IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
No. 18-2468

RODNEY MINTER and ANTHONY BERTOLONE,
Plaintiffs-Appellants,

vs.

JERRY BARTRUFF, in his Official Capacity as Director of the IDOC; KATRINA CARTER, in her Official Capacity as Interim Deputy Director of Offender Services of the IDOC; KRIS WEITZELL, in her Official Capacity as Warden of the Newton Correctional Facility, TERRY MAPES, in his Official Capacity as Warden of the Newton Correctional Facility; IOWA DEPARTMENT OF CORRECTIONS,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

PLAINTIFFS'–APPELLANTS' BRIEF

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Rodney Minter and Anthony Bertolone filed a Complaint and Jury Demand regarding the Iowa Department of Corrections' administration and operation of its Sex Offender Treatment Program ("SOTP") at the Newton Correctional Facility. The Complaint requests monetary damages, declaratory judgment, and injunctive relief. The Defendants filed a pre-answer Motion to Dismiss pursuant to Rule 12(b)(1) and (6). The district court granted the motion on procedural grounds and dismissed the case without prejudice.

Minter and Bertolone appeal the district court's dismissal because (1) 42 U.S.C. §1997e(a) does not require a prisoner to exhaust state statutory postconviction remedies before filing suit under 42 U.S.C. §1983; and (2) the claims raised by the Plaintiffs are not barred based on *Heck v. Humphrey*, 512 U.S. 477 (1994). The district court therefore erred in granting the Motion to Dismiss, and this matter must be remanded for further proceedings.

Counsel requests oral argument for ten minutes.

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JURISDICTIONAL STATEMENT

U.S. District Court Judge Charles R. Wolle granted the Defendants' Motion to Dismiss on June 8, 2018 and entered judgment on June 11, 2018. (Joint Appendix 56–57 (hereinafter ("App.")); Addendum A-1 (hereinafter "Add.")). The district court had jurisdiction pursuant to 28 U.S.C. §1331 and §1343(a)(3), and supplemental jurisdiction pursuant to 28 U.S.C. §1367. The Order and Judgment disposed of all claims raised by the Plaintiffs–Appellants. (App. 56).

Notice of Appeal was filed on July 9, 2018. (App. 58). The Eighth Circuit has jurisdiction pursuant to 28 U.S.C. §1291.

STATEMENT OF ISSUE

I. The district court erred in granting the Defendants' Pre-Answer Motion to Dismiss without prejudice.

Belk v. State, 905 N.W.2d 185 (Iowa 2017)
Edwards v. Balisok, 520 U.S. 641 (1997)
Heck v. Humphrey, 512 U.S. 477 (1994)
Ross v. Blake, 136 S. Ct. 1850 (2016)

STATEMENT OF CASE

1. Procedural History

On February 1, 2018, Plaintiffs Rodney Minter and Anthony Bertolone filed a Complaint and Jury Demand against the Iowa Department of Corrections ("IDOC"), its officers, and various officials with the IDOC's Newton Correctional

Facility. (App. 1).[1] The Defendants filed a pre-answer Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6). (App. 37). Following telephonic hearing, the district court granted the Motion and declined to exercise jurisdiction over the Plaintiffs' supplemental state-law claims. (App. 56). The district court dismissed the case without prejudice and entered judgment on June 11, 2018. (App. 57).

2. Factual Allegations in the Complaint

For purposes of this appeal, the following facts are taken as true and all reasonable inferences are construed in the Plaintiffs' favor. *Reynolds v. Dormire*, 636 F.3d 976, 979 (8th Cir. 2011).

The IDOC operates two penitentiaries and at least five correctional facilities across Iowa, including the Newton Correctional Facility. (App. 6). Pursuant to state law, the IDOC is responsible for the treatment and rehabilitation of all individuals within the Department's custody. (*Id.*). This includes individuals convicted of sex offenses, domestic-abuse offenses, and controlled-substance offenses, among others. (*Id.*). Individuals are commonly required by law or court order to participate in and complete treatment programming while incarcerated. (*Id.*). Participation in these

[1]The Plaintiffs maintained the action individually and as a class action. (App. 1). However, the Plaintiffs later filed a notice withdrawing the request for class certification.

programs provides critical psychological and psychiatric care and may also reduce a prisoner's term of confinement by earning "good-time" credits. (App. 6–7; 22).

Although programming for domestic-abuse or controlled-substance offenses is offered at many facilities across the State, sex-offender treatment is only offered at one location—the Newton Correctional Facility. (App. 6; 8). Prior to 2015, the IDOC's Sex Offender Treatment Program ("SOTP") was operated exclusively at the Mount Pleasant Correctional Facility. (App. 7). However, that facility was overcrowded and a significant number of "high-risk" prisoners needing care were unable to participate in the SOTP. (App. 10). Hence, IDOC announced its intention to move the SOTP from Mount Pleasant to Newton. (*Id.*).

Moving the physical location of the SOTP did not resolve the IDOC's overcrowding problem and many prisoners are still without psychological care via sex-offender programming. (App. 11). This is likely because IDOC policies and procedures cast a wide net and require a large number of individuals to participate in sex-offender treatment. (App. 8–9). Additional policies permit the IDOC to order sex-offender treatment in its own discretion. (App. 9). Due to the high number of inmates required to participate in the SOTP and the low capacity of the SOTP, a significant number of inmates are barred from immediately participating in the SOTP despite a desire or willingness to do so. (*Id.*). Some inmates have been

mandated to complete the SOTP, but have not yet even been transferred to the Newton facility because of the overcrowding. (App. 11).

Other IDOC policies and procedures prevent an inmate from timely receiving critical care and treatment. IDOC requires that sex-offender programming meet the standards set out by the Iowa Board for the Treatment of Sexual Abusers ("IBTSA"), a non-profit corporation comprised of public officers and private health providers. (App. 7). The IBTSA administers the certification process for professionals seeking to provide treatment and rehabilitation services to individuals convicted of sex offenses. (App. 7–8). However, IDOC procedures nevertheless recognize its own SOTP as the *only* program for purposes of fulfilling its statutory obligation to provide inmates with treatment and rehabilitation. (App. 8). The IDOC refuses to recognize any privately maintained sex-offender treatment program for purposes of its obligations under Iowa law. (*Id.*).

Plaintiffs Rodney Minter and Anthony Bertolone have both been convicted of offenses that require them to participate and complete the SOTP prior to discharge. (App. 11–12). Minter and Bertolone both have indicated a willingness to participate in treatment; however, the IDOC has denied them both access to treatment. (App. 12–13). The IDOC's denial of treatment, despite an undisputed obligation to do so, has resulted in a deprivation of necessary medical care, to wit: psychological and psychiatric care. (App. 22; 32). Because the IDOC has allocated inadequate

resources to the rehabilitation of inmates convicted of sex offenses, Minter and Bertolone have been denied access to treatment while fellow inmates receive treatment related to substance abuse or domestic abuse in a regular and timely fashion. (App. 19; 29–30). Finally, Minter and Bertolone's exclusion from the SOTP has deprived them of earning good-time credit, which prevents any reduction of their sentence and bars discharge from any State institution or facility. (App. 16–17; 27).

3. Order on Dismissal

Despite these facts, taken as true, the district court granted the Defendants' Motion to Dismiss on each of the Plaintiffs' nine separate claims and requests for monetary damages, declaratory judgment, and injunctive relief. First, noting the exhaustion requirement of 42 U.S.C. §1997e(a) is meant to improve the quality of prisoner suits, the district court concluded §1997e(a) requires prisoners to exhaust available "postconviction remedies," presumably in addition to administrative remedies, prior to filing suit under 42 U.S.C. §1983. (App. 55).

Second, the district court concluded that each of the Plaintiffs' four separate claims under §1983 were barred by *Heck v. Humphrey*, reasoning:

> Plaintiffs argue *Heck* does not bar their claims because they allege they are denied treatment for an indeterminable amount of time and success on their claims will not necessarily imply they must be released on parole. Yet plaintiffs acknowledge that participation in SOTP will allow them to accrue earned-time credit, and their requested relief includes recalculation and restoration of their earned-time credit.

> Because success on their claims would necessarily imply the invalidity of their lost earned-time credits, they do not yet have a cause of action under § 1983.

(App. 55–56). The court entered judgment on June 11, 2018. (App. 57).

SUMMARY OF THE ARGUMENT

The district court relied on two grounds in dismissing the Plaintiffs' claims without prejudice, both of which are incorrect. First, the plain language of §1997e(a) requires a prisoner to exhaust available administrative remedies, not potential statutory remedies, before bringing suit under §1983. Although the Iowa Supreme Court recently determined that a prisoner *may* raise a similar challenge using Iowa's postconviction-relief statutes, that conclusion has no bearing on whether Plaintiffs can instead raise the challenge under §1983 in federal court. Second, none of the Plaintiffs' §1983 claims are *Heck*-barred because they do not necessarily imply the invalidity of Minter or Bertolone's convictions or sentences. Given the clear statutory right and duty of the IDOC to provide timely treatment, the Plaintiffs' claims seek to *enforce*, not invalidate, the terms of their sentences.

ARGUMENT

I. The district court erred in granting the Defendants' Pre-Answer Motion to Dismiss.

A. Standard of Review

This court reviews *de novo* a district court's grant of a motion to dismiss under Rule 12(b)(6). *Martin v. Iowa*, 752 F.3d 725, 727 (8th Cir. 2014). In analyzing a

motion to dismiss, a court must accept the allegations contained in the complaint as true and make all reasonable inferences in favor of the nonmoving party. *Id.* Dismissal under Rule 12(b)(6) shall not be granted unless it appears beyond a reasonable doubt that plaintiff can prove no set of facts in support of a claim entitling him to relief. *Young v. City of St. Charles, Mo.*, 244 F.3d 623, 627 (8th Cir. 2001).

B. An inmate is not required to exhaust "postconviction remedies" before filing suit under § 1983 because Iowa's postconviction-relief statutes are not administrative in nature.

Relying on a recent Iowa Supreme Court decision, *Belk v. State*, 905 N.W.2d 185 (Iowa 2017), the district court dismissed the Plaintiffs' Complaint without prejudice for failure to exhaust "available postconviction remedies." (App. 55). No such requirement exists under 42 U.S.C. § 1997e and therefore the court's dismissal was in error.

According to § 1997e(a), "No action shall be brought with respect to prison conditions under section 1983 . . . until such administrative remedies as are available are exhausted." This exhaustion requirement has been the subject of several key decisions by the United States Supreme Court following the Prison Litigation Reform Act of 1995. *See Booth v. Churner*, 532 U.S. 731, 736–41 (2001); *see also Ross v. Blake*, 136 S. Ct. 1850 (2016); *Woodford v. Ngo*, 548 U.S. 81 (2006); *Porter v. Nussle*, 534 U.S. 516 (2002). Ultimately, those decisions recognize Congress' instruction that "an inmate must exhaust [administrative remedies] irrespective of

the forms of relief sought and offered through administrative avenues." *Booth*, 532 U.S. at 741 n.6.

Nonetheless, the *Ross* Court also emphasized the statute's own "textual exception": an administrative remedy must be "available" before it can possibly be exhausted. *Ross*, 136 S. Ct. at 1858. "An inmate, that is, must exhaust available remedies, but need not exhaust unavailable ones." *Id.* Relying on several dictionary definitions of the word, the Court pointed out that "available" means "capable of use for the accomplishment of a purpose," or one that is "accessible or may be obtained." *Id.* at 1858–59 (quoting *Booth*, 532 U.S. at 737–38). Hence, if an administrative remedy does not exist—or if the remedy is not attainable as a practical matter—a prisoner is not required to clear such a phantom hurdle before filing suit under §1983. *Id.* at 1862; *see Townsend v. Murphy*, 898 F.3d 780, 783–84 (8th Cir. 2018) (applying *Ross* and reversing judgment entered in favor of the defendants on a failure-to-exhaust basis).

As alleged in the Complaint, the Plaintiffs are required by law and court order to participate in SOTP while incarcerated as a result of their criminal convictions. (App. 11–12). Despite that otherwise clear obligation, the Complaint alleges the Defendants have excluded the Plaintiffs from placement into SOTP and accordingly, denied the Plaintiffs critical care and timely rehabilitation.

Plaintiffs know of no official administrative procedure that is established by the IDOC to encourage the Department to carry out its own legal obligations. No doubt this would be seen by many as unnecessary and superfluous. Even assuming the Plaintiffs filed a request to be placed in SOTP, such a grievance would be sloughed off as a request for the Department to "do its job." The Plaintiffs would be instructed to wait in line. In other words, the request would operate "as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates." *Ross*, 136 S. Ct. at 1859. Under those circumstances, there is no "available" administrative remedy in place to accomplish the relief set out in the Plaintiffs' Complaint.

Importantly, the Defendants failed to identify any particular administrative remedy they believe is applicable and required to be exhausted before Plaintiffs filed suit under §1983. Because the Defendants did not raise an argument on this point below, the district court did not address it and this Court will not consider it for the first time on appeal. *United States v. Hirani*, 824 F.3d 741, 751 (8th Cir. 2016).

Instead, the Defendants claimed, and the district court agreed, this §1983 suit is precluded because Plaintiffs have not yet successfully litigated a state-court postconviction-relief action. The district court dismissed the suit for failure to exhaust "*postconviction* remedies," not "*administrative* remedies," as §1997e(a) instructs. (App. 55). This conclusion is incorrect for two reasons.

First, relief under Iowa's Postconviction Procedure Act is not an administrative remedy, it is a civil remedy obtained in district court and authorized by state statute. *See* Iowa Code ch. 822. An inmate may commence an action for postconviction relief by filing an application with the clerk of the district court, an act which completely circumvents the administrative process. Iowa Code § 822.3. A district court judge considers the claims raised by the applicant, and the judgment entered under chapter 822 is treated as a "final judgment" for purposes of an appeal to Iowa's appellate courts. *Id.* §§ 822.7, .9.

In other words, Iowa's postconviction remedies are a far cry from the "administrative remedies" contemplated by the plain language of § 1997e(a). *See Ross*, 136 S. Ct. at 1856 ("Statutory interpretation, as we always say, begins with the text[.]"). Administrative remedies protect the authority of administrative agencies by providing the agency opportunity to correct its own mistakes, with respect to the programs it administers, before being haled into court. *Woodford*, 548 U.S. at 88–89. The statutory term "means using all steps that the agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits)." *Id.* at 90 (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002)); *accord Hammett v. Cofield*, 681 F.3d 945, 947 (8th Cir. 2012) (per curiam).

It naturally follows that a remedy cannot be "administrative" if the remedy is statutorily required to be initiated in district court and considered by a judicial

officer. *Compare McKart v. United States*, 395 U.S. 185, 193 (1969) ("The doctrine provides 'that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.' "), *with* Iowa Code § 822.7 ("The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented."). Because the term "administrative remedies" is not defined in statute, its ordinary meaning applies. *United States v. Santos*, 553 U.S. 507, 511 (2008). Notably, the Black's Law Dictionary provides the following definitions:

> ***Administrative remedy.*** A nonjudicial remedy provided by an administrative agency. See EXHAUSTION OF REMEDIES.
>
> . . . .
>
> ***Judicial remedy.*** A remedy granted by a court.

Black's Law Dictionary 608–09 (3d Pocket ed. 2006). There is no evidence Congress intended the language of §1997e(a) to encompass administrative *and* statutory or judicial remedies prior to filing suit under §1983. An action for postconviction is not an administrative remedy.

Second, the district court's reliance on *Belk v. State* is misplaced because that case holds a prisoner *may* raise a similar legal challenge using a state action for postconviction relief; not that the prisoner *must first* use that avenue for redress before filing under §1983. It should go without saying that a state supreme court

does not have the authority to shape the exhaustion requirements for federal suit filed under §1983.

The prisoner in *Belk* filed a state application for postconviction relief alleging state and federal constitutional violations related to the Department's failure to provide SOTP in a timely manner. 905 N.W.2d at 187. The application was dismissed, and the issue on appeal was whether the plaintiff—as a procedural matter—could raise such constitutional violations using Iowa's postconviction-relief statutes, *see id.* 905 N.W.2d at 188, or whether he should have used Iowa's administrative-procedure framework, *see id.* at 193 (Waterman J., dissenting). The majority held that Iowa's postconviction framework *could* (i.e., not *must*) be used to raise those issues and remanded the case for further proceedings. *Id.* at 192; *see id.* ("We are not commenting on the merits of Belk's claims under section 822.2(1)(e)."). The Court explained:

> [U]ntil today, there was no settled precedent on what avenue for relief, if any, was *potentially* available for an inmate in Belk's situation. . . . Both here and below, the State took the position that postconviction relief was not available at all and thus there is no unfairness to the State in reversing for further proceedings under section 822.2(1)(*e*).

Id. (emphasis added).

Belk was a narrow ruling. And significantly, no member of the Iowa Supreme Court discussed the viability of Belk's claims had they been raised via §1983. *Id.*; *see id.* at 193 (Waterman, J., dissenting). The decision merely holds that

postconviction relief is one available avenue to raise those claims. The Plaintiffs in this matter have opted to pursue a different avenue. *Belk* is not dispositive and does not preclude a challenge to a similar issue by way of suit under §1983.

It is also worth pointing out that *Belk* expressly rejected the State's argument that the prisoner's claim was an administrative matter, subject to administrative appeal. *Id.* at 191 ("Belk's complaint is really with the IDOC rather than the [Iowa Board of Parole]."). This is further evidence that Minter and Bertolone's claims, similar to those raised by Belk, are not subject to "administrative remedies" as contemplated by 42 U.S.C. §1997e(a).

C. Plaintiffs' Complaint is not barred by *Heck* because the relief requested does not necessarily imply the invalidity of their respective sentences.

The district court alternatively dismissed the Complaint based on the Favorable-Termination Rule first announced in *Preiser v. Rodriguez,* 411 U.S. 475 (1973), and since refined in cases such as *Heck v. Humphrey*, 512 U.S. 477 (1994), and *Edwards v. Balisok*, 520 U.S. 641 (1997). Those decisions make clear

> a state prisoner's § 1983 action is barred (absent prior invalidation)—no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)—*if* success in that action would necessarily demonstrate the invalidity of confinement or its duration.

Wilkinson v. Dotson, 544 U.S. 74, 81–82 (2005). Conversely, an action under §1983 must be allowed to proceed when, if successful, the claims raised will not necessarily

demonstrate "the invalidity of any outstanding criminal judgment against the plaintiff." *Heck*, 512 U.S. at 487; *see Nelson v. Campbell*, 541 U.S. 637, 647 (2004) ("[W]e were careful in *Heck* to stress the importance of the term 'necessarily.' ").

Success in this suit means the Plaintiffs' respective criminal judgments will be *enforced*, not invalidated. As alleged in the Complaint, the State of Iowa (through its legislature, sentencing courts, and corrections officials) has required the Plaintiffs to participate in and complete sex-offender treatment programming once incarcerated. (App. 8–9; 11–12). The Plaintiffs do not challenge the State's authority to mandate treatment; in fact, the Plaintiffs acknowledge the primary purpose of treatment is to rehabilitate them while serving an otherwise lawful sentence. (App. 7). This is consistent with the State's obligation to provide appropriate treatment and rehabilitation for all individuals within its custody. (App. 6–7).

The Plaintiffs' claims arise because of the Defendants' maladministration and mismanagement of its sex-offender treatment programming. Although the State requires an increasingly large number of individuals to participate in sex-offender treatment while incarcerated, the IDOC maintains a treatment program at only one of its many statewide facilities. (App. 6; 8–10). The State has established a board tasked with certifying professionals across the State to provide services for individuals convicted of sex offenses; however, that board only recognizes *one*

program—the SOTP at Newton Correctional Facility—as providing treatment for purposes of the IDOC's obligations under Iowa law. (App. 7–8). Importantly, the IDOC refuses to recognize any privately maintained sex-offender treatment for purposes of its obligation to provide treatment and rehabilitation. (App. 8). The IDOC moved its only treatment program from Mount Pleasant to Newton because the State was falling behind in its obligation to treat and rehabilitate its prisoners. (App. 10). Yet that move has proved unsuccessful—a significant number of prisoners are still barred from participating in the SOTP despite a desire and willingness to do so. (App. 9).

Again, the Plaintiffs allege their constitutional rights have been violated because of this mismanagement.[2] If successful, the Plaintiffs have requested monetary damages for past violations but, more importantly, they have also requested to be immediately placed into the SOTP at Newton Correctional Facility or alternatively authorized to seek treatment by any private licensed professional. (App. 35). They seek a declaratory judgment that Defendants' unconstitutional and unlawful conduct has resulted in a violation of their constitutional rights. (*Id.*). They have requested permanent injunctive relief to ensure the IDOC appropriates

[2]The district court did not consider whether the factual allegations raised in the Complaint were sufficient to establish claims under §1983. (App. 52–56). Those questions therefore should be addressed on remand. *See Henley v. Brown*, 686 F.3d 634, 643–44 (8th Cir. 2012).

adequate resources and/or funding for the SOTP to provide the same level of services for sex-offender treatment programming as other similar State-mandated treatment programs. (*Id.*). The Plaintiffs have requested an injunction preventing the Defendants from recognizing the SOTP as the only program sufficient to fulfill the IDOC's obligations to treat and rehabilitate prisoners. (*Id.*). Finally, the Plaintiffs requested a recalculation of the Plaintiffs' accrued earned-time credit to reflect the time they were willing to participate in programming but were, for matters outside their control, unable to do so. (App. 36).

The district court incorrectly latched onto only this final requested relief. Citing *Balisok*, the district court reasoned, "[b]ecause success on their claims would necessarily imply the invalidity of their lost earned-time credits, they do not yet have a cause of action under §1983." (App. 56). The fact remains that Plaintiffs have been deprived of earned-time credits for failing to take part in treatment after having been lawfully ordered—as a part of a conviction and sentence—to take part in treatment. In other words, the Plaintiffs' claims assume the validity of their respective convictions and sentences. Plaintiffs instead direct their challenge at the IDOC's abrogation of its duty to ensure timely treatment and rehabilitation of individuals within the State's custody.[3]

[3]Plaintiffs will not be entitled to an earlier release if successful on their claims related to earned-time. This is because an inmate required to participate in the SOTP is not

The district court's conclusion also ignores the Plaintiffs' prayers for injunctive relief cited above. "Ordinarily, a prayer for such prospective relief will not 'necessarily imply' the invalidity of a previous loss of good-time credits, and so may properly be brought under §1983." *Balisok*, 520 U.S. at 648; *accord Wilkinson*, 544 U.S. at 81. If successful, the Plaintiffs will be placed into the SOTP and will begin to receive the treatment and rehabilitation the IDOC is statutory bound to provide, and the necessarily psychological and psychiatric care to which the Plaintiffs are constitutionally entitled. Nothing about the Defendants' denial of critical care—which is raised as a §1983 claim wholly independent of the deprivation of earned-time credit—implies the invalidity of the Plaintiffs' convictions or sentences.

Finally, the district court failed to address the Plaintiffs' §1983 claim alleging violation of equal protection and how that claim necessarily implies the invalidity of judgment or sentence. As alleged, Defendants have engaged in an unconstitutional and unlawful course of conduct by allocating insufficient resources to the State's sex-offender treatment programs as distinguished from other treatment programs maintained and required by the IDOC. (App. 19; 29–30). The sole reason the Plaintiffs have been denied treatment is the State's bottle-necking of its

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eligible for a reduction in sentence until the inmate participates in *and completes* the SOTP. (App. 6–7).

rehabilitation of inmates convicted of sex offenses, which has not occurred for inmates convicted of controlled-substance or domestic-abuse offenses. Again, nothing about this alleged equal-protection violation implies the invalidity of the Plaintiffs' convictions or sentences.

The crux of Plaintiffs' §1983 claims, especially once taken together and viewed in a light most favorable to the Plaintiffs, is the denial of treatment, not the denial of earned-time credits. *Heck* does not bar the separately raised §1983 claims brought by the Plaintiffs, and those claims are therefore cognizable under §1983.

CONCLUSION

For the reasons stated, the district court erred in granting the Defendant's pre-answer motion to dismiss. This Court should reverse and remand this matter for further proceedings, including discovery as to the claims raised in the Complaint and Jury Demand. *Aten v. Scottsdale Ins. Co.*, 511 F.3d 818, 821 (8th Cir. 2008).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that upon receipt of the notice from CM/ECF system that the brief and addendum have been filed, the foregoing Plaintiffs'–Appellants' Brief will be served upon counsel by depositing two (2) copies thereof in the U.S. Mail, postage prepaid, in an envelope addressed to the following counsel:

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CERTIFICATE OF FILING

The undersigned hereby certifies the attached Plaintiffs'–Appellants' Brief, which was scanned for viruses using the latest available software, was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECR users will be served by the CM/ECR system.

Within 5 days of receipt of the notice that the brief and addendum have been filed, filer will forward 10 paper copies of the brief with the attached addendum to the court and serve the opposing side via United States Postal Service with Mr. Michael E. Gans, Clerk of Court, United States Courthouse, 111 South Tenth Street, Saint Louis, Missouri, 63102.

The attached Defendant-Appellant's brief is electronically filed with the CM/ECF system on September 14, 2018.

/s/ *Michael Boal*
Michael Boal, Attorney
Dated: September 14, 2018

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,223 words (no more than 13,000 words), excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in font size 14, Times New Roman.

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Dated: September 14, 2018