**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A20-0677**

Robert Louis Bellanger Fohrenkam,
Appellant,

vs.

Paul Schnell,
Respondent.

**Filed November 23, 2020**
**Affirmed**
**Cleary, Judge**[*]

Rice County District Court
File No. 66-CV-20-341

Robert Louis Bellanger Fohrenkam, Faribault, Minnesota (pro se appellant)

Keith Ellison, Attorney General, Corinne Wright-MacLeod, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Frisch, Presiding Judge; Johnson, Judge; and Cleary, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

## U N P U B L I S H E D  O P I N I O N

**CLEARY**, Judge

Appellant challenges the denial of his petition for writ of habeas corpus, arguing that the Minnesota Department of Corrections (DOC) violated his due-process and equal-protection rights by refusing to let him participate in the Challenge Incarceration Program under Minn. Stat. § 244.171 (2018). We affirm.

## FACTS

On August 20, 2018, the district court sentenced appellant Robert Louis Bellanger Fohrenkam, who had pleaded guilty to a first-degree controlled-substance crime, to a 110-month presumptive prison sentence. Once in custody at the Minnesota Correctional Facility-St. Cloud, Bellanger Fohrenkam applied for the Challenge Incarceration Program (CIP).

CIP is a three-phase program created by the legislature "to prepare the offender for successful reintegration into society" through educational programs, a rigorous physical program, and vocational training. Minn. Stat. § 244.171. Each phase lasts "at least six months." Minn. Stat. § 244.172 (2018). During phase I of CIP, offenders remain at the correctional facility to receive training. *Id*. To advance to phase II, the offender must complete all intensive treatment, education, and work programs as set by the DOC. *Id*., subd. 1. Phase II consists of intensive supervision, which may require daily reporting, while the offender is in the community. *Id*., subd. 2. Finally, the DOC determines at phase III whether the offender has successfully completed the program. *Id*., subd. 3. If so, the offender may be placed on supervised release for the remainder of the sentence. *Id*.

On November 13, 2018, the DOC denied Bellanger Fohrenkam admission to CIP. On November 30, 2018, a program director notified Bellanger Fohrenkam that the decision was "final and cannot be appealed." On November 5, 2019, Bellanger Fohrenkam received another notice from CIP that his file was sent to the assistant commissioner of corrections and that his request to enter CIP was again denied.

On February 11, 2020, Bellanger Fohrenkam filed a habeas corpus petition with the district court, alleging he was denied admission to CIP because he "sold heroin laced with Fentanyl and the substance allegedly caused an overdose death of one of [his] customers."

On February 26, 2020, the district court denied Bellanger Fohrenkam's habeas corpus petition without further hearing. Relying on *Hines v. Fabian*, the district court determined that offenders do not have a constitutionally-protected liberty interest in admission to CIP because admission is entirely discretionary. 764 N.W.2d 849 (Minn. App. 2009), *review denied* (Minn. July 22, 2009). The district court did not address Bellanger Fohrenkam's equal-protection claim. This appeal follows.

## D E C I S I O N

### I. The DOC did not violate Bellanger Fohrenkam's due-process rights.

Questions of law pertaining to a habeas corpus petition are subject to de novo review. *Aziz v. Fabian,* 791 N.W.2d 567, 569 (Minn. App. 2010). Whether a given case requires due process is a question of law, which this court reviews de novo. *Carrillo v. Fabian*, 701 N.W.2d 763, 768 (Minn. 2005). The due-process analysis requires two inquiries: (1) whether the complainant has a liberty or property interest with which the state has interfered, and (2) if the court finds a deprivation of such an interest, whether the

procedures attendant upon that deprivation were constitutionally sufficient. *Id*. The burden rests on the petitioner to establish a violation of his rights at the habeas corpus proceeding. *Payne v. Erickson*, 399 N.W.2d 126, 127 (Minn. App. 1987).

As to the first inquiry of the due-process analysis, Bellanger Fohrenkam asserts that admission to CIP is a liberty interest with which the state has interfered. We answered this question directly in *Hines*. 764 N.W.2d at 855. In *Hines*, this court distinguished a supervised release date from the provisions of CIP. *Id.* at 854-56; *see Carrillo*, 701 N.W.2d at 773 (recognizing a supervised release date as a constitutionally protected liberty interest). First, CIP has three phases, each with contingencies that prevent mere admission into the program from "inevitably" affecting the length of the offender's imprisonment. *Hines*, 764 N.W.2d at 853. Second, the DOC's "initial decision regarding an inmate's admission into the CIP is entirely discretionary." *Id*. (noting the DOC has discretion to deny admission to offenders who meet all admission criteria). Third, none of the three phases of CIP has a fixed duration. *Id*. at 850, 853 ("at least six months"). Fourth, Minnesota's sentencing scheme provides an expectation for mandated supervised-release dates at the time of sentencing, whereas CIP provides a mere possibility of an accelerated release date. *Id*. at 854. Fifth, CIP is a rehabilitative program, which this court previously held did not create a protected liberty interest. *Id*. (citing *State ex rel. McMaster v. Young*, 476 N.W.2d 670, 674 (Minn. App. 1991), *review denied* (Minn. Dec. 13, 1991)).

Bellanger Fohrenkam apparently concedes *Hines* controls, instead arguing *Heilman v. Courtney*, 926 N.W.2d 387 (Minn. 2019), overrules *Hines* because it recognizes CIP as an exception to the general statutory scheme of the mandatory two-thirds minimum

term of imprisonment. In *Heilman*, the Minnesota Supreme Court addressed a narrow statutory construction issue to conclude an offender is "released from prison" at the beginning of phase II of CIP. 926 N.W.2d at 395 (interpreting the term "release" in the context of first-degree DWI conditional release and CIP). The Minnesota Supreme Court only addressed phase II of the CIP, where offenders are under intensive supervision in the community. *Id*. Because Bellanger Fohrenkam was neither admitted to CIP, nor had he begun phase II of CIP, *Heilman* does not control. It is also worth noting the court in *Heilman* did not address due-process claims or cite to *Hines* at any point. For these reasons, we are not convinced that *Heilman* overrules *Hines*, or that *Heilman* controls.

Next, Bellanger Fohrenkam asserts that the mandatory language in the CIP statute contradicts this court's conclusion in *Hines* that admission is "entirely discretionary." The United States Supreme Court expressed disapproval of the emphasis courts were placing on "shall," "must," and other words expressing mandatory actions in determining whether a state has created a liberty interest. *Sandin v. Conner*, 515 U.S. 472, 479-84, 115 S. Ct. 2293, 2298-2301 (1995). Instead, the Court focused on the "nature of deprivation" to determine which interests are constitutionally protected. *Id*. Because our framework in *Hines* focused on five aspects of the nature of deprivation under CIP, we are unpersuaded by Bellanger Fohrenkam's argument. 764 N.W.2d at 853-55.

Bellanger Fohrenkam then asks us to overrule our own precedent arguing that *Hines* is "fundamentally flawed as a matter of law" and violates the Supremacy Clause as contrary to *Greenholtz v. Inmates of Neb. Penal and Corr. Complex*, 442 U.S. 1, 11, 99 S. Ct. 2100, 2105 (1979). In *Greenholtz*, the United States Supreme Court held the possibility of parole

"provides no more than a mere hope that the benefit will be obtained," which does not amount to a constitutionally-protected liberty interest. *Id*. Parole revocation, on the other hand, provides a liberty interest to participate in normal life outside of prison. *Id*. at 9, 99 S. Ct. at 2105. "A constitutionally-protected liberty interest arises from a legitimate claim of entitlement rather than simply an abstract need or desire or a unilateral expectation." *Carrillo*, 701 N.W.2d at 768. Because Bellanger Fohrenkam remains at the correctional facility and has not been afforded any sort of freedom akin to that of a parolee, he has only an anticipatory interest that is not afforded due process under *Hines* or *Greenholtz*. *Hines*, 764 N.W.2d at 855; *Greenholtz*, 442 U.S. at 10-11, 99 S. Ct. at 2105. As such, *Hines* is consistent with federal case law and Bellanger Fohrenkam has not offered compelling reasons to overrule our own precedent.

We conclude Bellanger Fohrenkam has no constitutionally-protected liberty interest in admission to CIP. As such, we do not reach the second inquiry of our due-process analysis.

## II. The DOC did not violate Bellanger Fohrenkam's right to equal protection.

The federal and state constitutions guarantee equal protection under the law. U.S. Const. amend. XIV, § 1; Minn. Const. art. 1, § 2. "An essential element of an equal protection claim is that the persons claiming disparate treatment must be similarly situated to those to whom they compare themselves. Similarly situated groups must be alike in all relevant respects." *St. Cloud Police Relief Ass'n v. City of St. Cloud*, 555 N.W.2d 318, 320 (Minn. App. 1996) (quotation and citations omitted), *review denied* (Minn. Jan. 7, 1997). Because Bellanger Fohrenkam's equal-protection claim does not involve a member of a

suspect class or violation of a fundamental constitutional right, we ask whether there is a rational basis for treating persons differently. *Kolton v. County of Anoka*, 645 N.W.2d 403, 411 (Minn. 2002).

Bellanger Fohrenkam appeared to allege in his habeas corpus petition that his right to equal protection was violated as the DOC did not "treat him similarly to those who have participated in CIP with first-degree controlled-substance convictions." Bellanger Fohrenkam repeats similar claims on appeal "due to the fact that other offenders have been allowed to participate in the program for the same crime raises equal protection concerns." We understand Bellanger Fohrenkam's argument to be that because other offenders with the same crime have been admitted to CIP, he too should have been admitted. As a preliminary matter, Bellanger Fohrenkam has not provided us with the initial denial from the DOC, or the two other denial notices he alleges CIP provided. Because the burden rests on the challenger to demonstrate there is no rational basis for the discrimination, Bellanger Fohrenkam has not met his burden. *State v. Frazier*, 649 N.W.2d 828, 832-34, 837 (Minn. 2002).

Even accepting Bellanger Fohrenkam's proffered reasons for denial, those reasons still fit within the DOC's statutory discretion for several reasons. *Hines*, 764 N.W.2d at 853 (noting discretionary criteria include: prior treatment program failures, correctional facility adjustment and discipline record, supervision failures, criminal history, documented aggravated-offense characteristics, victim impact or community concern, upward durational departures, residential ties to the state, mental health status, and health and fitness status). Because of the myriad of discretionary factors, an equal-protection

claim based merely on a group sharing the same type of offense is too general to qualify as a "similarly situated group" under CIP. Similarly situated groups must be alike in *all* relevant aspects. *St. Cloud Police Relief Ass'n*, 555 N.W.2d at 320. Whether Bellanger Fohrenkam's first-degree controlled-substance offense presents community concerns is essential to his equal-protection claim. Here, Bellanger Fohrenkam's proffered reasons for denial give rise to the community concern criterion because his first-degree controlled-substance crime allegedly resulted in death for one of his customers. Bellanger Fohrenkam also has an extensive criminal history and correctional facility discipline record. Any of these criterion alone would have provided a rational basis for the DOC to exercise its discretion to deny Bellanger Fohrenkam admission into CIP.

**Affirmed.**