IN THE SUPREME COURT OF IOWA
Supreme Court No. 20-0375

TRAVIS BOMGAARS,
KYLE CROSS,
ANTHONY GOMEZ,
JAMES HALL,
RAYMOND LABELLE,
SHANE MILLETT, and
KELLY SAND,
Applicants-Appellants,

vs.

STATE OF IOWA,
Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR JASPER COUNTY
THE HONORABLE BRAD MCCALL, JUDGE

APPELLEE'S FINAL BRIEF

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CERTIFICATE OF SERVICE

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ROUTING STATEMENT

In this case, a district court considering the combined postconviction claims of seven inmates determined the Iowa Department of Corrections is "not currently unreasonably withholding SOTP from male inmates." That determination, along with the district court's preliminary finding that Iowa's parole statutes create a statutory liberty interest in parole, represent the natural continuation of this Court's Opinion in *Belk v. State*, 905 N.W. 2d 185, 192 (2017). In *Belk*, this Court concluded that a district court, when properly presented with a claim under Iowa Code section 822.2(1)(*e*), "must decide if the parole system in Iowa, together with the IDOC's actions [related to the timing of SOTP treatment], unconstitutionally interfered with a liberty interest that would allow [the inmate] to obtain relief." *Id.* The Court's holding in *Belk* was entirely procedural in nature; the Court did not actually hold that Iowa inmates have a protected liberty interest in parole, nor did it comment on the merits of the inmate's claim. *Id.* As this appeal represents the first opportunity for this Court to address the merits of the issues first raised in *Belk*, the State agrees this case meets the criteria for retention. *See* Iowa R. App. P. 6.1101(2).

STATEMENT OF THE CASE

Nature of the Case

Each of the seven inmates in this case filed an application for postconviction relief in which he alleged that the Iowa Department of Corrections' (IDOC) method of sequencing sex offenders for placement into the Sex Offender Treatment Program (SOTP)—namely, the fact the method of sequencing inmates meant he had not yet been placed into treatment—amounted to an unlawful infringement on his right to obtain parole. The district court combined the seven inmates' postconviction claims, appointed counsel to represent them, and held a combined hearing on all seven cases. Following the submission of post-hearing briefs, the district court determined the inmates did have a protected liberty interest in parole, arising from the State of Iowa's parole statutes, but that the manner in which IDOC was sequencing inmates for placement in SOTP did not amount to an unconstitutional interference with that protected liberty interest. Counsel for the inmates moved the district court to amend or enlarge its ruling, but that motion was denied. The seven inmates now appeal.

Course of Proceedings

The State accepts Applicants-Appellants' course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

Iowa Code section 903A.2(1)(*a*)(2) provides that "an inmate required to participate in a sex offender treatment program shall not be eligible for any reduction of sentence until the inmate participates in and completes a sex offender treatment program established by the director [of the IDOC]." As of the date of the hearing in these seven inmates' combined postconviction cases, Sean Crawford—who was then the IDOC Treatment Director who oversaw the SOTP—testified there were approximately 1600 inmates within the IDOC prison system who were classified for placement in SOTP. Transcript of 9/18/2019 PCR Hearing, at 112:3–7. Due to the significant number of inmates needing treatment, inmates cannot all be placed into treatment immediately upon entering prison.

Crawford testified there has been a waiting list for placement in SOTP since he began working for IDOC in 2007. *Id.* at 53:17–54:15. At that point in time, SOTP was offered out of the Mount Pleasant Correctional Facility, and was a one-size-fits-all treatment program,

with only one waiting list (excepting inmates needing special needs treatment). *Id.* At some point between 2007 and 2013, the one-size-fits-all treatment was expanded into a three-track system designed to use assessment tools to separate inmates into different treatment programs based on risk levels, with separate waiting lists for each track. *Id.* at 61:15–62:21. When SOTP was still offered at Mount Pleasant, the typical length of treatment in the upper-level track was fourteen months. *Id.* at 64:3–10. As of 2013, the backlog of inmates requiring SOTP had resulted in a status quo where inmates would typically complete SOTP only months, or even weeks, prior to their discharge from prison. *Id.*

Crawford took over responsibility for program in 2013. *Id.* at 55:13–17. Since that time, Crawford has overseen significant changes in the way IDOC operates the SOTP. In 2015, a consistency committee was created to make sure inmates were receiving consistent treatment (both in terms of curriculum and treatment hours). *Id.* at 56:6–19. A new curriculum—the Good Lives model—was adopted to replace an outdated one. *Id.* at 55:18–56:19. Two of the tracks were combined to streamline administration of the program. *Id.* at 63:7–16. And, importantly, IDOC has worked to

shorten the length of sex offender programming, with the average length of the lowest risk SOTP class—the track applicable to all seven Applicants-Appellants—now typically running three months. *Id.* at 71:22–72:1; 95:6–23.

Beginning in the fall of 2015, the bulk of the SOTP was moved from Mount Pleasant to the Newton Correctional Facility, where it is now housed. *Id.* at 64:15–21. The only SOTP class offered outside of Newton is a single class at the Iowa Medical and Classification Center, for inmates with significant health issues. *Id.* at 82:11–16. SOTP is now offered to inmates in four different tracks, each with its own waiting list: track one, for low and low-moderate risk offenders; track two, for high risk offenders; a special needs track; and a Spanish-language track. *Id.* at 65:21–23; 93:1–94:1. As of the date of the hearing in these seven inmates' combined postconviction cases, the waiting list for track one was 419 inmates long; the waiting list for track two was 191 inmates long; the waiting list for special needs was 126 inmates long; and the waiting list for Spanish-language was twenty-seven inmates long. *Id.* at 65:21–23.

When inmates classified for SOTP arrive at the Newton Correctional Facility, they are assessed and placed on the appropriate

SOTP waiting list. *Id.* at 66:8–15. Inmates are placed on the SOTP waiting lists according to their tentative discharge dates (TDDs). *Id.* In that way, IDOC is able to sequence all SOTP-required inmates for treatment impartially, based upon a single, comparable data point that ensures everyone will have the opportunity to complete treatment prior to discharge. *Id.* at 66:8–15; 100:5–20. The only exceptions are for special circumstances; inmates without special sentences are given a three-year adjustment to their TDD in order to allow a window for a supervised transition out of the prison, and inmates with extremely lengthy sentences who have served more than twenty years are allowed to enter treatment out of sequence. *Id.* at 68:15–69:10; 97:10–98:15.

Sean Crawford explained that once two additional SOTP facilitators were hired, which was in the works when the combined postconviction hearing took place, SOTP classes would to be running at full capacity—from 6:00 a.m. to evening hours, using all available space inside the prison. *Id.* at 78:6–23; 83:7–84:12. Importantly, Crawford also testified IDOC does not intentionally delay treatment for any inmate; once an inmate's name is next on the waiting list

based on his TDD, he is placed in the next available class (unless his disciplinary status prevents class attendance). *Id.* at 106:6–108:2.

Additional facts will be addressed, as necessary, in the argument portions of this brief.

ARGUMENT

I. Of the seven inmates whose cases were combined before the district court, only one—Kyle Cross—presented a claim that was ripe for judicial review

Preservation of Error

Error has been preserved because the State raised the issue before the district court, and the district court's Ruling necessarily rejected the argument in considering the claims raised by each of the seven inmates. *See, e.g., Fassett v. State*, No. 15-0816, 2016 WL 3554954, at *3 (Iowa Ct. App. June 29, 2016).

Standard of Review

Postconviction proceedings are normally reviewed for errors at law. *Castro v. State*, 795 N.W.2d 789, 792 (Iowa 2011). However, to the extent Applicants-Appellants allege violations of their constitutional rights, their claims are reviewed de novo. *Id.*

Merits

The district court improperly considered the claims raised by six of the seven inmates in this combined matter—Travis Bomgaars,

Anthony Gomez, James Hall, Raymond LaBelle, Shane Millett, and Kelly Sand—as none of those claims were ripe for review. More specifically, none of those six inmates could show his lack of SOTP participation had caused the IBOP to deny him parole because each had received a denial letter from the IBOP which included the denial code DR7. *See* Exhibit C, at 20, Conf. App. 63; Exhibit D, at 27, Conf. App. 92; Exhibit F, at 8, Conf. App. 133; Exhibit G, at 15, Conf. App. 150; Exhibit H, at 11, Conf. App. 164; Exhibit I, at 31, Conf. App. 202. The explanatory text accompanying denial code DR7 states, "The seriousness of your crime or your criminal history suggests to the Board you have not yet served enough time to warrant an early release." *Id.* Furthermore, Andrea Muelhaupt, the IBOP witness who testified before the district court, explained denial code DR7 is sometimes listed without any other denial codes because it is outcome-determinative. Transcript of 9/18/2019 PCR Hearing, at 40:12–41:6. Applicants-Appellants Gomez and Sand had also received other denial codes which indicated a lack of SOTP was not the lone issue causing the IBOP from granting them a parole. *See* Exhibit F, at 8, Conf. App. 133; Exhibit G, at 15, Conf. App. 150.

"A case is ripe for adjudication when it presents an actual, present controversy, as opposed to one that is merely hypothetical or speculative." *State v. Tripp*, 776 N.W.2d 855, 859 (Iowa 2010). Because Applicant-Appellant Cross was the only inmate whose denial letter from the IBOP did not include a DR7 denial code, his was the only case before the district court that presented a situation where a lack of programming appeared to be "the sole remaining hurdle for [him] to overcome on his path to early release." *See Fassett*, 2016 WL 3554954, at *7. Because none of the other inmates could demonstrate that they would have been granted parole if they had already completed SOTP, their claims were not ripe for adjudication and the district court improperly considered them.

II. Inmates do not have a protected liberty interest in parole

Preservation of Error

The State concedes error has been preserved on this issue. Error was preserved by the district court's ruling on this issue. *See, e.g., Fassett v. State*, No. 15-0816, 2016 WL 3554954, at *3 (Iowa Ct. App. June 29, 2016).

Standard of Review

Postconviction proceedings are normally reviewed for errors at law. *Castro v. State*, 795 N.W.2d 789, 792 (Iowa 2011). However, to

the extent Applicants-Appellants allege violations of their constitutional rights, their claims are reviewed de novo. *Id.*

Merits

The Iowa Supreme Court has never held inmates have a protected liberty interest in parole. The majority opinion in *Belk* determined only that the inmate could proceed with his claim under Iowa Code section 822.2(1)(*e*), going so far as to state explicitly, "We are not commenting on the merits of Belk's claims under section 822.2(1)(*e*)." *Belk*, 905 N.W.2d at 192 (also stating "[t]aking these allegations as true, a court could find Iowa's parole law creates a liberty interest," and "[i]f the court so finds, the court must then consider whether the IDOC's actions as alleged has unconstitutionally violated this liberty interest"). The dissent did not similarly limit its analysis to the ability to proceed under Iowa Code chapter 822, because, in Justice Waterman's view, the inmate's case fell so short on the merits that he failed to state a claim upon which relief could be granted. *Id.* at 193. More specifically, Justice Waterman stated:

> [E]ven under notice pleading, Belk alleges no facts to show that he is "unlawfully held in custody or other restraint" within the meaning of that section. A motion to dismiss tests the legal sufficiency of the petition. . . . "We will affirm a district court ruling that granted a

> motion to dismiss when the petition's allegations, taken as true, fail to state a claim upon which relief may be granted." That is what we have here.
>
> Belk has no constitutional right to release on parole. The power to grant parole belongs to the executive branch—it is not a power the judiciary wields. Thus, "parole decisions are legitimately within the discretion of the executive branch."

Id. at 194–95 (internal citations omitted). Among the cases cited by Justice Waterman in support of his position were prior Iowa Supreme Court cases finding inmates have no right to a parole. *See State v. Cronkhite*, 613 N.W.2d 664, 667 (Iowa 2000) ("There is no constitutional or inherent right to be conditionally released from prison prior to the expiration of a valid sentence"); *State v. Wright*, 309 N.W.2d 891, 894 (Iowa 1981) ("Neither does he have a constitutional right to parole.").

Applicants-Appellants' reliance upon *Bonilla v. Iowa Board of Parole*, 930 N.W.2d 751 (Iowa 2019) is misplaced. In *Bonilla*, the Iowa Supreme Court dealt with the specific issue of SOTP participation for juvenile offenders with life sentences, and the extent to which those juvenile offenders have a Constitutional right under the Eighth Amendment to a "meaningful opportunity to obtain

release based on demonstrated maturity and rehabilitation" *Id.* at 770. The specific discussion in that case is therefore inapplicable to the facts presented by the adult offenders in these combined cases, and their argument that "[i]t is quite explicit in *Bonilla* that [the IDOC] cannot impose unreasonable barriers to a meaningful consideration for release" is not grounded in an accurate reading of the cited caselaw.

III. The district court correctly found the IDOC practice of sequencing inmates for placement into SOTP based on the inmates' tentative discharge dates did not amount to an unreasonable infringement on a protected liberty interest in parole

The State concedes error has been preserved on this issue. Error was preserved by the district court's ruling on this issue. *See, e.g., Fassett v. State*, No. 15-0816, 2016 WL 3554954, at *3 (Iowa Ct. App. June 29, 2016).

Standard of Review

Postconviction proceedings are normally reviewed for errors at law. *Castro v. State*, 795 N.W.2d 789, 792 (Iowa 2011). However, to the extent Applicants-Appellants allege violations of their constitutional rights, their claims are reviewed de novo. *Id.*

Merits

Setting aside the fact Applicants-Appellants' reliance upon the Iowa Supreme Court's language in *Bonilla* is misplaced— Applicants-Appellants ask the Court to employ language that explicitly applies to the review of a claim brought by a juvenile offender with a life sentence— Applicants-Appellants' claims must fail because the IDOC policies and practices at issue are not unreasonable.[1] The fact is the IDOC is not intentionally "withholding" SOTP from any inmate; the only thing causing Applicants-Appellants to wait for treatment is the fact there are hundreds of other inmates with earlier discharge dates who need to be placed into SOTP first. Sean Crawford testified the IDOC does not purposely delay SOTP for any inmate, but instead works at capacity in order to work through the waiting lists as fairly and efficiently as possible. Insofar as "reasonable" means fair, logical, sensible, or of sound judgment, it is hard to conceive of a more reasonable practice than that currently employed by the IDOC. In fact, the practice of sequencing placement of inmates into SOTP

[1] The proper analysis should be framed as described in *Belk*, where the Iowa Supreme Court concluded an inmate "may proceed under Iowa Code section 822.2(1)(*e*) when alleging an unconstitutional denial of his or her liberty interest based on the IDOC's failure to offer SOTP when SOTP is a necessary prerequisite to parole." 905 N.W.2d at 191.

based upon the impartial order of their discharge dates may be, literally, the most reasonable practice possible.

The district court properly concluded that IDOC's SOTP waiting list is the fairest, most logical means of ensuring *all* SOTP-required inmates have an opportunity to complete treatment prior to discharge. It may be appealing, in theory, to engage in case-by-case analysis for each of the seven inmates whose combined cases are now being considered, but what of the other 1600 inmates requiring SOTP whose cases are not before this Court? How can IDOC (or anyone else) be expected to fairly *and consistently* sequence inmates into treatment based on 1600 individualized, subjective determinations that boil down to "who deserves treatment first"?

Take, for example, a comparison of the first two Applicants-Appellants listed in the caption of this appeal, using facts listed in their brief. *See* Applicants-Appellants' Brief at 22–23, 28–29. At the time of the combined hearing in this case, Travis Bomgaars had already served seven years in prison, and had a low risk level as determined by IDOC risk assessments. *Id.* at 22–23. In contrast, Kyle Cross had served only one-and-a-half years in prison, and had a low/moderate risk level as determined by the same risk assessments.

Id. at 28–29. Given those data points, it would appear obvious that Bomgaars should receive treatment first. After all, he had served more than four times as long in prison and has a lower risk assessment. But Bomgaars is serving a forty-year sentence while Cross is only serving ten years, meaning Cross is tentatively scheduled to discharge his sentence more than eight years before Bomgaars will discharge his. As a result, at the time of the combined postconviction hearing, Cross was number 209 of 419 on the SOTP Track 1 waiting list, while Bomgaars was 392 of 419. *Id.* at 22, 28.

Are those waiting list numbers "fair" relative to each other? Is there even an objectively correct answer to that question? More importantly, given the fact each inmate's placement on the SOTP waiting list necessarily impacts each of the other 1600 inmates requiring SOTP, are those numbers "fair" relative to everyone else? No analysis of the individual facts for Bomgaars, Cross, or the other five Applicants-Appellants is meaningful absent similar comparative analysis with the individual facts for the other 1600 inmates who require placement in SOTP. Because similar information for the other 1600 inmates who are not parties to this case is obviously not a part of the record before this Court, discussion of the individual facts

for the seven Applicants-Appellants is not helpful.

Additionally, Applicants-Appellants' focus on the district court's mathematics is largely unimportant. As the district court emphasized in its Ruling on Applicants-Appellants' Motion to Amend or Enlarge, the precise rate at which IDOC is able to chip away at the size of the SOTP waiting lists does not affect its conclusions regarding the reasonableness of IDOC's current efforts to efficiently process the 1600 SOTP-required inmates through treatment, given the relevant limitations and constraints IDOC faces. *See* 2/28/2020 Ruling on Motion to Amend or Enlarge, at 2–3, App. 176–77. Even assuming Applicants-Appellants' stated estimate of a one-hundred-person-per-year reduction in the SOTP waiting list is correct,[2] the district court's central findings about the reasonableness of the waiting list would still hold true. Furthermore, it should be noted that the total elimination of the SOTP waiting list is not a particularly meaningful point of reference in and of itself, since every reduction of the waiting

[2] The State does not concede this point. While Applicants-Appellants correctly point out that the number of inmates on the SOTP waiting list would only be reduced by the number of inmates who successfully complete treatment (as opposed to the number who are placed into treatment) less the number of new IDOC inmates requiring SOTP, their estimate appears to significantly understate the potential yearly reduction going forward. This is so because Applicants-Appellants, like the district court, base their calculations upon an assumption of completions with eleven SOTP facilitators, rather than the fully-staffed complement of thirteen IDOC hopes to maintain going forward.

list will push an inmate's treatment completion date further from his TDD. Because no inmate can reasonably claim an expectation of being paroled immediately upon entry into prison, the waiting list would become functionally meaningless at some point before it ceases to exist.

At its core, Applicants-Appellants' entire case seems to be built on the presumption they can show the unreasonableness of the IDOC's policies and practices by pointing out the fact the IBOP plays no part in the implementation of the SOTP waiting lists (which they believe would presumably lead to a more individualized assessment of SOTP readiness for each inmate). But again, this case brought against the IDOC under chapter 822 of the Iowa Code should not—cannot—become a referendum on the policies and practices of the IBOP. If inmates wish to make a claim against the IBOP on the basis it is not properly exercising the parole authority vested in it by the legislature, then they must do so directly via chapter 17A.

The related idea that the IDOC is exercising a "pocket veto" on the parole consideration of inmates requiring SOTP misses the mark for two reasons. First, the term implies a considered rejection of a decision made by another entity, and in this case the IDOC is not

intentionally attempting to delay or deny anyone an opportunity at parole. Instead, as described above, the testimony and evidence shows a treatment program which has expanded to effectively fill an entire prison but is still running at capacity, with the unfortunate result being that the IDOC is simply unable to provide immediate access to SOTP for all of the hundreds of male inmates who require it. Second, the term implies that the IDOC can use SOTP as a means of preventing the IBOP from independently exercising its authority to parole inmates, which is simply not true. The IBOP is well aware it can choose to grant parole to any inmate it wishes, whether or not he has completed SOTP and been recommended for release by the IDOC. Transcript of 9/18/2019 PCR Hearing, at 36:21–37:8.

Finally, the State would note that Applicants-Appellants' arguments about sex offender recidivism rates and the appropriateness of releasing male inmates on parole so they can participate in SOTP in the community corrections system are not based in actual testimony or evidence within the record. No witness spoke to the various statistics and recidivism rates found in the exhibits offered by Applicants-Appellants, and Sean Crawford was not able to testify about what specific resources the judicial districts even

have to devote to SOTP programming. Transcript of 9/18/2019 PCR Hearing, at 94:16–96:17. Instead, Crawford testified as to his personal belief that any plan releasing low risk inmates and forcing judicial districts to take on primary responsibility for administering SOTP would result in chaos, with the length of treatment increasing dramatically and the unequal and uncertain resources and staffing among the judicial districts presenting hurdles that would hinder the State's ability to protect the public by ensuring inmates receive necessary SOTP programming. *Id.*

But even if this Court were to find both that inmates have a protected liberty interest created by Iowa's parole statutes and that the IDOC has unconstitutionally violated that protected liberty interest, the Court would still face the million-dollar question Applicants-Appellants cannot answer: What, exactly, can this Court lawfully order the IDOC to do to remedy such a violation? The most obvious solution, with the Applicants-Appellants' interests in mind, would be to order that they be placed into SOTP immediately. But, of course, that solution would ignore the fact that any benefit received by these seven individuals would result in an equal, but opposite, harm to all other inmates with earlier discharge dates who were

ahead of them on the waiting list. In effect, the zero-sum game that exists because the IDOC is operating SOTP at full capacity means someone (many someones, actually) must wait for treatment. These seven inmates may be frustrated they are not currently at the top of any of the SOTP waiting lists, but they have no more right to treatment than any other inmate waiting his turn.

Perhaps sensing the inherent unfairness of such a direct solution, Applicants-Appellants have instead presented this Court with a number of proposals that would have the Court order large scale, structural changes to the policies and practices of both the IDOC and IBOP.[3] Applicants-Appellants' proposals are deeply ironic; in the very same argument in which they accuse the IDOC of having violated the principle of separation of powers, they openly invite this Court to violate that principle as a means of benefitting themselves. They have suggested, among other things, the Court substitute its own judgment for that of the IDOC by determining how best to operate the SOTP waiting lists, when to recommend inmates for community-based SOTP, and even how to allocate its budget to

[3] The State must again point out that this case is not a proper vehicle for the Court to either find fault with the IBOP's policies and procedures or order the IBOP to do anything.

increase the capacity of the SOTP at the potential expense of other necessities like facility modernization or correctional officer staffing. On this point, Justice Waterman's dissent in *Belk* is particularly relevant:

> Belk's end game—the relief he seeks—is for the court to issue an injunction requiring Iowa prison officials to offer the SOTP for male offenders earlier. It is not the judiciary's role to control the timing of prison rehabilitation programs. That is for the executive branch. It is worth repeating here Justice Scalia's warning against the use of structural injunctions in prison reform litigation:
>
> > Structural injunctions . . . turn[ ] judges into long-term administrators of complex social institutions such as schools, prisons, and police departments. Indeed, they require judges to play a role essentially indistinguishable from the role ordinarily played by executive officials . . . . The drawbacks of structural injunctions have been described at great length elsewhere. This case illustrates one of their most pernicious aspects: that they force judges to engage in a form of factfinding-as-policymaking that is outside the traditional judicial role. The factfinding judges traditionally engage in involves the determination of past or present facts based (except for a limited set of materials of which courts may take "judicial notice") exclusively upon a closed trial record. That is one reason why a district judge's factual findings are entitled to plain-error review: because

having viewed the trial first hand he is in a better position to evaluate the evidence than a judge reviewing a cold record. In a very limited category of cases, judges have also traditionally been called upon to make some predictive judgments: which custody will best serve the interests of the child, for example, or whether a particular one-shot injunction will remedy the plaintiff's grievance. When a judge manages a structural injunction, however, he will inevitably be required to make very broad empirical predictions necessarily based in large part upon policy views—the sort of predictions regularly made by legislators and executive officials, but inappropriate for the Third Branch.

. . .

It is important to recognize that the dressing-up of policy judgments as factual findings is not an error peculiar to this case. It is an unavoidable concomitant of institutional-reform litigation. When a district court issues an injunction, it must make a factual assessment of the anticipated consequences of the injunction. And when the injunction undertakes to restructure a social institution, assessing the factual consequences of the injunction is necessarily the sort of predictive judgment that our system of government allocates to other government officials.

But structural injunctions do not simply invite judges to indulge policy

> preferences. They invite judges to indulge *incompetent* policy preferences. Three years of law school and familiarity with pertinent Supreme Court precedents give no insight whatsoever into the management of social institutions.
>
> We should heed Justice Scalia's warning.

Belk, 905 N.W.2d at 197 (citation omitted). This Court should not fall prey to the suggestion, however attractive, that the best solution in this case is for the Court to attempt to "fix" the manner in which the IDOC administers SOTP by supplanting the considered judgments and determinations of the IDOC with its own personal policy preferences. Instead, this Court should heed Justice Scalia's warning, as Justice Waterman urged the last time this issue was raised before this Court.

IV. The district court correctly found the IDOC practice of sequencing inmates for placement into SOTP based on the inmates' tentative discharge dates did not amount to a separation of powers violation

The State concedes error has been preserved on this issue. Error was preserved by the district court's ruling on this issue. *See, e.g., Fassett v. State*, No. 15-0816, 2016 WL 3554954, at *3 (Iowa Ct. App. June 29, 2016).

Standard of Review

Postconviction proceedings are normally reviewed for errors at law. *Castro v. State*, 795 N.W.2d 789, 792 (Iowa 2011). However, to the extent Applicants-Appellants allege violations of their constitutional rights, their claims are reviewed de novo. *Id.*

Merits

Applicants-Appellants allege the IDOC has violated the separation-of-powers principle in two ways: first, that the utilization of a waiting list for placing inmates into SOTP has usurped the sentencing power of the judiciary; and second, that the IDOC has usurped the power of the IBOP by effectively denying the possibility of parole for SOTP-classified inmates. In support of the former argument, Applicants-Appellants have cited two "somewhat related" cases where the Iowa Supreme Court found no equal protection violations. In support of the latter, they have cited nothing.

The first case cited by Applicants-Appellants—*State v. Phillips*, 610 N.W.2d 840, 842–43 (Iowa 2000)—explains that while the IBOP has "authority to determine parole eligibility and work release," the legislature does have constitutional authority to restrict eligibility for parole and work release, as "[t]he parole system is solely a creature of

the legislature." The second case cited by Applicants-Appellants — *Doe v. State*, 688 N.W.2d 265, 270–713 (Iowa 2000)—dealt with a claim the IDOC was violating the separation-of-powers principle by screening inmates for referral into the sexually violent predator assessment (SVPA), rendering those inmates unable to be considered for early release on parole. In that case, the Iowa Supreme Court explained "[s]entencing and parole . . . are different matters," and "in Iowa, most parole decisions are legitimately within the discretion of the executive branch," before holding no violation had occurred. *Id.* at 271.

The first of Applicants-Appellants' two separation-of-powers arguments is resolved by reading the cases they have provided to the Court. As in *Doe*, the IDOC has not actually attempted to modify the sentence of any inmate, but has simply sought to abide by the legislature's requirement that inmates "required to participate in a sex offender treatment program" participate in and complete SOTP so that they are eligible for a reduction in sentence pursuant to Iowa Code section 903A.2(1)(a)(2). *See Doe*, 688 N.W.2d at 271 ("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.").

Resolution of Applicants-Appellants' second separation-of-powers argument is even simpler. A violation of the separation of powers requires, at its most fundamental level, that one branch of government attempt to aggrandize for itself a power which properly lies with another of the branches. By definition, one agency within the Executive Branch cannot violate the principle of separation of powers by improperly encroaching on the responsibilities of another agency within the same branch. Whatever legal impropriety may result from such an encroachment would be of a different kind altogether. But even if the separation-of-powers violation suggested in this second line of argument were possible, it would be defeated by the testimony of Andrea Muelhaupt, who testified that the IBOP is always able to grant or deny a parole, regardless of the IDOC's position or recommendation in a particular case. Transcript of 9/18/2019 PCR Hearing, at 36:21–37:8.

V. The district court correctly determined Applicants-Appellants were not entitled to appointed counsel at State expense

The State concedes error has been preserved on this issue. Error was preserved by the district court's ruling on this issue. *See, e.g., Fassett v. State*, No. 15-0816, 2016 WL 3554954, at *3 (Iowa Ct. App. June 29, 2016).

Standard of Review

The standard of review for rulings on questions of statutory interpretation is for correction of errors at law. *State v. Watkins*, 914 N.W.2d 827, 837 (Iowa 2018).

Merits

Applicants-Appellants argue they are entitled to bring their claim(s) under Iowa Code sections 822.2(1)(*a*), (*c*), and/or (*e*). The distinction between these statutory paragraphs is important—Iowa Code section 822.2(1)(*e*), unlike sections 822.2(1)(*a*) and (*c*), does not entitle inmates to legal representation at State expense. *See* Iowa Code § 822.5 ("Unless the applicant is confined in a state institution and is seeking relief under section 822.2, subsection 1, paragraphs "*e*" and "*f*", the costs and expenses of legal representation shall also be made available to the applicant in the preparation of the application, in the trial court, and on review if the applicant is unable to pay.")

Iowa Code section 822.2(1)(*a*) relates to "any person who has been convicted of, or sentenced for, a public offense" and wishes to allege "[t]he conviction or sentence was in violation of the constitution of the United States or the Constitution or laws of this state." Iowa Code section 822.2(1)(*c*) is closely related to section 822.2(1)(*a*), and allows a person to attack an underlying criminal sentence on the basis "the sentence exceeds the maximum authorized by law."

Despite Applicants-Appellants' arguments otherwise, the Iowa Supreme Court already considered this precise issue in *Belk*, and determined the claim they now raise is properly raised under section 822.2(1)(*e*). 905 N.W.2d at 191. In so holding, the Iowa Supreme Court considered, and rejected, the argument that Belk's claim should be allowed to proceed under 822.2(1)(*a*). *See Belk*, 905 N.W.2d at 192 ("We believe section 822.2(1)(*a*) is inapposite, because Belk is not complaining about his 'conviction or sentence.'"). There is no sound reason in the law for this Court to deviate from the explicit holding of the *Belk* Opinion. Therefore, Applicants-Appellants are not entitled to appointed counsel at State expense. *See* Iowa Code § 822.5. Furthermore, given the explicit statutory language of Iowa Code

section 822.5, even if the district court had the inherent power to appoint counsel to assist the court in conducting the combined proceeding at the trial court level, that inherent power does not carry with it the power to order the State to compensate appointed counsel. *See Maghee v. State*, 639 N.W.2d 28, 31 (Iowa 2002) (considering the same question in a postconviction-relief action brought under what is now section 822.2(1)(*f*)).

CONCLUSION

The State of Iowa requests that this Court affirm the district court's dismissal of Applicants-Appellants' postconviction claims on the basis the Iowa Department of Corrections is not unreasonably withholding from them placement into the Sex Offender Treatment Program, or alternatively, on the basis inmates have no protected liberty interest in parole. The State of Iowa further requests that this Court affirm the district court's finding that inmates raising the type of claim authorized by *Belk* are not entitled to appointed counsel at State expense.

REQUEST FOR NONORAL SUBMISSION

The State believes that the parties' briefs are sufficient to apprise the Court of the relevant issues, and thus does not request to be heard at oral argument. However, in the event that oral argument is scheduled based on the request made by Applicants-Appellants, the State requests to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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