment rights. His refusal to participate led to a transfer to a higher-security unit and the loss of privileges. The Supreme Court ruled against him, stating that sex offenders are a “serious threat” and that rehabilitation programs are necessary to reduce recidivism. The Court held that it is therefore acceptable to require sex offenders to accept responsibility for their prior conduct to promote rehabilitation. It also held that immunity from prosecution should not be offered, as doing so would undermine the state’s legitimate interests in future prosecution. The Court added that the “potential for additional punishment reinforces the gravity of the participants’ offenses and thereby aids in their rehabilitation” (*McKune*, p 34).

In *United States v. Comstock*, 130 S. Ct. 1949 (2010), Mr. Comstock and four other inmates filed suit challenging the federal government’s authority to detain them indefinitely under the civil commitment provisions of the Adam Walsh Act. The Supreme Court ruled against Mr. Comstock, stating that a sexually dangerous federal prisoner may be held beyond the date that he would otherwise be released and that doing so does not violate the Necessary and Proper Clause of Article I of the U.S. Constitution.

In each of these cases, the Supreme Court limited the rights of sex offenders to protect public safety and to serve penological interests. In *Newman v. Beard*, the U.S. Third Circuit followed suit and tightened the guidelines for parole of convicted sex offenders.

Disclosures of financial or other potential conflicts of interest: None.

## Required Sex Offender Treatment and Due Process Rights

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## Iowa’s Supreme Court Rules That the Requirement to Participate in Sex Offender Treatment Programs Violates Due Process Rights

In *Dykstra v. Iowa*, 783 N.W.2d 473 (2010), the Supreme Court of Iowa ruled that Iowa’s Department of Corrections (IDOC) procedural implementation of Iowa Code § 903A.2 (1) (a) (Supp. 2005), which states that “an inmate required to participate in sex offender treatment program” (SOTP) will not be eligible for a reduced sentence unless the inmate participates and completes such a program, violated due process rights because of the lack of procedural protections as outlined in *Wolff v. McDonnell*, 418 U.S. 539 (1974).

### Facts of the Case

In 2005, John Dykstra pleaded guilty to charges of simple assault (misdemeanor) and dependent adult abuse (class “D” felony). Original charges had included third-degree sexual assault and dependent-adult abuse, but these were pleaded down to simple assault and dependent-adult abuse. The third-degree sexual assault charge was based on the allegation that he had forced his wife to perform oral sex on him, and the dependent-adult abuse charge was due to his not paying his wife’s nursing home bills. He was sentenced to 30 days for the simple assault charge and a term of five years or less for dependent-adult abuse. His prior criminal history included two charges for indecent exposure; a burglary conviction (which involved stealing sexually explicit materials); and a prostitution solicitation charge.

Mr. Dykstra had been convicted of a sexual offense in 1983 and was on the sex offender registry. In December 2005, while in the IDOC serving time on the dependent-adult abuse charge, he was told he would be required to participate in the sex offender treatment program. IDOC based its requirement on

the sexual allegations surrounding his most current conviction, not his sex offender history. This information was obtained from testimony during the plea agreement proceedings. However, he was not convicted of a new sexual offense. On January 27, 2006, he failed a polygraph, given by IDOC, related to the circumstances of his current assault charge, and on February 16, 2006, he signed a refusal form for the SOTP. The IDOC applied the 2005 amended version of Iowa Code § 903A.2, and determined that Mr. Dykstra was not eligible to earn good time because he had refused to participate in sex offender treatment. His discharge date was thus changed from January 20, 2008, to May 12, 2010. He filed an appeal to the warden and a postconviction petition, both of which were denied. He then filed with the Iowa Supreme Court and was granted *certiorari* challenging the district court's ruling.

Before 2001, Iowa Code § 903A.2 stated that inmates convicted of a category A felony were eligible for sentence reduction for good conduct and additional reduction for participation in treatment programming. In 2001 the Iowa Code § 903A.2 was amended and stated that, to earn good time, an inmate must show good behavior and participate in treatment programming. Inmates who refused sex offender treatment would lose 90 days' accrued good time, but they could still earn time in the future. In 2005 Iowa Code § 903A.2 was amended again to assure that an inmate "required to participate in a sex offender treatment program" would not be eligible for sentence reduction unless the individual participated in and completed such a program. Under this amendment change, IDOC instituted a policy in which an inmate could not accrue any sentence reduction after refusing to participate in an SOTP, although the inmate would not forfeit previously accrued earned time.

Mr. Dykstra argued that the application of the 2005 amended version of Iowa Code § 903A.2 violated the Ex Post Facto Clause of the Iowa and U.S. Constitutions; should not be applied retroactively; should not have been applied to his case, since his conviction was not a sexual offense; violated his due process rights by virtue of the procedures for determining whether he was required to participate in a SOTP; and led to the inappropriate use of a polygraph examination to determine his classification.

#### *Ruling and Reasoning*

The Iowa Supreme Court held that the application of the 2005 amended version of Iowa Code § 903A.2 to crimes that occurred before January 1, 2001, violated the Ex Post Facto Clause, but that its application to crimes between 2001 and 2005 did not violate the clause. In *Holm v. Iowa Dist. Ct.*, 767 N.W.2d 409 (Iowa 2009), the Iowa Supreme Court stated that the 2005 amended version of Iowa Code § 903A.2 was "merely a clarification of the 2001 amendment" and "did not result in more onerous punishment" (*Holm*, pp 416–17). The Iowa Supreme Court held that since Mr. Dykstra's alleged crime occurred in 2004, application of the 2005 amended version did not violate the Ex Post Facto Clause and could be applied retroactively to his case.

The Iowa Supreme Court recognized that Iowa Code § 903A.2 does not include criteria to determine who should participate in sex offender treatment, and it does not require that the sentence be connected to a "sexual offense" for the IDOC to determine that an inmate attend sex offender treatment. In *State v. Valin*, 724 N.W.2d 440 (Iowa 2006), the court found "that a [prior conviction] history is insufficient to determine rehabilitation unless there is a current problem suffered by the defendant." The court held that the 2005 amended version of Iowa Code § 903A.2 was applied appropriately because there was a sexual element to Mr. Dykstra's assault conviction.

The court addressed his claim that, even if the IDOC had the authority to classify him as a sex offender, the IDOC failed to provide proper due process protections in the procedure leading to the classification. The court reasoned that his situation did involve a liberty interest. In *Holm*, the court had recognized a liberty interest in an inmate's ability to accrue earned time. Once the liberty interest was established, the court turned to the question of what procedural due process protections are necessary for restraints that would forfeit sentence reduction. Turning to *Wolff v. McDonnell*, the court reviewed necessary procedural protections and ruled that the IDOC violated Mr. Dykstra's procedural protections in classifying him as a sex offender and requiring his participation in the SOTP. The court reasoned that since the IDOC relied on allegations surrounding his current crime that did not result in a sexual offense conviction, he should have been granted the procedural protections outlined in *Wolff*

*v. McDonnell*. These procedural protections include advance written notice of the claimed violation; a written statement of the fact finders as to the evidence relied on and reasons for the disciplinary action taken; a hearing where the inmate can call witnesses and present evidence; and an impartial decision-maker.

Finally, the court held that polygraph examinations are allowed when used as part of treatment in the IDOC.

#### Discussion

In *Sandin v. Conner*, 515 U.S. 472 (1995), the U.S. Supreme Court identified two situations where an inmate's liberty interests are at risk. The first is when an action causes "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life," (*Sandin*, p 484) and second, when an action "will inevitably affect the duration of [the inmate's] sentence" (*Sandin*, p 487). In *Wolff v. McDonnell*, the Supreme Court outlined procedural due process protections that are required in disciplinary hearings involving forfeiture of sentence reduction.

The Iowa Supreme Court compared Mr. Dykstra's situation to that in *Vitek v. Jones*, 445 U.S. 480 (1980). In *Vitek*, the U.S. Supreme Court held that a Nebraska statute authorizing correctional officers to identify inmates as mentally ill and transfer them to psychiatric hospitals for involuntary treatment involved liberty interests. In *Vitek*, the Court was concerned about the stigmatizing aspect of labeling inmates as mentally ill and subjecting the inmate to mandatory treatment. In *Dykstra*, the Iowa Supreme Court identified stigma and mandatory treatment as two of three concerns. The forfeiture of sentence reduction based on an inmate's refusal to participate in the SOTP was elevated to the third substantive concern. The court turned to the procedural protections in *Wolff* as a remedy to ensure the inmates' liberty interests.

In addition to the procedural questions, central to the Iowa decision is a consideration of the facts on which Mr. Dykstra was classified as a sex offender. He had been classified as a sex offender in 1983. However, the IDOC based its classification decision on elements of his recent conviction found in testimony but never proven in court. The Iowa Supreme Court reasoned that if the classification had been based on his past conviction for a sexual offense,

these procedural protections would not have been necessary, since the adjudication of his previous sexual offense would have occurred under proper procedural due process protections. However, since the IDOC based the decision on information unproven during his plea agreement for a recent nonsexual offense, it was required to create proper procedural safeguards.

In 1976, 30 states had mentally disordered sex offender statutes that allowed those convicted of a sexual offense to be both punished and treated for an indeterminate time. Sex offender law has evolved over time. The Supreme Court, in *Kansas v. Hendricks*, 521 U.S. 346 (1997), and subsequent cases resolved certain constitutional issues involving sexual offenses. The medicalization and mandatory treatment of sex offenders along with the primary concern of protecting children and the public are well-established principles and practices. In *Dykstra*, the Iowa Supreme Court recognized some essential procedural protections for those labeled sex offenders. However, the court made it clear that someone convicted of a sexual offense 22 years before a current non-sex-related crime, can be required to participate in sex offender treatment, and if refused, the inmate can forfeit sentence reduction benefits. In *Dykstra*, we see the court's continued struggle to balance inmates' constitutional protections and rights with crimes that are ambivalently conceptualized as medical in origin and are committed by individuals who are perceived as potentially dangerous for the duration of their lives.

Disclosures of financial or other potential conflicts of interest: None.

## Federal District Court's Ordering of Multiple Competency Examinations

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