IN THE SUPREME COURT OF IOWA

No. 20-0375

TRAVIS BOMGAARS, KYLE CROSS, ANTHONY GOMEZ, JAMES HALL, RAYMOND LABELLE, SHANE MILLETT, KELLY SAND,

Appellants,

v.

STATE OF IOWA,

Appellee.

ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR JOHNSON COUNTY
HONORABLE BRAD MCCALL, JUDGE

APPELLANTS' FINAL BRIEF

PHILIP B. MEARS

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

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

On December 18, 2020, the undersigned certifies that a true copy of the foregoing instrument was served upon the Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to:

Travis Bomgaars #6633938
Newton Correctional Facility
307 South 60th Avenue W
PO Box 218
Newton, IA 50208

Kyle Cross #6987417
Newton Correctional Facility
307 South 60th Avenue W
PO Box 218
Newton, IA 50208

James Hall #6886090
Newton Correctional Facility
307 South 60th Avenue W
PO Box 218
Newton, IA 50208

Anthony Gomez #6148264
Newton Correctional Facility
307 South 60th Avenue W
PO Box 218
Newton, IA 50208

Raymond LaBelle #6649972
Anamosa State Penitentiary
406 High Street
Anamosa, IA 52205

Shane Millett #6254388
Newton Correctional Facility
307 South 60th Avenue W
PO Box 218
Newton, IA 50208

Kelly Sand #6258693
Fort Dodge Correctional Facility
1550 L Street
Fort Dodge, IA 50501

/s/ Philip B. Mears
MEARS LAW OFFICE

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal

State

Iowa State Statutes and Rules

Other State Statutes

Other Authorities

STATEMENT OF ISSUES PRESENTED FOR REVIEW

ARGUMENT I

Everett v. State, 789 N.W.2d 151, 155 (Iowa 2010)

Belk v. State, 905 N.W.2d 185 (Iowa 2017)

Greenholtz vs. Nebraska Penal Inmates, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979)

Neb. Rev. Stat. § 83-1, 114(1) (1981)

Board of Pardons vs. Allen, 482 U.S. 369, 107 S.Ct. 2415, 96 L.Ed.2d 303 (1987)

Mont. Code Ann. § 46-23-201(1985)

Williams vs. Missouri Board of Probations and Paroles, 661 F.2d 697(8th Cir. 1981), cert denied 455 U.S. 993 (1982)

Parker vs. Corrothers, 750 F.2d 653 (8th Cir. 1984)

Subsection 822.2(1)(e)

Bonilla v. Board of Parole, 930 N.W. 2d 751 (Iowa, 2019).

Iowa Code Section 906.4(1)

Graham v. Florida, 560 U.S. 48, 130 S.Ct.2011, 176 L.Ed. 2d 825 (2010)

Miller v. Alabama, 567 U.S. 460, 132 S.Ct.2455, 183 L.Ed. Ed. 407 (2012).

State v. Seering, 701 N.W.2d 655 (Iowa 2005)

Smith v. Doe, 123 S.Ct. 1140 (2003)

McKune v. Lile, 122 S.Ct 2017 (2002)

In Interest of TH, 913 N.W.2d. 578, 595 (Iowa 2018)

Does v. Snyder, 834 F.3d 696, 700 (6th Cir. 2016)

Goff v. Harper, 59 F.Supp.2d 910 (S.D.Iowa,1999)

Goff v Harper, 235 F3d. 410 (8th Cir. 2000)

ARGUMENT II

Everett v. State, 789 N.W.2d 151 (Iowa 2010)

Iowa Constitution Article III section 1

Planned Parenthood of the Heartland v. Reynolds, 915.N.W.2d. 206, 212 (Iowa 2018)

State v. Phillips 610.NW. 2d.840 (Iowa 2000)

902.12

State v. Remmers, 259 N.W.2d 779, 784 (Iowa 1977)

State v. Phillips, 610 N.W.2d 840, 842–43 (Iowa, 2000)

Doe v. State 688.N.W.2d.265 (Iowa 2004)

Chapter 229A

State v. Hildebrand, 280 N.W.2d 393 (Iowa, 1979)

City of Cedar Falls v. Flett, 330 N.W.2d 251, 254-55 (Iowa 1983)

ARGUMENT III

Everett v. State, 789 N.W.2d 151 (Iowa 2010)

Belk v. State, 905 N.W.2d 185 (Iowa 2017)

17A

822.2(1)(e)

822.2(1)(a)

Mears v. State Public Defender, 2013 WL 2371308 (Iowa App. 2013)

822.2(1)(c)

ARGUMENT IV

Schaefer v. Putnam , 841 N.W.2d 68, 74 (Iowa 2013)

Belk v. State, 905 N.W.2d 185 (Iowa 2017)

17A

822.2(1)(e)

822.2(1)(a)

Mears v. State Public Defender, 2013 WL 2371308 (Iowa App. 2013)

822.2(1)(c)

ROUTING STATEMENT

The issue presented is whether the Iowa Department of Corrections (DOC) practice of delaying Sex Offender Treatment Program (SOTP) until near the end of a person's prison sentence, unreasonably deprives them of a realistic opportunity for parole, or is in some other way unlawful.

This issue was discussed by the Iowa Supreme Court in Belk v. State, 905 N.W.2d 185 (Iowa 2017). That case addressed the procedural issue only, holding that the issue could be presented in a post-conviction.

This case, arising from a consolidated of seven post-conviction cases Applicants, should require the Court to address the merits of the Belk claim.

It should be retained by the Supreme Court for the following reasons:

(1) The case presents a "substantial issue of first impression".

(2) The case presents a “substantial constitutional question” as to the validity of an administrative practice.

(3) The case presents a "fundamental and urgent issue of broad public importance". There are at least 1600 inmates in the DOC prisons who are required to take SOTP. Every one of those is affected by the DOC policy.

For all of these reasons, the court should retain jurisdiction, and address the merits of the issues presented, and provide the Applicants with relief.

.

STATEMENT OF THE CASE

This is a consolidated appeal from a consolidated ruling after a consolidated hearing. Combined were seven individual post-convictions filed *pro se* in Jasper County. In each case the inmate was subject to the DOC policy of delaying SOTP until near the end of their sentences. The cases were brought under the postconviction statute, as suggested by the Belk decision.

After an evidentiary hearing at the prison, Judge Brad McCall denied relief on January 30, 2020. Appx. 117. Judge McCall denied a Motion Amend or Enlarge on February 28, 2020. Appx. 175. Notice of Appeal was filed that same day in each of the seven cases. Appx.179.

Course of Proceeding

Seven applicants filed their post-convictions in Jasper County between May and July, 2019. All raised the claim that their rights were being denied by the DOC practice of delaying treatment until near the end of their sentences. Most cited the Belk case.

Here is the list with the date filed and the date of the Answer.

Name	Case Number	Date Filed	Date Answer Filed
Shane Millett	PCCV121545	05/15/2019	06/03/2019
James Hall	PCCV121556	05/22/2019	06/03/2019
Kyle Cross	PCCV121559	05/23/2019	06/03/2019

Kelly Sand	PCCV121579	06/07/2019	07/07/2019
Travis Bomgaars	PCCV121583	06/10/2019	07/10/2019
Raymond LaBelle	PCCV121588	06/17/2019	07/12/2019
Anthony Gomez	PCCV121633	07/17/2019	08/14/2019

On June 22, 2020 the Court appointed Philip Mears as counsel in these cases. Appx. 181. The State filed a Motion to reconsider or amend the order appointing counsel. Appx. 184. Agreement took place at that point to defer the question of appointment of counsel until final submission.[1]

The only other procedural matter prior to hearing was a Motion for change of venue filed by the State in each case on August 23, 2019. Appx. 187. This was filed less than a month before the date set for the hearing, September 19, 2020. Had the Motion been granted the seven cases would have been scattered to seven counties around the State.

Following a resistance, the Court denied the Motion. The Court ruled that venue had been waived, having not been raised prior to or with the Answer. Ruling September 9, 2019, Appx. 189.

[1] See Footnote 70 at page 23 of the Ruling dated January 30, 2020. Appx. 117.

An evidentiary hearing was held on September 19, 2020, inside the Newton Correctional Facility (NCF). At the hearing a representative of the Board of Parole (BOP) testified, as did the SOTP director. The seven applicants testified.

Decision of January 30, 2020

On January 30, 2020, the Court entered a single ruling in the seven cases denying relief. Appx. 117.

The specifics of the Court's ruling will be further discussed in the body of the brief. There are several parts of the ruling that should be emphasized.

1. The Court found that there was a considerable backlog of sex offenders in the DOC waiting to have treatment. There was something like 1,600 individuals who had a recognized requirement to take SOTP. Ruling p.16; Appx. 132.

2. The Court found that the DOC policy was to put people into treatment based on a waiting list. The waiting list primarily depends on a person's tentative discharge date (TDD) for their sentence. Ruling p. 4; Appx. 120.

3. The BOP does not seriously consider a person for release until SOTP is completed. Ruling p. 8; Appx. 124.

4. Judge McCall found that the Iowa parole statutes created a liberty interest in having parole granted. Iowa inmates have a liberty interest in having a good faith determination made by the BOP as to whether they could reasonably be released into society. Ruling p. 12; Appx. 128.

5. While there was no procedural due process violation, he did look at whether, in some other way, the DOC waiting list policy unreasonably interfered with the liberty interest established by the statutes. Ruling p. 16; Appx. 132.

7. Judge McCall found that while the approach taken by Corrections in the past might have been unreasonable, the current program at Newton with expanded treatment opportunities and shortening treatment classes meant the DOC was not behaving unreasonably in 2019. For that reason, no relief was available. Ruling p. 18; Appx. 134.

Motion to Amend

The Applicants filed a Motion to Amend or Enlarge the ruling under Rule 1.904(2). Appx. 141. Applicants requested among other things for the court to reconsider the math it had used in deciding how the current DOC efforts would reduce the waiting list.

The court, in its ruling on the Motion on February 28, 2020, responded as follows:

> Regardless of whether the waiting list will be eliminated in four years or fourteen years, the court reiterates its conclusion that the Iowa DOC is not currently unreasonably withholding SOTP from male inmates.
> Ruling p 2-3; Appx. 176-177.

STATEMENT OF FACTS

DOC policy as set out in testimony of treatment director

Testimony at the hearing about the DOC policy and the waiting list came primarily from then Treatment Director Sean Crawford.

1. With the exception of a small SOTP for inmates with special medical needs, at the Iowa Medical and Classification Center (IMCC), all SOTP for men occurs at NCF. Hearing Tr. p.82, lines 11-16.

2. As of the date of hearing there was space for 175 inmates to participate in SOTP. Hearing Tr. p. 65, lines 18-20.

3. At NCF there are 4 different waiting lists. The number of people on the respective waiting list appears after the name.

a. Track 1- which is for lower risk inmates- 419 on list

b. Track 2- for elevated risk inmates- 175 on the list

c. Special needs- 125 on the list

d. Spanish- 26 on the list

These numbers include only those inmates at NCF. There are a total of 745 waiting at NCF. There are many inmates elsewhere in the DOC system. Crawford put the total number of DOC inmates in need of SOTP at 1600. Transcript p 112, line 5.

Inmates have to be housed at other prison since there is only so much room at NCF. Those with TDD's later than 2024 are usually housed elsewhere. Counselors at those other institutions understand the waiting list. Individuals are then transferred to NCF prior to the time they would reach the top of the list.

4. There are now nine groups or classes for sex offenders running at Newton. This corresponds to the fact that there are nine SOTP trained facilitators with an additional two facilitators being trained. The goal is to have 5 of those facilitators running Track 1 classes. Transcript p 52, lines 17-22.

4. While the DOC would like to add more facilitators and therefore have more classes, they are at the point where there is literally no more space at NCF. Transcript p 78, lines 21-23.

5. As a general matter, Track 1 lasts between three to three and a half months. Track 2 lasts between four and five months. Transcript p 63, lines 1-4.

6. Classes have a completion rate of about 67% (12 of 18). Individuals who do not complete treatment are put back into treatment later, after they presumably have had their sentence extended by an earned time consequence. Transcript p 75, lines 19-22.

Individuals returning to treatment present a particular problem. Almost by definition, a person would not have been in treatment at all until he was nearing discharge. When they are reinserted into the list the will be near the top of the list.

7. Anyone arriving at Newton gets put onto the waiting list based on the TDD and not based on anything else. Someone arriving at Newton with a two year assault with intent conviction would generally discharge his sentence in ten months. He would almost immediately go to the top of the list.

8. There are two adjustments to the waiting list. The first is for those who do not have special sentences. These could be individuals whose offenses were from prior to 2005. It could also be for individuals, such as Applicant Sands, who were classified for SOTP without having a sexual offense at all. These people get essentially a three year upwards adjustment on the waiting list. If the initial discharge date for waiting list purposes was 2025, with that three year adjustment, they would go on the waiting list as if their discharge was 2022. Transcript p. 68, lines 17-21.

The second adjustment is for anyone who has served 20 years or longer on their sentence. These people no longer are on any waiting list. They just go to treatment whenever they can be worked into the classes. Transcript p 69, lines 5-10.

9. As of August, 2019, individuals were being placed into treatment in both Track 1 and Track 2 with discharge dates of October, 2020. That would have been about fourteen months prior to the TDD. That means that those individuals will

complete treatment with maybe about ten months to go on their TDD. Transcript p 66, lines 16-23.

10. There was no evidence that the DOC was planning on doing anything about the waiting list other than hiring more facilitators. It was not clear what more facilitators would do. At the moment there is no more classroom space for them to do classes. There are no plans of introducing sex offender classes at other prisons. There was a request in to the legislature in 2019 for $1 million for more classroom space. Certainly more classroom space would provide some assistance to the waiting list.

11. The DOC now has a new curriculum for SOTP. It is called the "Good Lives Model". It is designed to allow inmates to focus on positive things in their lives, not just the fact that they have done terrible things. All of the judicial districts in Iowa have adopted this same curriculum. Individuals who leave the prison and go to either a halfway house or directly to parole supervision will have that same program regardless of whether they have not completed it in prison. Transcript p 56, lines 24-25.

14. Another problem making progress on reducing the mandatory minimum sentence is the fact that individuals are returning to prison at fairly high rates to prison, for violation of special sentence paroles. A person coming back to

prison on a special sentence violation has either a two or a five year flat sentence. You do not get earned time on such a sentence.[2]

A first violation person would have a discharge date two years away. If that person is required to take or retake treatment, the person is going to wind up pretty close to the top of the waiting list.[3]

All these returning people with special sentence violations jump ahead of everyone with longer than a two year sentence, including individuals who have been model inmates but have just not made it to treatment.

15. Interrogatory #5 was a particularly important admission for purposes of our record. Interrogatory 5 asked Sean Crawford to "describe any role played by the BOP in the operation of the waiting list." The response was "none".

There was a time when the Parole Board did play a role in determining when individuals went to treatment.

Parole Board practice

Andrea Muelhaupt testified on behalf of the BOP. She is a staff person who has worked at the Board office since about 2008. She unequivocally testified that if

---

[2] Kolzow v. State 813 N.W.2d 731 (Iowa 2003)

[3] As of August, 2019, individuals were being taken into treatment are fourteen months from discharge. A returning person under 903B- assuming no jail time- will have two years left. It would presumably be ten months before they would get back into treatment.

someone was classified as still needing to complete SOTP by the DOC, the Board will not give that person any form of release. Transcript p 43, lines 9-13. Obviously when they reach the end of their sentence they have to be given a special parole.

For purposes of the record for this case the Applicants' submitted Exhibit 21. That exhibit is a transcript from hearing held in the Southern District of Iowa held on August 21, 2002, Board Chair Elizabeth Robinson-Ford testified. She explained that placement in treatment at that time involved communication between the Board and the DOC. At the point where the Board thought the person was getting close to having enough time in, the Board would give them a code which was code B10. See Exhibit 3, pg. 1. See Ex 21, pp 10-12. That code essentially told the DOC that if they put the person into treatment at that point, the Board would be prepared to release for the person upon completion of treatment.

By 2012, the Board eliminated B10 as one of the denial codes. Transcript p 30, lines 4-5.

Something should be said however about the somewhat different reality that existed in 2002 from today. 2002 was before special sentences were added by the legislature. That amendment occurred in 2005. Treatment for SOTP was at the Mt. Pleasant Correctional Facility and was a good deal longer than it currently is at NCF. Treatment could be 12-18 months. At the same time, what is significant

about Ms. Robinson-Ford's testimony is that at that time the DOC and the BOP worked together to figure out when to put someone into treatment and therefore when to release the person.

That of course no longer occurs.

Facts for individual persons

The facts presented in the seven cases are a decent cross section of the individuals facing the silent mandatory sentence. The sentences range from 10-40 years. As of September, 2019 all were on the waiting list.[4] All of the seven were set for Track I, the Track for people with lower risk.

Two people, Cross and LaBelle, have non forcible felonies. Cross was originally given probation and did quite a bit of treatment before he came to prison on a revocation. Some have quite a bit of time already served. (Labelle and Bomgaars have over 7 years served.) All have done certain things while incarcerated that would commend them to the Parole Board.

Some of the facts for these people can be put into this table.

---

[4] Kyle Cross, one of the seven who, who was the closest to the top of the waiting list at the time of the hearing, just started treatment at the beginning of this month. (September, 2020) Counsel for the State has given this Counsel permission to put in this footnote as the information not in the record below.

Name and case #	Length of sentence	Start date	TDD	Amount of time served as of 10-21-19	Place on Track I waiting list as of 8-2019
Travis Bomgaars, PCCV121583	40 years	08/08/2012	09/16/2030	7 years, 2 months	392 out of 419
Raymond LaBelle, PCCV121588	30 years	12/23/2010	09/25/2024	8 years, 9 months	341 out of 419
Kelly Sand, PCCV121579	29 years	07/07/2017	04/30/2030	2 years, 3 months	377 out of 419
Shane Millett, PCCV121545	25 years	12/16/2016	01/18/2028	2 years, 10 months	382 out of 419
James Hall, PCCV121556	20 years	07/24/2017	05/02/2026	2 years, 2 months	368 out of 419
Anthony Gomez, PCCV121633	15 years	04/23/2018	01/31/2024	1 year, 6 months	326 out of 419
Kyle Cross, PCCV121559	10 years	03/06/2018	04/25/2022	1 year, 7 months	209 out of 419

Travis Bomgaars, PCCV121583

Travis Bomgaars has a 40 year sentence from Woodbury County. He will have a special life sentence of parole after that is completed. He has served over 7 years on the sentence. He has a TDD of October 13, 2030.

He was number 392 out of 419 on the waiting list. Ex. 23, p. 3. Appx. 105. Those numbers include only the people at NCF. There are many people elsewhere in the system with a SOTP requirement. Some of them will have discharge dates earlier than 2030.

With a discharge date of 2030, Bomgaars, realistically, will not go to treatment for another 8-9 years. Without court intervention, he will have served a mandatory minimum sentence of 16 years.

Here is additional information about Bomgaars.

He was told at the time of the guilty plea that he would serve no more than 10 years of his sentence. Trans. p. 126, lines 6-7.

His combined risk assessment on the STATIC and ISORA scores is Low. Ex. 22, p 2. Appx. 5.

He has a long list of completed interventions. See p. 4 of the Board docket, Ex. 22. Appx. 7. He has taken a few college courses thorough the Grinnell College program at Newton and is currently enrolled in classes through Iowa Central Community College (Tr. Pg. 125, lines 15-19).

He did not have much of a criminal history when he committed his offense. There were no felonies. He had never been to prison. He had completed probation for his only indictable offense. See p. 6 of Ex. 22. Appx. 9.

Raymond LaBelle, PCCV121588.

Raymond LaBelle has 3 ten year sentences from Washington County, run consecutively. They were all non forcible sex abuse in the third degree. He had sex with someone that was 14 or 15 while he was more than four years older. He has a lifetime special sentence after completion of the 30 year indeterminate sentence.

Mr. LaBelle has been in prison since December of 2010. He has a TDD of September 25, 2024.

At the time of his guilty plea and sentencing, the prosecutor told him that he was likely to serve 5 years before release. Trans. p. 168, lines 3-4. Obviously, he has now served close to 9 with still another couple to go. He is 341 on a 419 waiting list.

By the combined STATIC/ISORA score, he is regarded as low risk to reoffend. Ex. 31 p. 1. Appx. 26.

He was classified as "minimum' custody in 2015. Trans. p. 163, lines 20-23.

The DOC will not put him in treatment for another 2 years. Even Sean Crawford's somewhat optimistic estimate is the fall of 2021. Int. #2, Ex. 32. Appx. 112.

LaBelle would be a person who the BOP might consider as doing treatment while on supervision.

During the time in prison, LaBelle has not only participated in but has run various veterans programs. Trans. p. 164, lines 9-14.

He has completed many interventions. See p. 5 of Ex. 31. Appx. 30.

He has taken college courses.

Kelly Sand, PCCV121579.

Kelly Sand has his criminal case from Polk County. The counts of burglary, harassment and willful injury total 29 years. He began his sentence in July of 2017. He had served over 2 years in September, 2019. His TDD on the 29 years sentence is April of 2030.

In this somewhat unusual case, Sand does not have a sexual offense, a special sentence, or the requirement that he register as a sex offender when he is released from prison. Instead he is in this group of inmates where the DOC found there was "a sexual component" to his crime and therefore he has to do SOTP.

He would be a person who would have a three year adjustment on his waiting list position because he has no special sentence. So 2030 becomes 2027. That makes him 377 out of 419 on the waiting list. With that position, he is not likely to get into treatment until 2025.

Here are other facts about his case.

He was told at the time of his guilty plea that he would do 2 years in prison, without the requirement that he do SOTP. Trans. p. 145, lines 9-16.

Like many of the other Applicants he scores low risk on the combined ISORA/STATIC tests for reoffending, Ex. 51 p. 1. Appx. 38.

The list of his completed interventions appears at page 2 of the parole docket, Exhibit 51. Appx. 38.

Shane Millet, PCCV121545.

Shane Millet has sex offenses from Pottawattomie County totaling 25 years. He also has the lifetime special sentence under 903B. He began his sentence in December, 2016. His TDD is January 18, 2028. He was number 382 out of 419 on the waiting list.

During his time in prison, he has done lots of programs. He has paid a lot of restitution. He has several thousand hours of an apprenticeship completed. He is awaiting placement for college courses (Tr. Pg. 157, lines 13-21).

He did not know about the silent mandatory when he was sentenced. He was told by his attorney that he would serve two to three years. Trans p. 156, lines 7-8. One has to wonder whether he would have received so large a sentence if the lawyers involved, and the judge, had known about the silent mandatory.

He is likely to be in prison at least until sometime in 2025.

He scores minimum custody. Ex. 49, p. 1. Appx. 34.

His prior record consisted of a few simple misdemeanors. Exhibit 49, p. 3. Appx. 36.

James Hall, PCCV121556.

James Hall has a 20 years sentence from Woodbury County, followed by the lifetime special. He started his sentence in July of 2017. His TDD is May, 2026.

He was 368 out of 419 on the waiting list. Realistically he will not do treatment until 2024.

Other facts of note include:

At the time of his guilty plea and sentencing, he was told that he would serve less than 36 months of his prison sentence (Tr. Pg. 116, lines 6-8).

He does not have much of a criminal record Ex. 28 p. 4. Appx. 24.

He is low moderate on the sex offender risk level. Ex. 28 p. 1. Appx. 21.

He is taking college courses. Tr. pg. 117, lines 17-19.

Anthony Gomez, PCCV121633

Anthony Gomez has a somewhat complicated sentencing situation. He came to prison with a 15 year sentence with a lifetime special. That was for 5 different counts. On appeal he was granted a new sentencing to see if the 10 year sentence and the 5 year sentence should be run consecutively. His resentencing is still pending as of the date this brief is being filed. (September 15, 2020)

So he will either have his same ten year sentence or the 15 year sentence. With the 15 year sentence, he has a TDD of January 31, 2024. He began his sentence on April 23, 2018.

He is at 326 out of 419 on the waiting list.

With a discharge date of January 2024, he is likely to start treatment maybe in the summer of 2023.

Other facts are as follows:

He is a combined low risk of reoffending. Ex. 26 p. 1. Appx. 15.

His criminal record was just misdemeanors. Ex. 26 p. 3-4. Appx. 17-18.

During the 18 months that he has been in prison, he has done good things. The list of his completed interventions appears at page 2 of the parole docket, Exhibit 26. Appx. 15. He has participated in the Grinnell College program at Newton where people take college classes for which they can receive credit.

Kyle Cross, PCCV121559

Kyle Cross has a ten year sentence for Sex Abuse Third Degree from Dubuque County. It was a non-forcible Sex Abuse in the Third Degree. He was given probation initially. His probation was revoked in March, 2018 after he picked up a D felony theft charge. The sentence for the theft charge was run concurrently.

He was on probation for almost two years when he was revoked. During that time, he had participated in SOTP in the community.

He has a TDD date of April 25, 2022. He is number 209 out of 419 on the waiting list.

Cross is a good example of someone who would likely be able to do treatment either on parole or work release. Indeed, he actually did the treatment program for almost two years when he was outside on probation.

He scores low-moderate on the combined ISORA/STATIC 99 tests. Ex. 24 p. 1. Appx. 11.

He had no prior criminal record before the Sex Abuse charge. Ex. 24 p. 3. Appx. 13.

Cross also testified at the hearing about not being allowed to communicate with his young children, despite the fact they are not victims in his case. He will not be allowed to communicate with them until he completes treatment (Tr. Pg. 133-134, lines 12-25, 1-9).

Parole statutes

Here are the relevant statutes regarding parole, with the important language underlined :

> The board of parole shall adopt rules regarding a system of paroles from correctional institutions, and shall direct, control, and supervise the administration of the system of paroles. The board of parole shall consult with the director of the department of corrections on rules regarding a system of work release and shall assist in the direction, control, and supervision of the work release system. The board shall determine which of those persons who have been committed to the custody of the director of the Iowa department of corrections, by reason of their conviction of a public offense, shall be released on parole or work release. The grant or denial of parole or work release is not a contested case as defined in section 17A.2.
> 906.3. Duties of parole board, IA ST § 906.3
>
> 1. A parole or work release shall be ordered only for the best interest of society and the offender, not as an award of clemency. The board shall release on parole or work release

any person whom it has the power to so release, when in its opinion there is reasonable probability that the person can be released without detriment to the community or to the person. A person's release is not a detriment to the community or the person if the person is able and willing to fulfill the obligations of a law-abiding citizen, in the board's determination.

906.4. Standards for release on parole or work release--community service--academic achievement,

1. a. The board shall establish and implement a plan by which the board systematically reviews the status of each person who has been committed to the custody of the director of the Iowa department of corrections and considers the person's prospects for parole or work release. The board at least annually shall review the status of a person other than a class "A" felon, a class "B" felon serving a sentence of more than twenty-five years, or a felon serving an offense punishable under section 902.9, subsection 1, paragraph "a", or a felon serving a mandatory minimum sentence other than a class "A" felon, and provide the person with notice of the board's parole or work release decision.

906.5. Record reviewed--rules

ARGUMENT

I

THE IOWA DOC UNREASONABLY RESTRICTS THE "LIBERTY INTEREST" OF APPLICANTS IN BEING GRANTED PAROLE

Standard of Review:

As this claim is based on a constitutional violation, review is *de novo*.

Everett v. State, 789 N.W.2d 151, 155 (Iowa 2010).

Preservation of Error:

The issues presented were all addressed on the merits by Judge McCall.

Summary of Argument

This case on some level is not all that complicated.

Fact summary

There is a factual dimension to the case. The simplified facts are:

a) There are around 1,600 inmates in DOC custody that are required to take the SOTP.

b) The DOC has treatment class space, at least as of 2019, for maybe 175 of these at a time. Treatment takes 3-4 months.

c) New inmates come into the DOC system all the time who also get the requirement to take SOTP.

d) Since there are more inmates who need treatment than classroom slots, the DOC has created a priority system called the 'waiting list'. It is entirely based on the date the inmate is projected to complete the prison sentence. That date is called the TDD.

e) This practice means that, at least as of 2019, inmates are placed in treatment about 13 months prior to the TDD. They then complete that treatment with about ten months until their discharge.

f) This waiting list applies whether the person has a five year sentence or a forty year sentence. This creates what is referred to by the inmates as a 'silent mandatory minimum sentence'.

g) The BOP plays no part in the 'waiting list'. The BOP will not grant a parole for someone with required treatment until after they have completed that treatment.

Legal question

The big legal question, once these facts are determined, is whether there is anything legally wrong with the fact that the DOC creates this silent mandatory minimum sentence for sex offenders.

The first legal question is whether inmates in Iowa have a constitutionally protected liberty interest in being granted parole.

If there is such a legal interest, does the DOC practice violate that interest?

Applicants assert, as the District Court found, that there is a liberty interest created by the Iowa parole statutes. Applicants contend that the DOC waiting list policy violates that protected interest by arbitrarily and unreasonably denying them realistic consideration for parole until near the very end of their sentence.

Applicants disagree with the District Court as to whether the DOC is acting reasonably in 2019 by continuing its present policy.

Argument

A. The Iowa parole statute creates a "liberty interest" in being granted parole.

There is, in fact, a liberty interest created by the Iowa Parole statutes.

Analysis of whether there is a liberty interest created by the Iowa parole statutes was set out by the Iowa Supreme Court in Belk v. State, 905 N.W.2d 185 (Iowa 2017). Belk set out the analysis but did not decide the question.

Judge McCall in this case used that analysis. He found a constitutionally protected interest. Ruling .p. 13; Appx. 129. Applicants agree with this legal conclusion.

Nevertheless this Court will need to affirm that conclusion. For that reason the analysis is set out.

United States Supreme Court cases

There were two important cases where the United States Supreme Court has addressed and discussed due process in connection with the parole granting process.

The first case was Greenholtz vs. Nebraska Penal Inmates, 442U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979). In Greenholtz the United States Supreme Court granted certiorari to decide "whether the Due Process clause of the Fourteenth Amendment applied to discretionary parole release

determinations made by the Nebraska BOP and if so, whether the procedures the Board currently provides meet constitutional requirements."

The Supreme Court answered that question affirmatively.

The Court first rejected the suggestion that the mere possibility of parole created a liberty interest. Instead, the Court found a protected interest in the particular Nebraska statute based on its wording. Here was the statutory language:

> Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it *shall* order his release unless it is of the opinion that his release should be deferred because:
>
> "(a) There is a substantial risk that he will not conform to the conditions of parole;
> "(b) His release would depreciate the seriousness of his crime or promote disrespect for law;
> "(c) His release would have a substantially adverse effect on institutional discipline; or
> "(d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date." Neb.Rev.Stat.
> § 83-1, 114(1) (1981).

Here is what the United States Supreme Court stated:

> We can accept respondents' view that the expectancy of release provided in this statute is entitled to some measure of constitutional protection. However, we emphasize that this statute has unique structure and language and thus whether any other state statute provides a protectable entitlement must be decided on a case-by-case basis. S.Ct. at 2106.

In 1987, the United States Supreme Court reaffirmed its conclusion in Greenholtz in Board of Pardons vs. Allen, 482 U.S. 369, 107 S.Ct. 2415, 96 L.Ed.2d 303 (1987). In Board of Pardons, the issue was again whether the parole granting statute in Montana created a liberty interest. The Court again found a protected interest.

The case went to the Supreme Court because the District Court had found that, despite mandatory language in the statute, the State BOP had very broad discretion. The District Court felt that this precluded a finding of a liberty interest under Greenholtz.

The Supreme Court found a protected interest. In Montana, as in the Nebraska statute in Greenholtz, "the discretion of the Board is very broad." At the same time, here was the language of the Montana statute:

> Prisoners eligible for parole. (1) Subject to the following restrictions, the board *shall* release on parole ... any person confined in the Montana state prison or the women's correction center ... when in its
> opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community[.]
> "(2) A parole shall be ordered only for the best interests of society and not as an award of clemency or a reduction of sentence or pardon. A prisoner shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen." Mont.Code Ann. § 46-23-201(1985)

Here was the United States Supreme Court's conclusion in the Board of Pardons case:

> Here, as in Greenholtz, the release decision is "necessarily subjective ... and predictive," see 442 U.S., at 13, 99 S.Ct., at 2107; here, as in Greenholtz, the discretion of the Board is "very broad," see ibid.; and here, as in Greenholtz, the Board *shall* release the inmate when the findings prerequisite to release are made. (citation omitted) Thus, we find in the Montana statute, as in the Nebraska statute, a liberty interest protected by the Due Process Clause.
> 107 S.Ct. at 2422

The statute from Montana in Allen was/is almost identical to the Iowa statute.

For two similar federal court appeal cases from the Midwest see Williams vs. Missouri Board of Probations and Paroles, 661 F.2d 697(8th Cir. 1981), cert denied 455 U.S. 993 (1982) and Parker vs. Corrothers, 750 F.2d 653 (8th Cir. 1984).

Iowa cases that are important to this case.

Belk v State

In December, 2017, the Iowa Supreme Court decided Belk v. State, 905 N.W.2d.185 (Iowa 2017).

Lavern Belk went to prison in 1992. His 60 year sentence included Sexual Abuse in the Second Degree. With projected earned time, his release date was

around 2019. Since his sentence was from before 2005, he did not have a special sentence.

Belk filed a post conviction application in 2013. Belk complained that the DOC would not put him in treatment until the end of his sentence. He had been in prison at that point for over 20 years.

A hearing was held on the application in Benton County on October 13, 2015. The Court made certain findings of fact. One fact that appears in the District Court ruling of January 29, 2016 (available on EDMS) was that inmates were put into treatment 2 years prior to their TDD. Treatment at that point lasted 6-18 months. Another fact was that no one would get a release from the BOP without treatment completion.

The District Court dismissed the case saying that Belk was required to pursue his claim under 17A, the Administrative Procedures Act.

On appeal, the Iowa Supreme Court held that Belk could proceed with a post-conviction case. The Court identified filed subsection 822.2(1)(e) as being available. In the course of the decision, the Court noted that Belk was alleging that he had a "protected liberty interest in obtaining parole" 905 N.W.2d. 192. Here is what the Court said:

> Although prisoners do not have a constitutional right to parole, a state may choose—but is under no duty—to establish a parole system....

> [O]nce a [state] scheme is implemented[,] prisoners are imbued with a liberty interest to which the procedural protections of the Due Process Clause attach...
> However, the mere presence of a parole system does not automatically mean a prisoner has a constitutionally protected liberty interest in parole.[2] Bd. of Pardons v. Allen, 482 U.S. 369, 373, 107 S.Ct. 2415, 2418, 96 L.Ed.2d 303 (1987).[3] Rather, the existence of a protected liberty interest in parole depends on the state's parole statute....
>
> From *Greenholtz* and *Allen*, a court can conclude if the statute mandates that a parole board must release an inmate if the inmate meets certain statutorily created criteria, then a protected liberty interest in parole exists. In contrast, if the statute grants the parole board discretion to make the ultimate parole decision, even if the inmate meets the criteria, then the inmate does not have a protected liberty interest in parole. *See Richardson v. Joslin*, 501 F.3d 415, 419 (5th Cir. 2007) ("The hallmark of a statute that has not created a liberty interest is discretion" such that "[w]here the statute grants the prison administration discretion, the government has conferred no right on the inmate.").
> Belk v. State, 905 N.W.2d 185, 190 (Iowa, 2017)

While the Court did not address the merits of the constitutional claim brought by Belk, it allowed the claims to be presented in a postconviction. The Court returned the matter to the District Court.

On remand, the District Court on January 25, 2018, noting that the action could proceed under 822.2(1)(e), denied Belk's request for court-appointed counsel. The case proceeded to hearing with the State represented by the Attorney General's office and Belk represented by himself.

The Court on December 31, 2018, denied relief. The judge found that Iowa law did create a liberty interest in being reviewed by the Parole Board for parole. The Court, however, could not find any violation of that liberty interest.

Belk appealed. It was case # 19-0133. Judge Anderson appointed the Appellate Defender's Office. When they withdrew, he appointed a private attorney. Belk discharged his sentence on October 22, 2019. For that reason the Supreme Court dismissed the case as moot.

Bonilla v. Board of Parole

On June 28, 2019, the Iowa Supreme Court decided Bonilla v. Board of Parole, 930 N.W. 2d 751 (Iowa, 2019).

Julio Bonilla is serving a life sentence, from 2005, with the possibility of parole. He committed his Class A felony while still a juvenile. This case is of interest to this case since Bonilla had a conviction that involves a sexual offense. He therefore had the requirement from the DOC that he complete SOTP. This makes him like the Applicants in these cases. What is unusual about Bonilla's sentence is that, as a person with a life sentence with the possibility of parole, he does not have a TDD. How would the DOC decide when to put him into SOTP?

Bonilla's brought his complaint against the BOP under 17A.19. He challenged the manner in which the BOP considers whether persons like Bonilla, who were convicted of offenses as juveniles, should be granted parole. Since

Bonilla had a requirement that he take SOTP, he was encountering difficulty since the DOC would not put him into SOTP.

The case is important. First, it discusses whether a "liberty interest" in obtaining parole is available in Iowa. More importantly, the case discusses how that "liberty interest" might be illegally affected by programming by the DOC.

The starting point for the Supreme Court in Bonilla was a recognition that cases both in Iowa and from the United States Supreme Court between 2012 and 2015, "generally stand for the proposition that a juvenile under a life sentence is entitled to a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." 903 NW2d at p. 767.

With that understanding, the Court looked to see whether Bonilla had a liberty interest in obtaining parole that triggered traditional due process. The Court started with Iowa Code Section 906.4(1), which establishes the standard for release on parole or work release. Here is the language of that section.

> The board shall release on parole or work release any person whom it has the power to so release, when in its opinion there is reasonable probability that the person can be released without detriment to the community or to the person. A person's release is not a detriment to the community or the person if the person is able and willing to fulfill the obligations of a law-abiding citizen, in the board's determination.

The Court found a constitutional liberty interest that arose under Graham-Miller[5] that imposes a constitutionally based mandatory requirement on the Board to provide a juvenile with a meaningful opportunity to demonstrate maturity and rehabilitation. 930 NW2d at 777.

The Court added this about adult cases.

> Nothing in *Greenholtz* is to the contrary. In *Greenholtz*, while the majority did not find a constitutionally based liberty interest for adult offenders, the Supreme Court found that the Nebraska parole statute, which used mandatory "shall" language, gave rise to a *statutory* liberty interest entitled to due process protections. *Id.* at 12, 99 S. Ct. at 2106. Likewise, in *Board of Pardons v. Allen*, 482 U.S. 369, 377–81, 107 S. Ct. 2415, 2420–22, 96 L.Ed.2d 303 (1987), the Court held that the Montana parole statute gave rise to a liberty interest based on the mandatory language "shall" and that the parole board would grant parole when designated findings were made.
>
> Bonilla v. Iowa Board of Parole, 930 N.W.2d 751, 777 (Iowa, 2019)

Here was the Court's conclusion.

> For the above reasons, we conclude that a juvenile offender has a liberty interest in the proper application of *Graham–Miller* principles under the Due Process Clause in the Fourteenth Amendment to the Federal Constitution and independently under the due process provision of article I, section 9 of the Iowa Constitution.

---

[5] References to "Graham-Miller" are references to the two United States Supreme Court Cases serving as the foundation for restrictions on life sentences for juveniles. See Graham v. Florida, 560 U.S. 48, 130 S.Ct.2011, 176 L.Ed. 2d 825 (2010) and Miller v. Alabama, 567 U.S. 460, 132 S.Ct.2455, 183 L.Ed. Ed. 407 (2012).

Bonilla v. Iowa Board of Parole, 930 N.W.2d 751, 778 (Iowa, 2019)

After discussing individual factors and procedural rights, the opinion of the Court has a section addressing "programming and treatment." Bonilla had argued that if he was deprived of access to programming and treatment by the DOC, to aid in his rehabilitation, he would not have the meaningful opportunity to obtain release in violation of his rights to due process.

He challenged what he referred to as a "Catch-22 problem." He could not be seriously considered for parole until he completes a SOTP. He cannot gain access to SOTP until he is being seriously considered for parole. The BOP argued that there was no constitutional right to any treatment program. Here is the all-important paragraph from the Iowa Supreme Court:

> If the state, through the Board, wishes to condition release upon successful completion of certain programming such as SOTP, the department of corrections cannot unreasonably withhold such programming from a juvenile offender. Otherwise, the state could effectively deprive a juvenile offender of a meaningful opportunity to show maturity and rehabilitation by establishing release criteria that the state prevents the juvenile offender from meeting. **The department of corrections does not have a pocket veto over the release of a juvenile offender through the withholding of services required by the Board for the release of a juvenile offender. (Emphasis added)**
> It may be, however, that the Board has limited direct authority over the department of corrections. If the department of corrections fails to act reasonably in light of the communication from the Board regarding programming, the juvenile the

> juvenile offender may file a claim against the department under Iowa Code chapter 822, alleging that by denying reasonable access to the programming necessary to obtain an opportunity for release, the state is failing to live up to the requirements of *Graham–Miller*. *See Belk*, 905 N.W.2d at 191.
> Bonilla v. Iowa Board of Parole, 930 N.W.2d 751, 786 (Iowa, 2019)

What can be said after Bonilla?

First, the liberty interest recognized in Bonilla was primarily based on the cases establishing the right of juveniles to meaningful opportunity to be released from prison if they have a life sentence. Those cases created a liberty interest for juveniles in having a meaningful opportunity to be released.

Second the DOC plays a required role in this process. If the DOC refuses to put juveniles into treatment, this is actionable under chapter 822. It is quite explicit in Bonilla that the DOC cannot impose unreasonable barriers to a meaningful consideration for release.

B. Application of this law to the Iowa parole statute

This Court should conclude that, based on the federal cases, there is a liberty interest in Iowa for adults at the initial parole granting stage. The language about parole in Iowa is the same as the language in Montana.

Montana:

> Prisoners eligible for parole. (1) Subject to the following restrictions, the board *shall* release on parole ... any person confined in the Montana state prison or the women's correction

> center ... when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community[.]

Iowa:

> A parole or work release shall be ordered only for the best interest of society and the offender, not as an award of clemency. The board shall release on parole or work release any person whom it has the power to so release, when in its opinion there is reasonable probability that the person can be released without detriment to the community or to the person. (emphasis added) A person's release is not a detriment to the community or the person if the person is able and willing to fulfill the obligations of a law-abiding citizen, in the board's determination.

The Iowa statute contains the specific language, almost word for word, from the Montana statute. In Iowa, the Board "shall release" the person, when, in its opinion, there is a reasonable probability. That is the exact same language found in Allen.

Based on the authority of Allen, which interpreted Greenholtz, this Court should find that there is a protected liberty interest in getting a parole based on the Iowa parole statute.

Belk and Bonilla also provide support and/or confirmation for this liberty interest in Iowa in being considered for parole. In Belk Justice Wiggins said that "if the statute mandates that the Parole Board must release an inmate, if the inmate certain statutorily created criteria, then a protected liberty interest in parole exists" 905 NW.2 at 190.

Under Bonilla, the DOC does not have a pocket veto over that liberty interest. That is precisely what the current policy of the DOC does for all offenders

In a way, the pocket veto in these adult cases is a little worse than what was occurring in Bonilla. The pocket veto in adult cases imposes effectively a mandatory minimum sentence where none of the applicants had a mandatory minimum sentence from the legislature. Bonilla did not have a discharge date. All of the applicants have discharge dates with no judicially imposed mandatory.

B. The Iowa DOC unreasonably eliminates the right of Applicants to a reasonable consideration of whether to be granted a parole.

Once it is established that the Applicants have a liberty interest in being considered for parole, Bonilla says that the DOC cannot unreasonably withhold such programming.

The question becomes: how is the DOC administration of their waiting list unreasonable?

Let us count the ways.

1. The waiting list policy is unreasonable by essentially treating all sex offenses the same. The only criterion used by the DOC is the discharge date. The DOC does not consider whether the offense was a forcible felony, for example. It does not consider whether inmates had a significant prior record. It does not consider the age or health of an inmate.

It only marginally considers what kind of risk the person presents if released. There are two tracks that are used based on the risk assessment. But the testimony was that the start date for each track was about the same.

The waiting list does not consider institutional adjustment or positive steps toward rehabilitation other than treatment. It does not consider all these other factors, which quite frankly, are the factors considered by the BOP in deciding whether to release non sex offenders.

2. Perhaps as importantly, the program is unreasonable by not incorporating the BOP into the process. As a factual matter the DOC director was quite candidate about the BOP. They play no role whatsoever in deciding when someone goes to treatment.

At an earlier time, in 2002, placement into SOTP did involve the BOP. The Board actually had a denial code which said "put the person into treatment now". Over the years, however, as the waiting list grew and became more all consuming, the BOP involvement disappeared. Tr. p. 30, lines 14-18.

Of course, compounding this difficulty is that the BOP goes along with the establishment of the silent mandatory. You have to complete SOTP to get serious consideration for release by the BOP. It was clear from the testimony that, at this point in time, and for the last decade there is essentially a pocket veto by the DOC

on parole consideration until or unless a person gets through SOTP near the very end of their sentence.

3. The practice of requiring completing SOTP before any kind of release for everyone is unreasonable. The testimony establishes that there is now SOTP available in all halfway houses or in the community. Indeed, the curriculum is the same. Track 1 individuals, according to Sean Crawford, are individuals who generally regarded as lower-risk offenders. While Sean Crawford might not know what recidivism rates are for low-risk offenders- that information is out there.

The studies by the DOC, for example, showed in 2010 that the overall recidivism rate for sex offenders was something like 5% in Iowa. Other more nationally-based studies have shown overall rates to be perhaps between 10-15%.What is significant, however, is that low-risk offenders are lower than the average of everybody. That means we are talking about individuals who have repeat offending rates of more like 2-3%, if that. See Ex.17 p. 4. Appx. 53.

As of 2019 there are trained facilitators in the community corrections system. They use the same curriculum. There is no reason why low-risk offenders who have been sentenced to prison cannot be even considered for parole, without doing treatment in prison.

It is unreasonable for the DOC not to be recommending low risk persons to the BOP for release to the community.

3. The DOC has had the problem with the waiting list and the silent mandatory for at least a decade. While they moved the sex offenders to NCF, which has its advantages, that movement has not particularly made much of an impact on the waiting list. The DOC has tried to expand the available classes for SOTP. But NCF does not really have any more class room space. Instead, the DOC should open classes at other facilities. At this point the Mt. Pleasant Correctional Facility presumably has counselors that not long ago were actually running SOTP treatment groups. If you opened up a unit at that facility, you could perhaps put a dent in the overall waiting list.

Could low risk persons do treatment in the community?

At page 8 of the ruling, Judge McCall stated that SOTP programs play an important part in rehabilitating sex offenders. He then went on to say that there is a high rate of recidivism among untreated sex offenders and quotes the Iowa Supreme Court as saying that the risk of recidivism posed by sex offenders is "frightening and high." Ruling p. 8; Appx. 124.

Judge McCall did not base this conclusion on anything in the record of our case.

First of all, it should be noted that these quotes did not come from the Attorney General's brief. The suggestion that there is a high rate of reoffending,

did not come from the testimony of Sean Crawford. Had high rates been quoted at that time, they would have been responded to at the time.

Judge McCall took these quotes from the Iowa Supreme Court. The Iowa Supreme Court, in turn, took their language from United States Supreme Court Cases. State v. Seering, 701 N.W. 2d 655 (Iowa 2005), the case upholding the residency restriction, quotes the "frightening and high" language from Justice Anthony Kennedy in Smith v. Doe , 123 S.Ct. 1140 (2003).

State v. Iowa Dist. Court for Webster County, 801 N.W.2d 513 (Iowa 2011) cited to another Justice Kennedy quote regarding the high-risk rate of recidivism, this time taken from McKune v. Lile, 122 S.Ct. 2017 (2002).

Those particular quotes from Justice Kennedy have been much analyzed, and indeed have been criticized. See article written in 2015, by Ira Ellman and Tara Ellman, called 'Frightening and High': The Frightening Sloppiness of the High Court's Sex Crime Statistics (June 8, 2015). Available at SSRN: http://ssrn.com/abstract=2616429.

It turns out that there was a remarkably limited statistical foundation for Justice Kennedy's quotes. The authority for the McKune quote came from an article published in Psychology Today, a mass market magazine aimed at a lay audience. Recently, the Sixth Circuit Court of Appeals struck down the Michigan Registration Statute in Does v. Snyder, 834 F. 3d 696, 700 (6th Cir. 2016).

Here is what the Court in Does said:

> Intuitive as some may find this, the record before us provides scant support for the proposition that SORA in fact accomplishes its professed goals. The record below gives a thorough accounting of the significant doubt cast by recent empirical studies on the pronouncement in *Smith* that "[t]he risk of recidivism posed by sex offenders is 'frightening and high.' " ... One study suggests that sex offenders (a category that includes a great diversity of criminals, not just pedophiles) are actually *less* likely to recidivate than other sorts of criminals. *See* Lawrence A. Greenfield, *Recidivism of Sex Offenders Released from Prison in 1994* (2003). Even more troubling is evidence in the record supporting a finding that offense-based public registration has, at best, no impact on recidivism... And while it is intuitive to think that at least some sex offenders—*e.g.*, the stereotypical playground-watching pedophile—should be kept away from schools, the statute makes no provision for individualized assessments of proclivities or dangerousness, even though the danger to children posed by some—*e.g.*, Doe # 1, who never committed a sexual offense—is doubtless far less than that posed by a serial child molester.
> Does #1-5 v. Snyder, 834 F.3d 696, 704–05 (C.A.6 (Mich.) 2016)

In a similar fashion, Justice Cady, writing for the majority in the case of In Interest of TH, 913 N.W. 2d. 578, 595 (Iowa 2018) was critical of the Smith language, at least as to juvenile offenders.

In the record in this case we have one piece of evidence that was introduced about recidivism rates. That was the DOC empirical study from 2010 of over 1000 Iowa sex offenders. See Exhibit 17.

That study, perhaps the only one done just in Iowa, found the overall rate was less than 5%. See page 17 of Ex. 17. It is important to understand that number

some more. Only 5% of the entire universe of Iowa sex offenders reoffended sexually. That included individuals in all risk categories, including those who might not have completed SOTP.

The rates for persons classified as low or low-moderate, such as all the Applicants, were 1-2%.

There was no evidence in these cases that a recidivism rate for sex offenders is "frighteningly high". Indeed, the evidence was that the Applicants in this case were all either low risk or low-moderate risk. In that category, the risk would be well below 5%.

Applicants are not suggesting that they be allowed to go without treatment. They are suggesting that a reasonable approach- particularly for low-risk individuals- would be for treatment to occur in a halfway house or the community. At least that should be the remedy until the DOC gets its waiting list greatly reduced.

Proposals

Here are some proposals. These would be ways of significantly addressing the waiting list that created the current mandatory minimum sentences. Some can be done right away. Some require a commitment over time.

Proposal #1

The DOC could identify the 100 individuals in Track 1 who have the lowest risk assessment. The DOC could forward those individuals to the BOP for consideration of release with SOTP to be done in the community.

Maybe the BOP would look at a particular person and say they would not want that. On the other hand, if the person had little or no criminal record, was low-risk, and had done incredibly well in prison for years, maybe the BOP would allow that person to do treatment in a halfway house.

It is unreasonable given the difficulties with the waiting list and the congestion that exists for the DOC not to in some cases, ask the BOP whether they would consider release with treatment in the community.

Proposal #2

The DOC, for anyone with more than five years prison time, could propose to the BOP that those individuals that are low risk be considered for treatment in the community. These might be individuals who through their DOC behavior had demonstrated that they could be a responsible person in the community.

Proposal #3

The DOC could give the BOP some say in the management of the waiting list. This would, of course, require that the BOP look at a sex offender file at that person's annual review. The DOC could allow the BOP essentially to give

someone a boost on the waiting list. This could be 2-3 years. This could be 10 years.

This proposal makes sense because the BOP is the agency that has been entrusted with decisions as to when someone is released from prison. In fact, it is unreasonable and arbitrary for the DOC not to give the BOP some cooperative role in deciding how soon a person goes to treatment.

Proposal #4

It is unreasonable for the DOC to not open treatment beds at other facilities. Newton is full and has no more classroom space. So, classroom space needs to be created elsewhere. When the DOC moved the program to NCF, they left a group of sex offender trained counselors behind at Mount Pleasant. In effect, the DOC added to the problem by not continuing to have classes at MPCF.

Proposal #5

So what else could be done? 20 years ago, there was a class action lawsuit at the Fort Madison Penitentiary complaining about the misuse of long-term lockup and the lack of mental health treatment within that maximum security prison. United States District Court Judge Donald O'Brien found pervasive constitutional violations. As a remedy, however, he did not order sixteen different things. Rather, he directed the Defendants (in that case, the administrators for the DOC) to come up with their own plan, a plan to address the entire problem. See Goff v. Harper,

59 F.Supp.2d 910 (S.D.Iowa, 1999). The case is also discussed in Goff v Harper, 235 F3d. 410 (8th Cir. 2000)

In a case like this, we do not really have a class action. We have seven individual post-convictions. On the other hand, there is a claim that there is an unconstitutional practice by the DOC. Maybe what the Court should do in this case is direct the State to come up with a plan within some period of time (120 days, for example).

That plan should not only address the seven individuals in front of the Court, but also the systemic problem of the present pocket veto over sex offenders release from prison. As part of the remedy everyone should have to play. The State is the party who is doing the wrong in this case. Mostly that is the DOC. But it is also the BOP.

This can then be left to the DOC, perhaps in consultation with the BOP, to decide what combination of remedies will address this issue.

Comments in response to Judge McCall's mathematics

Judge McCall found the DOC was not being unreasonable in 2019 because it had taken steps in the right direction that he felt would all but eliminate the waiting list in a few years. The particular discussion and his mathematics appears at page 18 of the January 30, 2020 Ruling. Based on the judge's calculation

> "the prison will be able to provide SOTP for every inmate now on the waiting list, as well as every new admission in less than

> 4 years. While that is possible the IDOC has failed in the past to reasonably provide SOTP for inmates classified with the program, it is no longer failing in that responsibility."
> Appx. 134.

What mathematical calculation did the Court do? Judge McCall concluded that NCF, with the projected changes, would be able to process nearly 600 inmates through SOTP every year (ruling p.18 in footnote). The Court noted that the classes had about a 66% pass rate. That meant that as of 2019, 400 inmates were graduating from the program every year.

The question then becomes if they can graduate 400 inmates per year, how much of a dent does that put in the waiting list? The Court's mathematics was just incorrect.

The Court said that with 400 completions in a year the DOC would get through the waiting list for treatment in 4 years. Did the Court just divide 1600 by 400 and concluded that the entire waiting list would get completed treatment "in less than 4 years?"

But more people come in every year. The Court noted that the testimony was that 260 new inmate admissions occur each year. (Ruling p. 18) Those are people with new sexual offenses.

Sean Crawford testified about the period from July 1, 2018 to September 11, 2019. During that time there was 262 new court commitments. (Trans. p. 73, lines 9-12) That can be adjusted to a yearly figure of 224/year. But he also

identified 167 revocations, presumably of special sentences, during that same time period. He thought maybe half would need treatment. (Trans. 74-75, lines 11-25, 1-2). When that number is adjusted to a yearly number it is 143/year. Half would be 72. [6]

According to Crawford, 2019 was the first year the DOC graduated more from SOTP than there were new committed inmates. (Ruling p. 18).

But there were 224 new commitments and 72 revocation people needing treatment for that year. That adds up to 296.

So how much of a dent in the waiting list is going to take place?

If they graduate 400, operating at super-capacity with 13 facilitators, and there are 296 new people needing treatment per year what happens, mathematically?

They are going to maybe make a dent in the waiting list by perhaps 100 people a year. That would take sixteen years to eliminate the waiting list, not 4 years.

What is also significant about the waiting list is how and where the new people go on the list. They are not just going to the bottom of the list. The

---

[6] People returning to prison having violated a special sentence is particularly a problem, for the DOC. The statistics appear at page 30 of Exhibit 5. The number for FY 2018 was 174. This was up from 103 just 5 years ago. As more people go out on special sentences, many for their lifetime, this number is just going to keep going up.

Petitioners with 20 and 40 years to serve always will get jumped over by most of the new people.

That is why the inmates with longer sentences wind up spending so many years without any meaningful consideration of their individual factors. That is what is unreasonable about the DOC approach.

II

THE SILENT MANDATORY SENTENCE VIOLATES THE CONSTITUIONAL PRINCIPLE OF SEPARATION OF POWERS

Standard of Review:

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

Preservation of Error:

The issues presented were all addressed on the merits by Judge McCall.

Argument

There is another legal argument available to Applicants that is related to but distinct from this liberty right analysis. This is an argument based on the constitutional principles of Separation of Powers.

The Iowa Constitution, like its federal counterpart, establishes three separate but equal branches of government. Iowa Constitution Article III section 1. Our

constitution tasks the legislature with making laws, the executive with enforcing laws, and the judiciary with construing and applying laws to cases brought before the courts. Planned Parenthood of the Heartland v. Reynolds, 915.N.W.2d. 206, 212 (Iowa 2018).

As part of those inherent powers of each branch, the judiciary gives a defendant the sentence, subject to the parameters established by the legislature. The legislature defines the sentence which includes whether earned time is available. The legislature spells out parole eligibility and how that is to be exercised by the BOP.

In the case of the Applicants the legislature set out the punishment for their offenses. They all were given indeterminate sentences with no mandatory minimums. They were all eligible for parole the moment they walked into the institution. Parole needs to be considered in accordance with the statutes established by the legislature.

What has happened over the last fifteen years is that the executive branch- specifically the DOC- has gradually and maybe not even intentionally, established a mandatory minimum sentence for all individuals classified as requiring SOTP.

This violates the principle of Separation of Powers, as only the courts can give them a mandatory minimum sentence. That mandatory can only be given if the legislature has prescribed that minimum sentence as part of their punishment.

There are two cases that are somewhat related to the application of the principle to our set of facts. State v. Phillips, 610 N.W. 2d.840 (Iowa 2000), involved a challenge to the imposition of a mandatory sentence under 902.12. The legislature had eliminated parole at that time for the person with a second degree robbery conviction.

Phillips argued that the legislature enactment violated Separation of Powers by eliminating all parole consideration. The Court rejected her argument with this language:

> We have upheld the authority of the legislature to prescribe punishment for crimes and restraints on eligibility for reduced terms of incarceration because these are policy matters peculiarly within the constitutional authority of the legislature. We have said:
> Our legislature has demonstrated it knows how to restrict the discretion of the board of parole when it wishes to do so. It may do so by prescribing a minimum sentence for a particular offense. It may also do so by precluding parole, as with a life sentence. It may limit eligibility for parole, as it has done for persons imprisoned for felonies like second-degree murder under the criminal code which will take effect January 1, 1978. *State v. Remmers,* 259 N.W.2d 779, 784 (Iowa 1977) (citations omitted).
> .....
> We reject Phillips' argument that section 902.12 "disrupts" the balance between the legislature's power to provide indeterminate sentences and the parole board's authority to determine parole eligibility and work release. The 100% provision in section 902.12 is clearly a part of the legislature's constitutional authority.
> State v. Phillips, 610 N.W.2d 840, 842–43 (Iowa,2000)

The second case is Doe v. State, 688 N.W.2d.265 (Iowa 2004). Doe challenged a DOC screening policy where individuals who had not yet been cleared from the possibility of civil commitment under chapter 229A , would not be run up for parole. The Supreme Court rejected the argument, noting that chapter 229A was constitutional. The Court also noted that the procedure for determining whether the person was subject to possible commitment under 229A was detailed in the statute. Here is what the Court had to say in rejecting those arguments:

> C. *Separation-of-powers violation.* The Iowa Constitution provides:
> The powers of the government of Iowa shall be divided into three separate departments—the Legislative, the Executive, and the Judicial: and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted.
> *271 Iowa Const. art. III, § 1. "This principle is violated if one branch of government purports to use powers that are clearly forbidden, or attempts to use powers granted by the constitution to another branch." *State v. Phillips,* 610 N.W.2d 840, 842 (Iowa 2000) (citing *In re C.S.,* 516 N.W.2d 851, 858 (Iowa 1994)).
> Although the distinction between the executive and judicial powers is often unclear, they do differ. The executive department has the general power to execute and carry out the laws; the judicial department has the power to interpret the constitution and laws, apply them, and decide controversies....
> *City of Cedar Falls v. Flett,* 330 N.W.2d 251, 254–55 (Iowa 1983).
> The DOC screening policy does not purport to deal with the length of an inmate's sentence; it simply establishes a procedure for determining the inmate's status vis-à-vis the SVPA. The policy does not in any sense usurp the sentencing authority of the court and does not violate the Separation of Powers Clause. We affirm on this issue as well.
> Doe v. State, 688 N.W.2d 265, 270–71 (Iowa,2004)

In our cases there is also Separation of Powers problem. The Iowa Supreme Court has recognized that sentencing is exclusively the realm of the judiciary. Parole, in turn, is determined by the legislature, and administered by the Parole Board.

If the DOC decided that anyone with OWI 3rd offense commitment to the DOC would have to serve half the sentence before release, everyone would understand this was unconstitutional. It would be unconstitutional as a violation of Separation of Powers. Only the courts could impose such a mandatory, assuming the legislature had made it an available penalty.

To some extent, this is reminiscent of cases from 40 years ago when a judge in OWI cases had a policy of never giving deferred judgments if there was an accident. That was wrong because the judge was imposing a mandatory sentence that had not been authored by the legislature. While that was thought of as an abuse of discretion, it could also have been thought of as a violation of separation of powers. See State v. Hildebrand, 280 N.W.2d 393 (Iowa, 1979)

Over 15 years, the DOC has created a mandatory minimum sentence for sex offenders like the Applicants. The fact that this was gradual does not matter. The question of remedy, of course, remains complicated.

If the Applicants have shown the existence of a silent mandatory minimum sentence, created and imposed by the DOC, that is enough to find the practice

unlawful. The fact that there is acquiescence from the BOP does not matter. This Court should find the DOC practice unlawful as a violation of the Separation of Powers constitutional principle.

III

THE SILENT MANDATORY VIOLATES THE SEPARATION OF FUNCTION BETWEEN THE DOC AND THE BOP

Standard of Review:

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

Preservation of Error:

The issues presented were all addressed on the merits by Judge McCall.

Applicants have complained under several different theories that the creation of the silent mandatory minimum sentence by the DOC is unlawful.

To those previous arguments, this argument should be added.

A person's sentence in Iowa is prescribed by the legislature and imposed by the judiciary. It is then to be executed by the executive. There are clearly at least two different agencies involved in that execution of the sentence, until the person is finally released from prison.

The first agency, of course, is the DOC. They have certain responsibilities with regard to the care and custody of inmates who are committed to their custody. That includes responsibilities for treatment and programming.

As part of the sentence, the BOP has certain functions.

The functions of both of these state agencies are prescribed by statute.

There is a right, as part of a sentence, for a person in the custody of the DOC to be periodically or annually considered for release by the BOP. There are statutes that define the criteria. There are statutes that speak to the process by which the DOC provides them with information.

The principle, as set out by the legislature, is that the BOP determines when a person is to be released within their indeterminate sentence.

Applicants have essentially argued in several ways that the DOC is interfering with that parole review.

In addition to violating the liberty interest created by the legislature, Applicants argue that it violates separate powers to create this mandatory minimum sentence.

It also violates the statutory part of the sentence itself. If the DOC were to decide that some group of inmates would not just get reviewed by the BOP in their first two, five, or ten years, then we would all recognize there is something wrong with that.

Once again – and this has been said before – the DOC did not wake up one day in 2004 and decide to impose a mandatory minimum sentence. However, steps were taken by the DOC over the past fifteen years that have led them to the point

where they are today. It has led to the full creation of a mandatory minimum sentence for sex offenders that has really not changed much in ten years. Maybe there has been some movement by a few months since the record made in Belk. Maybe the current Director of Treatment would like to do better.

However, as has been discussed above, there are structural barriers to the existing mandatory minimum sentence that are not going to change without fundamental change in the way this is administered. Those changes may have to be guided by the courts.

As one lists the things that are legally wrong with the silent mandatory minimums for sex offenders, the Court should recognize that there is also a violation of the separation of function between the BOP and the DOC.

IV

THE DECISION STRIKING THE APPOINTMENT OF COUNSEL SHOULD BE SET ASIDE, AS THE CLAIM CAN BE BROUGHT UNDER SECTION 822.2(1)(a) AND 822.2(1)(c).

Standard of Review:

Appellate review of rulings on statutory construction is for correction of errors at law. Schaefer v. Putnam , 841 N.W.2d 68, 74 (Iowa 2013)

Preservation of Error:

The issues presented were all addressed on the merits by Judge McCall.

Argument

Before looking at the specific question of appointment of counsel, something should be said about jurisdiction challenging the "silent mandatory" problem, and the question of bringing this action under the post-conviction statute.

First, there is the threshold question of whether the action can be/ should be brought against the BOP or the DOC or both. The silent mandatory is somewhat a problem of the DOC but also somewhat a problem because of the BOP.

The problem is primarily the result of DOC policies. The DOC does not have enough beds for sex offenders to do treatment. They also have a waiting list that fails to take into consideration in a meaningful way a sex offender's risk assessment- or for that matter, any individual factors about a particular case. Applicants have this silent mandatory minimum sentence, which in some cases keeps people who require treatment incarcerated years beyond what is necessary.

The problem is partly the responsibility of the BOP. At one time, the BOP played a role in when a person took treatment. They would code someone as being ready for treatment, and Corrections would put them in. That no longer happens. Instead, the BOP simply gives the DOC a pass and conducts no meaningful review of anyone with treatment completion at their annual review proceeding.

The Iowa Supreme Court in the Belk case recognized that as a general matter, an allegation of a silent mandatory against the DOC could be processed as a claim under the post-conviction statute. The narrow issue in front of the Court in

Belk was whether it could be brought under any provision in the post-conviction statute.

If an applicant really wants to bring the BOP into the case, that is hard to do under the post-conviction statute apparently. If you are complaining about a denial of parole, then you probably have to proceed under 17A.

In this case, Applicants have directed their complaint at the DOC. This was authorized under Belk. After all, the DOC administers the waiting list and could do things differently with regard to that waiting list. The DOC for example, could submit cases to the BOP for consideration of whether the treatment could be done in the work release centers or on street parole.

Assuming the case is brought as a postconviction case, then there is the question of what subsection in the post-conviction statute should be used. Belk certainly seemed to say that it should be 822.2(1)(e). At the same time, the question was not exactly presented to the Court as to which particular subsection it should be brought under.

The consequence of course of 822.2(1)(e) is that there is no court appointed counsel.

There are two other subsections that could reasonably have been used as a basis for post-conviction relief. The Belk court seemed to reject 822.2(1)(a). The Court concluded that the complaint was not really directed at the sentence.

The problem is that the complaint very much is directed at the sentence. The Applicants are complaining that they had a sentence that did not have a mandatory minimum. They had a sentence where the execution of that sentence required the BOP to give them a meaningful review as to whether they could safely be released on parole or work release. They are saying that DOC interferes unreasonably with the sentence given to them by the Court.

The Court should reconsider the language in Belk that precluded consideration under 822.2(1)(a).

Here is what the Court said in Belk:

> We conclude Belk's amended application should not have been dismissed outright for failure to state a claim because, in fact, he had stated a claim under Iowa Code section 822.2(1)(*e*). Notably, Belk's amended application cited only Iowa Code section 822.2(1)(*a*), although his original application also cited section 822.2(1)(*e*). We believe section 822.2(1)(*a*) is inapposite because Belk is not complaining about his "conviction or sentence." Iowa Code § 822.2(1)(*a*). ... Belk v. State, 905 N.W.2d 185, 192 (Iowa, 2017)

The argument in this case should make clear that Applicants are very much complaining about their sentence.

There was a case that was not discussed in Belk. In Mears v. State Public Defender, 2013 WL 2371308 (Iowa App. 2013) the question was also what subsection could be used if the DOC was refusing to give jail credit toward the two year period of revocation of a special sentence. This mattered because the question

was paying for appointed counsel. The State Public Defender took the position that this was a claim that could only be brought under subsection (e) and for that reason, appointed counsel was not available. That meant that they should not have to pay attorney Mears.

The Court of Appeals found in favor of a subsection where payment was available. The Court accepted the argument that by refusing to give jail credit, the sentence actually served exceeded the maximum sentence authorized by law. For that reason, the claim could be brought under 822.2(1)(c) . Payment was available under that subsection.

In the Mears case the Court of Appeals found that a complaint about the "sentence" included a claim that some agency, the DOC, was not recognizing that their "sentence" came with the right to have jail credit.

This Court should recognize that the Applicants' complaint in this case is very much directed at the sentence they had been given. The District Court did not give them any mandatory minimum sentence. The DOC, however, is giving them such a mandatory sentence.

The claim is also "contrary to the laws of the state" in many ways.

The claim is also that they have to serve a sentence "in excess of the sentence" they were given.

This is a claim that can be brought under 822.2(1)(a) or 822.2(1)(c). The court should determine that a Belk claim can be brought under a section that allows for appointment of counsel.

CONCLUSION

In this consolidated proceeding, Applicants challenged the DOC policy which gives each of them a silent mandatory minimum sentence. This practice has developed over perhaps 15 years. It has not changed all that much during that time.

There are so many individuals who require SOTP that there is nowhere near enough beds to give them treatment until the very end of their sentence.

Since the BOP will not release those inmates without treatment, individuals, whether they have a two-, five-, or forty- year sentence, will not get released until the very end of their sentence. The facts presented established that there is a real silent mandatory minimum sentence imposed by the DOC. The fact that they do not have sufficient beds does not detract from the existence of the mandatory minimum sentence.

Applicants have shown that they have a liberty interest in having a meaningful review before the Iowa BOP before they can be released. The DOC unreasonably interferes with that right, by maintaining a pocket veto over that release until the very end of the person's sentence.

Applicants have also shown that present practice is unreasonable both in the short term and in the long term. There are things that could be done to ameliorate this situation. At a minimum, for example, the DOC and the BOP could talk to each other about when individuals should go to treatment. The DOC could identify individuals who could safely take treatment in halfway houses or on street parole. Such treatment is available in those locations, in fact, using the same curriculum.

There is a reason why the Applicants refer to this as a "silent mandatory minimum sentence". It is silent in that the minimum sentence was never imposed by a court. It was never authorized by the legislature. It is also silent because there is no written policy anywhere from the DOC.

There are remedies. There are systemic remedies and then there are remedies for the individual Applicants. The Court should find that the silent mandatory minimum sentence violates not only the various constitutions, but also state law. The Court should then return the matter to the District Court to fashion both individual and group remedies.

REQUEST TO BE HEARD IN ORAL ARGUMENT

The Appellant 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 APPELLANTS

ATTORNEY'S CERTIFICATE OF COSTS

I, Philip B. Mears, Attorney for the Appellant, hereby certify that the cost of preparing the foregoing Appellants' Page Proof Brief was $51.10.

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 APPELLANTS

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:

[X] this brief has been prepared in a proportionally spaced typeface using Times New Roman in size 14 and contains 13,947 words, excluding the parts of the brief exempted by Iowa Rs. App. P. 6.903(1)(f)(1)

/s/ Philip B. Mears — 12-18-2020
Signature — Date