No. 20-5662

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

Hazhar A. Sayed — PETITIONER
(Your Name)

vs.

Dean Williams — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Colorado Supreme Court

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Hazhar A. Sayed, #133608
Limon Correctional Facility
49030 State Hwy. 71
Limon, CO. 80826
(Pro-Se)

QUESTION(S) PRESENTED

1) Whether the Colorado Court of Appeals abused its discretion when it summarily dismissed Mr. Sayed's 42 U.S.C. §1983 Prisoner's Civil Rights Complaint for failure to exhaust the administrative remedies afforded him by the Colorado Department of Corrections prior to brining suit?

2) Whether the Court of Appeals errer when it ruled that Mr. Sayed was not within 4-years of his expected release date and hence the provisions of § 18-1.3-1004 (3) C.R.S., are inapplicable to him?

3) Whether the provisions of § 18-1.3-1004 (3) C.R.S., requires that an inmate be allowed to participate in sex offender treatment programing in order to serve the rehabilitative interest of the People of the State of Colorado?

4) Whether Mr. Sayed's Fourteenth Amendment Rights violated when he was not allowed to participating in sex offender treatment Programs?

LIST OF PARTIES

[**xx**] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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Other Authorities

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or, [ ] has been designated for publication but is not yet reported; or, [ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or, [ ] has been designated for publication but is not yet reported; or, [ ] is unpublished.

[XX] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[XX] is unpublished.

The opinion of the Colorado Court of Appeals court appears at Appendix A to the petition and is

[XX] reported at 2020 Colo. App. Lexis 727; or,
[ ] has been designated for publication but is not yet reported; or,
[XX] is unpublished.

JURISDICTION

[ ] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. ___A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[XX] For cases from state courts:

The date on which the highest state court decided my case was **August 17, 2020**. A copy of that decision appears at Appendix **B**.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. ___A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment Fourteen

"**1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Colorado Revised Statute

§ 16-11.7-105 C.R.S.
§ 17-22.5-403 C.R.S.
§ 17-22.5-405 C.R.S.
§ 17-22.5-406 C.R.S.
§ 18-1.3-1004 C.R.S.
§ 18-1.3-1006 C.R.S.

STATEMENT OF THE CASE

In 2019, Mr. Sayed filed a complaint in the El Paso County District Court under 42 U.S.C. § 1983. In that Complaint, among other issues, Mr. Sayed alleged (as pertinent to the issues raised herein), that he was being denied his statutory right to access to sex offender treatment programing as mandated by § 18-1.3-1004 (3) C.R.S.

Mr. Sayed filed timely grievances, which the step III grievance being responded to by Anthony DeCesaro, the step III Grievance officer for the Colorado Department of Corrections (CDOC). In this final response, as is typical of Mr. DeCesaro, he states that Mr. Sayed failed to exhaust his administrative remedies because the third grievance was untimely, and the relief unavailable. Despite this statement from Mr. DeCesaro, Mr. Sayed filed a 42 U.S.C. § 1983 Prisoner's Civil Rights Complaint, in which he raised that , the named Defendant denied his statutory right to participate in sex offender treatment as mandated by § 18-1.3-1004 (3) C.R.S., (1) deprived him of equal protection of the laws under the U.S. and Colorado Constitutions; (2) constituted discrimination pursuant to Title II of the American with Disabilities Act ("ADA") and § 504 of the Rehabilitation Act; and (3) violated the Colorado sex offender Life time supervision Act ("SOLSA"), as set forth in § 18-1.3-1001 et seq., C.R.S.,

The El Paso County District Court served the complaint upon the named Defendant and the Colorado Attorney General's Office. On behalf of the named Defendant, the Colorado Attorney General filed a Motion to Dismiss, in which they challenged the sufficiency of Mr. Sayed's claims under both C.R.C.P. 12(b)(5) and 12 (b)(1). Without making an independent ruling in which the court made findings of facts or conclusions of law, it dismissed Mr. Sayed's complaint simply by stating only that, "the Motion to Dismiss is granted." Mr. Sayed appealed and a division of the Colorado Court of Appeals affirmed. See Attached Appendix **A**. Certiorari to the Colorado Supreme Court was sought and denied. See Attached Appendix **B**.

REASONS FOR GRANTING THE PETITION

1) **Whether the Colorado Court of Appeals abused its discretion when it summarily dismissed Mr. Sayed's 42 U.S.C. §1983 Prisoner's Civil Rights Complaint for failure to exhaust the administrative remedies afforded him by the Colorado Department of Corrections prior to brining suit?**

It is well settled that all prisoners must exhaust their administrative remedies prior to brining suit under 42 U.S.C. § 1983. See 42 U.S.C. § 1997e (a); Booth v. Churner, 532 U.S. 731, 734 & n.1 (2001). In Ross v. Blake, 136 S.Ct. 1850, 1858 (2016), the Court determined that, "under § 1997e (a), the exhaustion requirement hinges on the 'availability' of administrative remedies. An Inmate that is, must exhaust available remedies, but need not exhaust unavailable ones..."

As this Court knows, the Colorado Department of Corrections grievance process requires offender to complete a three step process. The inmate first files a grievance that is investigated and answered by the (C.D.O.C)'s employee or official involved and a separate (C.D.O.C) designee; if the grievance remains unresolved, the inmate may file a second-step grievance, which is investigated by a local administrative official. If the inmate remains aggrieved he may file a third-step grievance that is considered by (C.D.O.C)'s grievance officer. An inmate must complete the third step of the grievance process to exhaust the administrative procedure. Accord Snyder v. Harris, 406 Fed. Appx. 313, 315 (10th Cir. 2011).

In this case, Mr. Sayed complied with that procedure. Mr. Sayed filed his step-one grievance wherein he requests that, he be allowed to access in statutorily mandated sex offender treatment and programs, and then explained the factual basis for his grievance. Mr. Sayed specifically requested that, he be allowed to participate in treatment and programs, due to parole eligibility date. The (C.D.O.C) denied Mr. Sayed's step-one grievance because, the (C.D.O.C) claimed; Mr. Sayed did not meet the parole eligibility date at this time. See attached Appendix **C.** In his step-two grievance Mr. Sayed again

outlined the circumstances and requesting that, he should be allowed to participate in sex offender treatment and programs. The (C.D.O.C) responded and informed Mr. Sayed that, the classification review for programing was not permissible via (C.D.O.C) grievance process. See attached Appendix **D.** In his step-three grievance, Mr. Sayed requested he should be allowed to participate in sex offender treatment and programing for a third time. Unlike the two prior responses to Mr. Sayed's grievances which disputed the facts underlying the grievances), Mr. DeCesaro responded:

I have reviewed your step 3 grievance that you filed with regard to request for transfer to another facility for treatment programs.

Matters that are not subject to the grievance procedure are outlined in Administrative Regulation 850-04, IV. D.2. Grievance substance/format. The subject of your grievance is not an issue which the grievance process was designed to address. Please check A.R. for the appropriate remedy. The language in the A. R. states," This grievance procedure may not be used to seek review of (COPD) convictions, administrative segregation placement (Currently listed as MCU), decisions of the Reading Committee, **classification**, sex offender designation, (SOTMP) termination reviews, parole board decisions, sentence computation, security threat (STG) status, or records requests". Regardless of the reason a request for transfer is a classification issue.

You have not exhausted your administrative remedies. **This is the last administrative action in this matter.** (Emphasis added). See attached Appendix **E.**

The lower Court and Mr. DeCesaro claim that, Mr. Sayed failed to exhaust his administrative remedies fails as a matter of law. See Booth v. Churner, 532 U.S. 731, 734 & n.1 (2001). Simply because one aspect of Mr. Sayed's request relief—access to treatment and programs—was not available does not mean that Mr. Sayed failed to exhaust. In Booth supra, the U.S. Supreme Court reached the exact opposite conclusion when confronted with this issue Id. The U.S. Supreme Court held that, the ("Prison Litigation Reform Act") mandates "exhaustion...regardless of the relief offered through administrative procedures". Id, at 741. That is because, the Court explained, "one 'exhausts' process, not forms of relief,

and the statute provides that one must". Id; at 739. Mr. Sayed could not consistent with the Supreme Court's holding in Booth fail to exhaust his administrative remedies merely because his requested relief was unavailable through the (CDOC) grievance procedure. Contrary to the lower Court and Mr. DeCesaro's assertion, an inmate can and does exhaust his administrative remedies even if the requested relief is unavailable. See Gwinn v. Awmiller, 354 F.3d 1211, 1228 (10th Cir. 2004).

In *Gandy v. Raemisch*, 2014 U.S. Dist. LEXIS 43668, 2014 WL 1292799, at *9 (D. Colo. Mar. 31, 2014), the Court while citing Booth, found that, "Mr. DeCesaro [is] incorrect in concluding that [the offender's] requesting of unavailable relief rendered his grievance unexhausted." Id at *10; see also, Woodford v. Ngo, 548 U.S. 81, 85 (2006) ("Indeed, as we held in Booth, a prisoner must now exhaust administrative remedies even the relief sought...cannot be granted by the administrative process.").

If the lower Court and Mr. DeCesaro was correct that Mr. Sayed's request of unavailable relief under the grievance procedure rendered his grievance unexhausted, then by definition, the grievance procedure was not "available" to remedy Mr. Sayed's grievance. If that is the case, the logical conclusion is that there is no administrative process available to Mr. Sayed, and thus, nothing for him to exhaust. See Gandy supra, at *9, n.10.

Moreover, by informing Mr. Sayed that he failed to exhaust his administrative remedies and then in the very next sentence informing him that Mr. DeCesaro's step-three denial "is the **last** administrative action in this matter". Mr. DeCesaro creates a situation where offenders have not exhausted their administrative remedies, but simultaneously informs them there will be no further administrative action on the matter. Without further administrative action, there can never be the purported exhaustion Mr. DeCesaro apparently demand. Mr. DeCesaro's internally inconsistent step-three denial creates a paradox from which offenders cannot emerge and, as a result, one that prevents offenders' access to the court system. Accordingly, with all due respect to the lower Court's decision is flawed, and this Court should to grant Certiorari and remand this case for further proceedings.

2) **Whether the provisions of § 18-1.3-1004 (3) C.R.S., requires that an inmate be allowed to participate in sex offender treatment programing in order to serve the rehabilitative interest of the People of the State of Colorado?**

In pertinent part, § 18-1.3-1004 (3) C.R.S., states:

"Each sex offender . . . shall be required as a part of the sentence to undergo treatment to the extent appropriate pursuant to § 16-11.7-105, C.R.S."

In the instant case, Mr. Sayed sought to enforce this legislative mandate claiming that, he is in fact within four years of the date of his expected release (or parole eligibility). See Appendix **A**. However, the Court of Appeals, in its decision, found that Mr. Sayed was not within four years of his parole eligibility date and hence the provisions of that statute are inapplicable to him. See Appendix **A**.

In making this finding, the Court of Appeals held that the provisions of § 18-1.3-1006 (1)(a) C.R.S., requires Mr. Sayed to serve minimally 21 or his 24 year sentence)or three-quarters of said), prior to becoming parole eligible. See Appendix **A**. Mr. Sayed respectfully submits that there is absolutely no case law on this subject matter and for the Court to have held this is clearly erroneous.

§18-1.3-1006(1) (a), C.R.S. 2019, as relevant states:

"[o]n completion of the minimum period of incarceration specified in a sex offender's indeterminate sentence, less any earned time credited to the sex offender pursuant to § 17-22.5-405 C.R.S., the parole board shall schedule a hearing to determine whether the sex offender may be released on parole." Id, See also, e.g., People v. Oglethorpe, 87 P.3d 129, 134 (Colo. App. 2005).

Nothing in this statutory provision indicates that, the statutory dictates of § 17-22.5-403 (1) C.R.S., are inapplicable to Mr. Sayed. In fact, initially, the Colorado Department of

Corrections, (C.D.O.C), applied the mandates of this section to all indeterminately sentence sex offenders and it was not until 2004, when the Colorado Attorney General's Office issued an opinion that such offenders were required to serve three-quarters of their sentence prior to becoming parole eligible that, (C.D.O.C), officials started requiring this.

In Ankeney v. Raemisch, 2015 CO 14, ¶ 12, the Colorado Supreme Court, addressed the application of § 17-22.5-403 (1) C.R.S., where it held:

"In 1990,...the legislature added an entirely new statutory scheme for parole eligibility and discharge from custody contained in part 4, of title 17, article 22.5, expressly making it applicable to all those offenders sentenced for crimes committed on or after July 1, 1979, other than those expressly excluded. See § 17-22.5-406 (1) C.R.S. (2014). Of particular note, the new statutory scheme abandoned the concept of good time altogether...and created an entirely new formula for parole eligibility, making most felony offenders eligible after the service of fifty percent of the sentence imposed on them, less earned time granted in accordance with the provisions of the new statutory scheme..."

§ 17-22.5-403 (1) C.R.S., allows that, any person convicted of a class (2-6) felony "shall be eligible for parole after such person has served fifty percent of the sentence imposed, less any time authorized for earned time granted pursuant to § 17-22.5-405 C.R.S." Accordingly, Mr. Sayed submits that, he too should be eligible for parole at 50% of the service of his sentence, less any earned time authorized under § 17-22.5-405 C.R.S., and that the lower Court and the opposing counsel's unclear/indecisive decision finding that, Mr. Sayed must serve 23-years of a 24-year sentence is erroneous.

With all possible respect to the Court of Appeals pane, Mr. Sayed submits that, they have misinterpreted the requirements of § 18-1.3-1006 (1)(a) C.R.S., and have not considered the statutory scheme as a whole (thereby giving consistent and harmonious, as well as sensible effect to all its parts, which is what is required. See Charnes v. Boom, 766 P.2d 665, 667 (Colo. 1988).

The Court of Appeals in making this finding relied on this Court's holding. See Appendix A, (Citing Vensor v. People, 151 P.3d 1274, 1276 (Colo. 2007)). Mr. Sayed respectfully submits that Vensor is not controlling as it states nothing concerning parole eligibility. Instead, it only deals with the necessity of a parole board hearing (versus when the inmate is supposed to see the board or whether he/she is to become parole eligible).

Given that, this issue will affect thousands of inmates who currently are or will be serving time as an indeterminately sentence for sex offender. Mr. Sayed submits that, this issue is of paramount importance and thus respectfully moves this Court to grant Certiorari on this claim.

3) **Whether the provisions of § 18-1.3-1004 (3) C.R.S., requires that an inmate be allowed to participate in sex offender treatment programing in order to serve the rehabilitative interest of the People of the State of Colorado?**

As noted on Page 8 supra, § 18-1.3-1004 (3) C.R.S., allows that the (C.D.O.C), "shall" provide to every inmate within four years of their expected release date the opportunity to participate in sex offender treatment programing. See id. Here, Mr. Sayed submits that he not only should be within four years of his expected release date (and that there is no decided State law on this issue), but also that he be allowed the opportunity to successfully complete the sex offender treatment programing. Moreover, the named Defendant's denied this opportunity thereby violating his statutory rights.

It is well-settled that the purposes of the sentencing code are to punish a defendant for commission of his offense; deter others from committing like off senses; and to promote a defendant's rehabilitation in order that he have the best possible chance of reintegrating into society once the inmate is released. See e.g., People v. Reed, 43 P.3d 644, 646-47 (Colo. 2001).

Consequently, Mr. Sayed would submits that allowing him the opportunity to participate in sex offender treatment programing would serve the People's interests as well as his own. Mr. Sayed submits that, regardless of how this Court ultimately determine his sentence is to

be calculated, will in all likelihood be released. Accordingly, allowing him the opportunity to better himself would promote rehabilitation and serve everyone's interest as well as that set by the sentencing code.

The Court of Appeals held in its decision, that § 18-1.3-1004 (3) C.R.S., does not actually requires that an inmate be availed of the opportunity to complete the sex offender treatment programs outlined therein and instead, that there is to right to any sex offender treatment within prison setting. See Appendix **A** (equal protection section). Respectfully, Mr. Sayed submits that this interpretation of this section of the sentencing statutes is incorrect.

A court's duty in interpreting a statute, is to give effect to the legislature's intent. See People v. Luther, 58 P.3d 1013, 1015 (Colo. 2002). Generally, when discerning intent, a court is to look at the plain and ordinary meaning of the statutory language. See People v. Madden, 111 P.3d 452, 457 (Colo. 2005). "a commonly accepted meaning is preferred over a strained or forced interpretation". People v. Voth, 2013 Colo. 61, ¶ 21. As a result, a court must read and consider the statutory scheme as a whole with the end result being a consistent, harmonious and sensible effect of all its parts. See People v. Boom, 766 P.2d 665, 667 (Colo. 1988). This allows, as is required, a just and reasonable result of all of the statutes. See Luther supra, 58 P.3d at 1015.

Mr. Sayed respectfully submits that the statute requires he receive such an opportunity and that is dictated by the use of the word "shall" which this Court has always deemed to mandatory. See Nowak v. Suthers, 320 p.3d 340 (Colo. 2014). Accordingly, whether he is entitled to relief will turn on this Court's determination of the dictates of § 18-1.3-1006 C.R.S., (as well as § 18-1.3-1004 (3) C.R.S.), and thus he moves this court to grant certiorari on this claim.

4) **Whether Mr. Sayed's Fourteenth Amendment Rights violated when he was not allowed to participating in sex offender treatment Programs?**

The Fourteenth Amendment of the U.S. Constitution guarantee all citizens of Colorado the right to equal protection under the law. U.S. Const., Amend. XIV; See also e.g., People v. Black, 915 P.2d 1257 (Colo. 1996). In order to receive this constitutional safeguard, those challenging a violation of this right must show that they are similarly situated to those which are receiving said. Id. Identical treatment for every individual is not always necessary, however, there must be a distinction of some relevance for disparate treatment. See People v. Fetty, 650 P.2d 541 (Colo. 1982). Some courts, when evaluating prisoner's claims, have adopted the "reasonable relationship" standard set forth in Turner v. Safley, 482 U.S. 78, 95, 97-99 (1987). See e.g., Gwin v. Awmiller, 354 F.3d 1211, 1228-29 (10th Cir. 2004). See also, Dobbert v. Fla., 432 U.S. 282, 301 (1977), i.e.,1) that he is similarly situated to those inmates he is claiming disparate treatment from; and 2) there is no rational relationship between the dissimilar treatment and any legitimate penal interest. See e.g., Williams v. Lane, 851 F.2d 867, 881-82 (7th Cir. 1988)(allowing that prevention from participation in programing due to living in protective custody versus general population may state equal protection claim).

In this case, Mr. Sayed submits that, he has been discriminated against based solely on his race by excluded him from statutory mandated sex offender treatment and programing as is required by the Colorado Statutory scheme, and under sex offender life time supervision act, (SOLSA). Mr. Sayed is similarly situated as those inmates who are currently in the treatment and programs, i.e., he is within parole eligibility of 4-years. However, because Mr. Sayed's sentence is set 24-years to life, the named Defendant have repeatedly stated that, he has a life sentence. Mr. Sayed submits that, he has a liberty interest in completing the statutory mandated sex offender treatment and programs, and denial of said not only denied him his statutory rights and equal protections rights, but may as well create a liberty interest as he will never be able to complete said and thus never be parole.

For these reasons, Mr. Sayed respectfully moves this Court to grant Certiorari and remand this case for further review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted this 24th day of August, 2020.

Hazhar A. Sayed, #133608
Limon Correctional Facility
49030 State Hwy. 71
Limon, CO. 80826
(Pro-Se)