STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0829

Max Carl Werlich,
Appellant,

vs.

Paul Schnell, et al.,
Respondents.

Filed February 18, 2020
Affirmed
Rodenberg, Judge

Washington County District Court
File No. 82-CV-18-4201

Bradford Colbert, Legal Assistance to Minnesota Prisoners, St. Paul, Minnesota; and

Thomas Schultz (pro hac vice), Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, District of Columbia (for appellant)

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

Considered and decided by Reilly, Presiding Judge; Rodenberg, Judge; and Klaphake, 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

RODENBERG, Judge

Appellant Max Carl Werlich challenges the district court's dismissal of his claims for injunctive and declaratory relief from the determination of respondents Tom Roy, Commissioner of the Minnesota Department of Corrections (DOC),[1] and Drew Evans, Superintendent of the Minnesota Bureau of Criminal Apprehension, that appellant is ineligible for admission to the Challenge Incarceration Program (CIP) because he is required to register as a predatory offender. We affirm.

FACTS

This is an appeal from the district court's dismissal of appellant's complaint for injunctive and declaratory relief under Minn. R. Civ. P. 12.02(e). That context requires that the court review and accept as true the facts as alleged in the complaint. *See Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 606 (Minn. 2014).

Appellant's complaint alleges that, in April 2016, appellant was at a friend's house when two persons stopped by to sell marijuana. Appellant believed that these persons owed him money, so he demanded repayment and a dispute occurred. These two persons told police that they and appellant went to a gas station, appellant told one of them to withdraw money from an ATM, and that person gave appellant $40 and two cellular telephones.

[1] Tom Roy is no longer the commissioner of the DOC. We ordered that the current commissioner, Paul Schnell, be substituted for Tom Roy in this matter. *See* Minn. R. Civ. App. P. 143.04.

The state charged appellant with one count of kidnapping, two counts of aggravated robbery, and one count of unlawful possession of a firearm. A plea agreement intended to make appellant eligible for admission to the CIP was negotiated. As part of the agreement, the state dismissed the first criminal complaint and filed a new complaint charging appellant with two counts of fifth-degree drug possession, two counts of threats of violence, two counts of theft, and one count of possession of a firearm. Appellant pleaded guilty to all seven offenses and was sentenced to 71 months in prison.

Appellant applied for admission to the CIP. The DOC denied appellant's application because he "fail[ed] to meet the statutorily defined eligibility requirements." The DOC based this determination on appellant's status that required him to register as a predatory offender under Minn. Stat. § 243.166 (2018) (registration statute). Appellant administratively appealed the determination. The DOC denied appellant's appeal because appellant was "committed [to DOC custody] for an offense . . . that require[d] registration as a predatory offender."

Appellant sued respondents, alleging three classes of claims. First, appellant claimed that respondents' determination that he was required to register as a predatory offender violated his substantive-due-process, procedural-due-process, and Sixth Amendment rights, as well as the separation-of-powers doctrine. Second, appellant claimed that respondents' determination that he was ineligible for the CIP was legally erroneous and violated his procedural-due-process rights. Third, appellant claimed that respondents' imposition of custody points and a no-contact order, which prohibited appellant from having contact with his infant child, violated his constitutional rights.

Appellant sought injunctive relief under 42 U.S.C. § 1983 and declaratory relief to the effect that he is eligible for the CIP because he is not committed to the custody of the DOC for an offense that requires registration as a predatory offender and, alternatively, if he is ineligible for the CIP under the relevant statutes and program rules, that ineligibility violates his constitutional rights.

Respondents moved to dismiss appellant's complaint for want of subject-matter jurisdiction and failure to state a claim upon which relief can be granted. The district court issued a lengthy and well-reasoned written order ruling only on the motion to dismiss for failure to state a claim.

First, the district court determined that binding precedent required it to conclude that appellant must register as a predatory offender. As a result, appellant's claims that he suffered violations of his substantive-due-process, procedural-due-process, and Sixth Amendment rights, and his separation-of-powers challenge fail to state a claim on which relief can be granted. Second, the district court determined that the DOC's determination that appellant is not eligible for admission to the CIP did not violate appellant's procedural-due-process rights. Third, the district court determined that appellant did not have a liberty interest in his custody classification. Fourth, the district court determined that appellant had a cognizable claim for a violation of his fundamental constitutional right to care, custody, and control of his child as a result of the DOC's no-contact order and the attendant visiting restrictions. The district court granted respondents' motion to dismiss all claims except appellant's claims concerning violation of his fundamental right to care, custody, and control of his child.

Appellant and respondents thereafter stipulated to dismiss appellant's surviving claim without prejudice. This appeal followed.

D E C I S I O N

A district court may dismiss a civil action when the pleadings fail "to state a claim upon which relief can be granted." Minn. R. Civ. P. 12.02(e). "We review de novo whether a complaint sets forth a legally sufficient claim for relief. We accept the facts alleged in the complaint as true and construe all reasonable inferences in favor of the nonmoving party." *Walsh*, 851 N.W.2d at 606 (citations omitted). When constitutional violations are alleged, increased scrutiny applies and "dismissal is proper only when the defendant demonstrates the complete frivolity of the complaint." *Schocker v. State Dep't of Human Rights*, 477 N.W.2d 767, 769 (Minn. App. 1991) (emphasis omitted) (quotation omitted), *review denied* (Minn. Jan. 30, 1992).

I. Appellant is not eligible for admission to the CIP.

Foundational to appellant's claims and to his arguments on appeal is his contention that, despite his conviction and imprisonment for offenses arising out of the same set of circumstances as the now-dismissed kidnapping charge, he remains eligible to participate in the CIP. The district court held as a matter of law that appellant is not CIP eligible. We begin our analysis by reviewing that determination. This review requires that we interpret the statutes governing CIP eligibility in the light of precedent from the Minnesota Supreme Court.

Issues of statutory interpretation are reviewed de novo. *Heilman v. Courtney*, 926 N.W.2d 387, 393 (Minn. 2019). The goal of all statutory interpretation "is to ascertain and

effectuate the intention of the legislature." Minn. Stat. § 645.16 (2018). "When legislative intent is clear from the statute's plain and unambiguous language, we interpret the statute according to its plain meaning without resorting to other principles of statutory interpretation." *City of Brainerd v. Brainerd Invs. P'ship*, 827 N.W.2d 752, 755 (Minn. 2013). "A statute is ambiguous only if it is subject to more than one reasonable interpretation." *State v. Thonesavanh*, 904 N.W.2d 432, 435 (Minn. 2017) (quotation omitted). A statute is considered as a whole in a way that gives effect to all of its statutory provisions "so that no word, phrase, or sentence is superfluous, void, or insignificant." *Boutin v. LaFleur*, 591 N.W.2d 711, 716 (Minn. 1999) (quotation omitted); *see also Cocchiarella v. Driggs*, 884 N.W.2d 621, 624 (Minn. 2016) (quoting Minn. Stat. § 645.16 (2014)).

The CIP is a program created by the legislature and administered by the DOC. *Hines v. Fabian*, 764 N.W.2d 849, 850 (Minn. App. 2009), *review denied* (Minn. July 22, 2009). The CIP is "an intensive, structured, and disciplined program with a high level of offender accountability and control and direct and related consequences for failure to meet behavioral expectations." Minn. Stat. § 244.171, subd. 1 (2018). The CIP has three phases; after successful completion of all three phases, the offender is placed on supervised release for the remainder of his sentence. Minn. Stat. § 244.172, subd. 1-3 (2018). An offender who successfully completes the CIP may be released from prison earlier than the release date contemplated by the sentence. *Hines*, 764 N.W.2d at 853. The commissioner of corrections has discretion to select offenders who meet strict eligibility requirements to participate in the CIP. Minn. Stat. § 244.17, subd. 1(a) (2018). The CIP statute identifies

categories of offenders who are not eligible for participation in the CIP, including "offenders who are committed to the commissioner's custody for an offense that requires registration under" the registration statute. *Id.*, subd. 3(a)(4) (2018).

A person must register as a predatory offender if he was charged with an enumerated felony offense "and [was] convicted of or adjudicated delinquent for that offense or another offense arising out of the same set of circumstances." Minn. Stat. § 243.166, subd. 1b(a)(1); *see also Boutin*, 591 N.W.2d at 715-16. One of the offenses enumerated in the registration statute is "kidnapping under section 609.25." Minn. Stat. § 243.166, subd. 1b(a)(1)(ii).

Appellant's complaint alleges, and the parties agree, that the state originally charged appellant with the enumerated offense of kidnapping. That complaint was dismissed. Then, appellant was charged with and pleaded guilty to non-enumerated offenses arising out of the same set of circumstances as the initially charged kidnapping. Appellant is currently incarcerated as a result of the convictions following from that guilty plea.

Appellant argues that the CIP statute's use of the phrase "offense that requires registration" unambiguously limits the class of offenders who are statutorily ineligible for the CIP to those convicted of one of the offenses enumerated in the registration statute. Appellant contends that only convictions for those enumerated offenses "require" registration as a predatory offender because convictions for non-enumerated offenses do not "independently require" registration. Because he was convicted of non-enumerated offenses, appellant argues that he was not "committed to the commissioner's custody for

an offense that requires registration" and he therefore remains eligible for admission to the CIP.

The supreme court's interpretation of the registration statute in *Boutin* guides our analysis. There, the offender was charged with third-degree criminal sexual conduct, an offense enumerated in the registration statute. *Boutin*, 591 N.W.2d at 713. He later pleaded guilty to and was convicted of third-degree assault, a non-enumerated offense. *Id.* Prison officials informed the offender before his release from prison that he was required to register as a predatory offender. *Id.* The offender appealed, arguing that the registration statute did "not require him to register because he was not convicted of one of the enumerated felony offenses listed in subd. 1(a)(1) of section 243.166." *Id.* at 715. The supreme court held that:

> The statutory language of section 243.166 has a plain and logical meaning, particularly when read in the context of the 1993 amendment. From 1991 to 1993, the statute required registration only of persons convicted of or adjudicated delinquent for an enumerated felony. In 1993 the legislature amended the statute to *require that a person register* if convicted of an enumerated felony *or another offense arising out of the same set of circumstances if initially charged with an enumerated offense*.

Id. at 715-16 (emphasis added) (citations omitted). The supreme court concluded that the offender "was required to register under the provisions of section 243.166." *Id.* at 716.

Boutin provides that an offender charged with an enumerated offense and convicted of a crime arising from the same set of circumstances is "required to register" as a predatory offender under the registration statute. *Id.* Appellant was originally charged with an enumerated offense. The non-enumerated offense to which appellant pleaded guilty is an

"offense that requires registration" because it arose from the same set of circumstances as the enumerated offense that was initially charged. And because that is so, appellant is "committed to the commissioner's custody for an offense that requires registration under section 243.166." Minn. Stat. § 244.17, subd. 3(a)(4).

The CIP statute's provision deeming offenders ineligible from participation if they were "committed to the commissioner's custody for an offense that requires registration under section 243.166" includes conviction of an offense that arises out of the same set of circumstances as a charged enumerated offense.

Examination of the plain and ordinary meaning of the phrase "offense that requires registration under section 243.166" confirms this conclusion. The CIP statute directs us to the registration statute to determine whether an offender is eligible for admission to CIP. Under the registration statute, an offender "shall register" if he was "charged with" an enumerated offense "and convicted of . . . another offense arising out of the same set of circumstances." Minn. Stat. § 243.166, subd. 1b(a)(1). "Shall" indicates that registration under these circumstances is "mandatory," Minn. Stat. § 645.44, subd. 16 (2018), and "mandatory" is synonymous with "required," *Black's Law Dictionary* 1106 (10th ed. 2014). Accordingly, the registration statute provides that an offender is required to register if he was charged with an enumerated offense and convicted of another offense arising out of the same set of circumstances. The conviction for "another offense arising out of the same set of circumstances" is therefore "an offense that requires registration under section 243.166."

Appellant asks us to interpret the CIP statute according to his proffered dictionary definitions. Without expressly saying so, appellant effectively asks us to disregard the supreme court's analysis in *Boutin*. We decline to do so for two reasons. First, we are bound by the decisions of the Minnesota Supreme Court. *State v. Curtis*, 921 N.W.2d 342, 346 (Minn. 2018). *Boutin* therefore controls our analysis. Second, adopting appellant's interpretation would require us to read language into the CIP statute, which is not permitted. *State v. Noggle*, 881 N.W.2d 545, 550-51 (Minn. 2016) ("[W]e cannot read in additional language, but rather must apply the plain language of the statute as written . . . .").

Appellant contends that "require" is defined as "cause to be necessary," and the only offenses that "cause" registration "to be necessary" are those enumerated in the registration statute. But, as described above, an offender is "required to register" as a predatory offender if he is charged with an enumerated offense and convicted of another offense arising out of the same set of circumstances. *Boutin*, 591 N.W.2d at 716; *see also* Minn. Stat. § 244.166, subd. 1b(a)(1). It is therefore the initial charge for the enumerated offense combined with the conviction for an offense arising out of the same set of circumstances that *together* "cause" registration "to be necessary." In other words, an "offense that requires registration" as a predatory offender is either an enumerated offense or "another offense arising out of the same set of circumstances" as a charged enumerated offense.

Appellant also argues that *In re Risk Level Determination of C.M.*, 578 N.W.2d 391 (Minn. App. 1998), requires us to adopt his interpretation of the CIP statute. We disagree. In *C.M.*, we "construe[d] the [sex-offender-community-notification] statute to provide that

sex-offender notification applies only to individuals who have been convicted of an offense for which sex offender registration is specifically required under Minn. Stat. § 243.166, subd. 1." 578 N.W.2d at 399. But *C.M.* involved the sex-offender-community-notification statute, a statute materially different from the CIP statute. *Compare* Minn. Stat. § 244.17 (2018), *with* Minn. Stat. § 244.052 (2018). And, importantly, *C.M.* was decided before the supreme court decided *Boutin*, by which we are bound. *See Curtis*, 921 N.W.2d at 346 ("The court of appeals is bound by supreme court precedent . . . ."). The supreme court's decision in *Boutin*—not our decision in *C.M.*—controls here.[2]

The district court correctly determined that appellant is ineligible for CIP.

II. Requiring appellant to register as a predatory offender does not violate his constitutional rights.

Appellant next argues that the district court erred in granting respondents' motion to dismiss because his complaint sufficiently alleges that requiring him to register as a predatory offender violates his constitutional rights. Specifically, appellant argues that requiring him to register as a predatory offender violates: (1) his substantive-due-process rights; (2) his procedural-due-process rights; (3) his rights to a jury trial; and (4) principles of separation of powers.

The constitutionality of a statute is reviewed de novo. *Bedeau v. Evans*, 926 N.W.2d 425, 429 (Minn. App. 2019). Because Minnesota statutes are presumed constitutional,

[2] We reject respondents' alternative argument that we should affirm because, even if he were eligible for the CIP, "the DOC Commissioner may still deny [appellant] admission." Respondents denied appellant admission to the CIP because appellant did not meet statutory requirements, not because of a discretionary decision.

appellate courts "exercise our power to declare a statute unconstitutional with extreme caution and only when absolutely necessary." *Boutin*, 591 N.W.2d at 714. A party challenging the constitutionality of a statute bears the "very heavy burden of demonstrating beyond a reasonable doubt that the statute is unconstitutional." *Id.* (quotation omitted).

A. Requiring appellant to register as a predatory offender does not violate his substantive-due-process rights.

Appellant contends that requiring him to register as a predatory offender violates substantive due process concerning five of his fundamental rights under the United States and Minnesota Constitutions: (1) the presumption of innocence; (2) the right to custody of his child; (3) the right to be free from unreasonable searches; (4) the right to free speech; and (5) the right to interstate travel.

The Due Process Clauses of the United States and Minnesota Constitutions provide that the government cannot deprive a person of "life, liberty, or property without due process of law." U.S. Const. amends. V, XIV; Minn. Const. art. I, § 7. "Both clauses prohibit certain arbitrary, wrongful government actions, regardless of the fairness of the procedures used to implement them." *Boutin*, 591 N.W.2d at 716 (quotation omitted). For statutes that implicate a fundamental right, "the state must show a legitimate and compelling interest for abridging that right." *Id.* For statutes that do not implicate a fundamental right, the state must show that the statute "provide[s] a reasonable means to a permissible objective." *Id.*

1. The registration statute does not implicate appellant's right to the presumption of innocence.

The presumption of innocence is a recognized fundamental right that "only applies to statutes which are punitive, or criminal, in nature." *Id.* at 717. If the statute is regulatory, rather than punitive, there is no infringement of the constitutional right to the presumption of innocence. *Id.*

In *Kennedy v. Mendoza-Martinez*, the United States Supreme Court outlined a series of factors relevant to whether a statute is punitive or regulatory. 372 U.S. 144, 168-69, 83 S. Ct. 554, 567-68 (1963). The Minnesota Supreme Court applied the *Mendoza-Martinez* factors to an earlier version of the registration statute in *Boutin*. 591 N.W.2d at 717. The supreme court held that "it is clear that the [registration] statute is regulatory" and does not implicate the right to the presumption of innocence. *Id.*

Appellant asserts that *Boutin* does not control because that case involved an earlier version of the registration statute, the statute "has become significantly more onerous" since *Boutin* was decided, and we must "evaluate the full panoply of restrictions imposed on [appellant] and judge whether they are, taken together, punitive or not." We recently considered and rejected a similar argument. *See Thibodeaux v. Evans*, 926 N.W.2d 602, 608 (Minn. App. 2019) ("While the registration requirements have expanded since *Boutin* was decided, it remains controlling precedent."), *review denied* (Minn. June 26, 2019), *petition for cert. filed*, (U.S. Oct. 23, 2019) (No. 19-6432). We continue to follow course, as we must, because we are bound by clear precedent from the supreme court. *Curtis*, 921 N.W.2d at 346.

2. Appellant has not alleged justiciable violations of his rights to care, custody, and control of his child; interstate travel; freedom from unreasonable searches; and free speech.

The district court dismissed the remainder of appellant's alleged violations of his substantive due process rights based on binding caselaw. Appellant is correct that each of these rights are recognized fundamental rights. *See Schatz v. Interfaith Care Ctr.*, 811 N.W.2d 643, 654 (Minn. 2012) (interstate travel); *State v. Hipp*, 213 N.W.2d 610, 616 (Minn. 1973) (free speech); *State v. Trahan*, 870 N.W.2d 396, 403 (Minn. App. 2015) (unreasonable searches), *aff'd*, 886 N.W.2d 216 (Minn. 2016); *Mitchell v. Smith*, 817 N.W.2d 742, 748 (Minn. App. 2012) (care, custody, control of children). But to successfully challenge the constitutionality of the registration statute, appellant must establish that he has standing by showing "not only that the statute is invalid but that [he] has sustained or is in immediate danger of sustaining some direct injury resulting from its enforcement and not merely that [he] suffers in some indefinite way in common with people generally." *Paulson v. Lapa, Inc.*, 450 N.W.2d 374, 380 (Minn. App. 1990), *review denied* (Minn. Mar. 22, 1990). He must also establish that his claim is ripe by showing that the law is, or is about to be, applied to his disadvantage. *McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 338 (Minn. 2011). Issues that are purely hypothetical or a future possibility are not justiciable. *Id.*

We agree with the district court that appellant's remaining claims for violations of his substantive-due-process rights fail because they are not justiciable. First, appellant's complaint generally asserts that his classification as a predatory offender "has significant and harmful repercussions for [his] ability to retain custody of his child after his release."

On appeal, appellant asserts that his right to care, custody, and control of his child is being violated because, as a result of his classification as a predatory offender, he "cannot live with his child without it being classified as 'sexual abuse'" under Minn. Stat. § 626.556 (2018). But as we explained in *Thibodeaux*, a registered predatory offender may live in a household with children so long as the offender adheres to the statute requiring "a supervising agency to authorize a registered offender to live in a household with children and requir[ing] local law enforcement to notify the appropriate child-protection agency." 926 N.W.2d at 607 (citing Minn. Stat. § 244.057 (2018)). The additional notification requirement does not materially infringe on appellant's rights. *See id.* And appellant cannot reside with children presently, because he is in prison. Appellant's complaint therefore does not sufficiently allege that he is in immediate danger of an infringement to his right to care, custody, and control of his child. Appellant's claim is not presently justiciable. *See Bedeau*, 926 N.W.2d at 431.

Second, the supreme court in *Boutin* stated that the registration statute does not deprive an offender of the right to interstate travel because

> registration does not require an affirmative disability or restraint, it only requires that the person register with law enforcement and inform the state of any change of address. In addition, the registration statute does not restrict [the offender's] ability to change residences at will or even to move out of state. Nor is registering a permanent requirement; [the offender] is only required to register and update his address for 10 years.

591 N.W.2d at 717. We have restated several times that the registration statute does not affect the right to interstate travel. *See Thibodeaux*, 926 N.W.2d at 607; *Bedeau*, 926

N.W.2d at 430-31; *State v. Munger*, 858 N.W.2d 814, 823-24 (Minn. App. 2015), *review denied* (Minn. Mar. 25, 2015). Additionally, like in *Bedeau*, appellant's claim is not justiciable because appellant has "not allege[d] any present intention to travel to another state." 926 N.W.2d at 431. Moreover, appellant cannot travel; he is in prison. Appellant has not sufficiently claimed a presently justiciable violation of his fundamental right to travel.

Third, appellant has not asserted an "immediate danger of sustaining a direct injury" to his right to be free from unreasonable searches. Appellant concedes that, depending on his risk classification level upon release from incarceration, "he *may* be subject to arbitrary and unannounced searches by law enforcement officers." This is too speculative to confer standing or be a ripe controversy. *See id.*; *Paulson*, 450 N.W.2d at 380.

Fourth, and similarly, appellant has not asserted an "immediate danger of sustaining a direct injury" to his freedom of speech. Appellant pleaded that his free-speech rights might be infringed by respondents "*potentially* imposing significant restrictions" on his access to social media. Appellant concedes that a violation of his freedom of speech "is dependent upon his risk classification upon release." Again, this is too speculative to confer standing or be a ripe controversy. *See Bedeau*, 926 N.W.2d at 431; *Paulson*, 450 N.W.2d at 380. This is particularly so when, as is now the case, appellant is in DOC custody.

Still, appellant asserts that his claims are ripe because "he will have no meaningful opportunity to appeal the risk determination." Appellant cites two cases to support this assertion.

First, in *Evenstad v. City of W. St. Paul*, a federal district court said in passing that, under Minnesota law, "[o]ffenders have a limited right to request review of the assessment, though not to appeal it to a court." 306 F. Supp. 3d 1086, 1099 (D. Minn. 2018). But ripeness and standing were not at issue in *Evenstad*; the alleged constitutional violation had already occurred. *Id.* at 1092. And the court did not say the "limited right to request review" was lacking or insufficient. *Id.* at 1099-1100. *Evenstad* does not support appellant's argument that his claims are ripe.

Second, the challengers' claims in *McCaughtry* were held to be ripe because they asserted a facial challenge to the constitutionality of an ordinance, "a purely legal question that [did] not require the development of a factual record." 808 N.W.2d at 339-40. Here, in contrast, appellant asserts an as-applied challenge to the registration statute, and his claimed violations of his rights to free speech and freedom from unreasonable searches depend on the occurrence of future acts not in the factual record.

Appellant has not sufficiently alleged a violation of any of his fundamental rights that are protected by substantive due process. This means that we apply a rational-basis analysis, which requires: (1) the act to promote a public purpose, (2) the act not be an unreasonable, arbitrary, or capricious interference with a private interest, and (3) the means chosen bear a rational relation to the purpose sought to be served. *Boutin*, 591 N.W.2d at 718 (quotations omitted). The supreme court has already resolved this issue, holding that the state has a legitimate interest in requiring registration of predatory offenders and that "[k]eeping a list of such offenders is rationally related to the legitimate state interest of

solving crimes." *Id.* We follow that binding supreme court precedent. *Curtis*, 921 N.W.2d at 346.

The district court did not err in dismissing appellant's claims alleging violations of his right to substantive due process.

B. Requiring appellant to register as a predatory offender does not violate his procedural-due-process rights.

Appellant contends that requiring him to register as a predatory offender violates his procedural-due-process rights with respect to seven of his protected liberty interests under both the United States and the Minnesota Constitutions: (1) the presumption of innocence; (2) the right to care, custody, and control of his child; (3) the right to be free from unreasonable searches; (4) the right to free speech; (5) the right to interstate travel; (6) his interests under the "stigma-plus" doctrine; and (7) his release date from custody.

The United States and Minnesota Constitutions provide that no person shall be deprived "of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1; *see also* Minn. Const. art. I, § 7. We analyze claimed procedural-due-process violations in two steps: (1) we determine whether the government deprived the person of a protectable liberty interest; and, (2) if so, we "determine whether the procedures followed by the government were constitutionally sufficient." *Rew v. Bergstrom*, 845 N.W.2d 764, 785 (Minn. 2014) (quotation omitted). "If the government's action does not deprive an individual of such an interest, then no process is due." *Id.* We review alleged violations of an individual's procedural-due-process rights de novo. *Id.*

1. Binding caselaw bars appellant's claims for alleged violations of his interests in the rights to the presumption of innocence; care, custody, and control of his child; interstate travel; freedom from unreasonable searches; and free speech.

As with appellant's substantive-due-process claims, binding caselaw bars appellant's procedural-due-process claims concerning his interests in the rights to the presumption of innocence; care, custody, and control of his child; interstate travel; freedom from unreasonable searches; and free speech.

First, as described above, the presumption of innocence "only applies to statutes which are punitive, or criminal, in nature." *Boutin*, 591 N.W.2d at 717. The supreme court held in *Boutin* that the registration statute "is a civil, regulatory statute and that the presumption of innocence does not attach." *Id.* Because the presumption of innocence is not implicated by the requirement that appellant register as a predatory offender, the registration statute does not infringe his right to the presumption of innocence.

Second, and for the same reasons discussed above, appellant has not pleaded justiciable claims for violations of his rights to care, custody, and control of his child; interstate travel; freedom from unreasonable searches; or free speech. *See Bedeau*, 926 N.W.2d at 431 (care, custody, and control of his child); *Munger*, 858 N.W.2d at 824 (interstate travel); *Paulson*, 450 N.W.2d at 380 (no standing because there was no argument that the appellant suffered or was in immediate danger of suffering some direct injury).

2. Binding caselaw precludes appellant's claims concerning his interest under the stigma-plus doctrine.

Minnesota has adopted the "stigma-plus" doctrine, which provides that a liberty interest is implicated where: (1) there is a loss of reputation (2) which "is coupled with the

loss of some other tangible interest." *Boutin*, 591 N.W.2d at 718. The supreme court has stated that "[b]eing labeled a 'predatory offender' is injurious to one's reputation." *Id.* The issue becomes whether appellant's future loss of reputation "is coupled with the loss of some other tangible interest." *See id.*

Again, *Boutin* controls. The supreme court there rejected the offender's "claims that complying with the requirements of the registration statute amounts to the loss of a recognizable interest" because "there is no recognizable interest in being free from having to update address information." *Id.* Being required to update address information "is a minimal burden and is clearly not the sufficiently important interest the 'stigma-plus' test requires." *Id.*

Appellant repeats his argument that we should decline to follow *Boutin* because "[t]oday's scheme . . . implicates much more substantial tangible interests. Most immediately, as a direct result of his erroneous classification, [a]ppellant's legal status regarding his eligibility for the CIP has purportedly changed." Appellant's argument fails for two reasons. Foremost, and as discussed, we are bound to follow controlling supreme court precedent. *Curtis*, 921 N.W.2d at 346. The supreme court has not overruled *Boutin*. *Thibodeaux*, 926 N.W.2d at 608 ("*Boutin* . . . remains controlling precedent."). Moreover, appellant pleaded guilty with no guarantee of admission to the CIP. *See Hines*, 764 N.W.2d at 850. Appellant pleaded guilty in the criminal case with only an *expectancy*, not a *protected interest*, in his admission to the CIP. *Carillo v. Fabian*, 701 N.W.2d 763, 768

(Minn. 2005) ("A constitutionally-protected liberty interest arises from a legitimate claim of entitlement rather than simply an abstract need or desire or a unilateral expectation.").[3]

Appellant has not sufficiently pleaded a violation of an interest under the "stigma-plus" doctrine.

3. Appellant has not sufficiently alleged a violation of a protected interest in his release date.

Appellant contends that the registration statute infringes on his "liberty interest in his release date from custody by transforming what was intended to be a six-month sentence served in the CIP followed by supervised release into a 47-month prison sentence."

Prisoners do not have a due-process right to participate in rehabilitative programs. *State ex rel. McMaster v. Young*, 476 N.W.2d 670, 672 (Minn. App. 1991), *review denied* (Minn. Dec. 13, 1991). The CIP is a rehabilitative program. *See* Minn. Stat. § 244.171, subd. 1(1) (stating that one of the CIP's stated goals is "to treat offenders who are chemically dependent"). As discussed, appellant had an expectancy, not a right, to participate in the CIP. Denial of his admission to the CIP does not amount to a violation of his liberty interest in his release date. *Carillo*, 701 N.W.2d at 768.

We also note that the district court in the criminal case sentenced appellant to 71 months' incarceration, with a minimum of 47 1/3 months to be served in prison. There is no evidence in the record that appellant's sentence has changed from that which was

[3] Appellant has apparently made no plea-withdrawal motion to the district court that sentenced him. His argument here is not that his guilty plea was invalid.

pronounced. Appellant is serving the very sentence the district court imposed, and that sentence did not "transform" in any way. There was no infringement to appellant's liberty interest in his release date.

Appellant failed to sufficiently allege an infringement to any of his procedural-due-process rights. We therefore do not consider whether the government provided appellant constitutionally-sufficient procedures. *See Rew*, 845 N.W.2d at 785 ("If the government's action does not deprive an individual of such an interest, then no process is due.").

The district court did not err in dismissing appellant's claims for alleged violations of his procedural-due-process rights.

C. Requiring appellant to register as a predatory offender does not violate his Sixth Amendment rights.

Appellant contends that requiring him to register as a predatory offender violates his Sixth Amendment rights to a jury trial and to confront witnesses, because the registration statute is punitive and increased the penalty for his crime by "denying him eligibility for the CIP."

The United States and Minnesota Constitutions guarantee the right to a jury trial and to confront witnesses in "all *criminal prosecutions*." U.S. Const. amend. VI (emphasis added); Minn. Const. art. I, § 6 (emphasis added). As discussed above, the supreme court held in *Boutin* that the registration statute is civil and regulatory, not criminal. 591 N.W.2d at 717. The Sixth Amendment has no independent application to the registration requirement.

Appellant failed to sufficiently allege a violation of his Sixth Amendment rights. The district court properly dismissed his claims alleging such a violation.

D. The requirement that appellant register as a predatory offender does not violate the constitutional separation of powers.

Lastly, appellant contends that requiring him to register as a predatory offender violates separation-of-power principles "by encroaching on the prosecutor's discretion to pursue or dismiss charges as part of a plea bargain."

The Minnesota Constitution provides that government shall be divided into the legislative, executive, and judicial branches, and that "[n]o person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution." Minn. Const. art. III, § 1.

In *Bedeau*, the offender argued that the registration statute violated the constitutional separation of powers by placing the power to require registration in the hands of the prosecution, a component of the executive branch. 926 N.W.2d at 433. Here, appellant essentially argues the opposite; rather than *placing* power in the executive branch, appellant argues that the registration statute *takes* power from the executive branch. This is so, appellant argues, because the statute prohibits the executive-branch prosecutor from fully and finally dismissing an unprovable charge (here, kidnapping). He argues that the executive branch should properly control the consequences that attend any later conviction for an "offense arising out of the same set of circumstances" as the unprovable enumerated offense.

Appellant's argument is a distinction without a difference. We held in *Bedeau* that the registration statute "does not implicate the separation-of-powers doctrine" because the prosecutor's discretion to charge offenses that could require registration as a predatory offender "is checked by the judiciary" by requiring a judicial determination of probable cause for the charged offense and because "registration is a collateral consequence of a conviction." *Id.* at 434. These reasons apply with equal force in both directions.

As a final note, and although it may be of little consolation to appellant, we are not insensitive to appellant's plight. He negotiated a plea specifically designed to preserve his CIP eligibility, only to discover that he was ineligible because of the state's initial decision to charge him with an offense enumerated in the registration statute. But the judiciary interprets the statutes as passed by the legislature, and we are bound by the supreme court's interpretation of those statutes. *See State v. Grigsby*, 806 N.W.2d 101, 114 (Minn. App. 2011) (holding that "[t]he task of extending existing law falls to the supreme court or the legislature" (quotation omitted)). The district court aptly cited *Grigsby* as requiring that it follow *Boutin*, and we are similarly constrained to follow the law as it exists. *See also Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987) (holding that "the task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court"), *review denied* (Minn. Dec. 18, 1987).

We agree with appellant that the current registration statute has changed since *Boutin* was decided. And it seems undisputed that the current version of the statute requires many more convicted persons to register than were required to register when *Boutin* was decided. *See* Stacy L. Bettison, *The New Scarlet Letter: Is Minnesota's Predatory*

Offender Registry helping or hurting?, Bench & Bar of Minn., Dec. 2019, at 16, 17 (stating that more than 21,000 people are now on the Predatory Offender Registry in Minnesota). But, for the reasons discussed at length above, we reject appellant's suggestion that these changes to the statutory landscape indicate either error by the district court or that we ought to decline to follow *Boutin*. The applicable statutes and binding interpretations of them compel the result here. The larger, policy-based questions to which appellant points are more properly for resolution by the legislative branch or by the Minnesota Supreme Court modifying its precedent.

Affirmed.