

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0766**

State of Minnesota ex rel. Gerald Browneagle,
Appellant,
vs.

Paul Schnell, Commissioner of Corrections,
Respondent.

**Filed March 15, 2021
Affirmed
Johnson, Judge**

Anoka County District Court
File No. 02-CV-19-6205

Cathryn Middlebrook, Chief Appellate Public Defender, Amy Lawler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Keith Ellison, Attorney General, Steven R. Forrest, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Bjorkman, Presiding Judge; Johnson, Judge; and Larkin, Judge.

SYLLABUS

An offender whose conditional release has been revoked does not have an entitlement under state law to again be released from prison to the community if his difficulty in finding agent-approved housing is due to reasons that are not largely outside his control, he has not yet reached the end of the revocation period, and his caseworker is making efforts to find an appropriate residence.

OPINION

JOHNSON, Judge

Gerald Browneagle's conditional release was revoked for 365 days or less after he violated multiple conditions of his release. He was required to engage in chemical-dependency treatment. Approximately four months before the end of the revocation period, after he had completed treatment, he petitioned the district court for a writ of habeas corpus, arguing that the commissioner had an obligation to release him from prison and supervise him in the community. The district court denied the petition. We conclude that the commissioner was not required by state law to release Browneagle at the time he petitioned for habeas relief. We also conclude that the commissioner did not violate Browneagle's federal constitutional right to due process of law. Therefore, we affirm.

FACTS

In 2011, Browneagle pleaded guilty in Beltrami County to fourth-degree criminal sexual conduct, in violation of Minn. Stat. § 609.345, subd. 1(c) (2006). The conviction was Browneagle's second conviction of criminal sexual conduct because he previously had been convicted of first-degree criminal sexual conduct in Hennepin County in 1994. In April 2011, the Beltrami County District Court imposed a sentence of 102 months of imprisonment and a 99-year term of conditional release.

Browneagle was in prison until December 2014, when he was placed on intensive supervised release (ISR). While on ISR, he was required to comply with various conditions, including the condition that he maintain a residence approved by his

supervising agent. Because Browneagle had been designated a risk-level-III offender, he was required to register as a predatory offender.

When Browneagle was first placed on ISR, he was released to a group residence known as the Bemidji House, which is leased and operated by the department of corrections. In the summer of 2015, Browneagle moved from the Bemidji House to a private residence. In February 2016, his release was revoked for 179 days after he admitted to four violations of his release conditions: leaving his residence without agent permission, consuming alcohol at a bar, being terminated from sex-offender treatment, and failing to comply with certain other ISR conditions.

In August 2016, Browneagle was released to the Bemidji House a second time. Only one month later, however, his release was revoked for 150 days after he admitted to another violation of his release conditions: having two guests without his supervising agent's approval.

In January 2017, Browneagle's prison sentence expired, and he began his conditional-release term. One month later, he was released to the Bemidji House for a third time. Two months after that, however, Browneagle's release again was revoked when he was found to have committed five violations of the conditions of his release: possessing explicit photographs of a female friend on his cell phone, possessing a cell phone with internet access, making contact with a minor without approval or supervision, failing to inform his agent of his activities, and possessing alcohol and marijuana at the Bemidji House. This revocation was for 365 days. In July 2018, his revocation was extended for "60 days or less" to "accommodate release planning." The hearing officer's written report

stated that Browneagle would be placed in a department-leased residence when a vacancy arose.

In August 2018, Browneagle was released to the Bemidji House for a fourth time. In February 2019, Browneagle's release again was revoked after he was found to have committed five violations of the conditions of his release: possessing explicit photographs of a female friend on his cell phone, hiding an unapproved guest in his closet, possessing a mood-altering medication that had not been prescribed to him, possessing a dangerous weapon (a knife), and failing to follow his agent's instructions. The hearing officer revoked his release for "365 days or less with credit from the date of arrest," February 27, 2019, which implies a projected release date of February 27, 2020. The hearing officer required Browneagle to complete chemical-dependency treatment if he was deemed eligible. The hearing officer also found that Browneagle was "unamenable to supervision and an ongoing risk to the public."

Browneagle completed chemical-dependency treatment on July 30, 2019. Thereafter, a caseworker made efforts to find appropriate housing for him. On July 31, 2019, the caseworker noted that she had asked a Ramsey County ISR supervisor to assume supervision of Browneagle at a particular apartment in St. Paul. The Ramsey County supervisor denied the request on the grounds that the apartment is a sober home and is across the street from three schools. The Ramsey County supervisor noted that the location would not be suitable even for a risk-level-III sex offender from Ramsey County.

In August 2019, the caseworker contacted a corrections agent at the Bemidji House to ask whether Browneagle could reside there again. The corrections agent responded in

the negative, stating that Browneagle “has burnt that bridge and was told last time that it was his last opportunity.” In September 2019, Browneagle’s caseworker asked a Hennepin County ISR supervisor to assume supervision of Browneagle. The Hennepin County supervisor denied the request on the grounds that the proposed residence was within 500 feet of a school and is transitional in nature. In October 2019, the caseworker contacted Hennepin County again to request supervision of Browneagle. The Hennepin County supervisor denied the request on the grounds that the area of the proposed residence already had too high of a concentration of risk-level-III sex offenders and that Browneagle did not have “valid historical ties.”

Meanwhile, on September 10, 2019, Browneagle’s attorney requested a review hearing before a department of corrections hearing officer because Browneagle had completed chemical-dependency treatment. The hearing officer denied the request for a hearing because Browneagle did not yet have an agent-approved release plan. The hearing officer stated that a hearing would occur at or near the end of the 365-day revocation period and that, until then, Browneagle should continue to work with his caseworker on developing a release plan.

On November 4, 2019, Browneagle, with the assistance of a public defender, petitioned the Anoka County District Court for a writ of habeas corpus. In an accompanying memorandum, he presented two arguments. First, he argued that his continued incarceration at the Lino Lakes prison was in violation of his right under state law to be released to the community because the commissioner was obligated to approve a residence in the community and supervise him there. Second, he argued that his continued

incarceration at the Lino Lakes prison was in violation of his rights to procedural due process and substantive due process under the Fourteenth Amendment to the United States Constitution.

On November 20, 2019, the department released Browneagle to the Bemidji House for a fifth time. In February 2020, the commissioner responded to Browneagle's habeas petition by arguing, in part, that his petition was moot because Browneagle had been released from prison. In a reply memorandum, Browneagle argued, in part, that the district court should not dismiss the petition as moot because of certain exceptions to the mootness doctrine. In March 2020, the district court denied Browneagle's petition on the ground that it is moot, without resolving the merits of Browneagle's arguments.

Browneagle appeals. He makes three arguments. First, he argues that the district court erred by dismissing the habeas petition as moot. Second, he renews the argument he made to the district court that his incarceration at the Lino Lakes prison on November 4, 2019, violated his right under state law to be released to the community and supervised there. Third, he renews the argument he made to the district court that his incarceration at the Lino Lakes prison on November 4, 2019, violated his federal constitutional rights to procedural due process and substantive due process.

ISSUES

I. Did the district court err by dismissing Browneagle's habeas petition on the ground that it is moot?

II. When he filed his habeas petition, was Browneagle incarcerated in violation of his right under state law to be released to the community?

III. When he filed his habeas petition, was Browneagle incarcerated in violation of his federal constitutional right to due process?

ANALYSIS

I.

Browneagle first argues that the district court erred by dismissing his habeas petition as moot.

“An appeal is moot when ‘a decision on the merits is no longer necessary or an award of effective relief is no longer possible.’” *State ex rel. Ford v. Schnell*, 933 N.W.2d 393, 401 (Minn. 2019) (quoting *Dean v. City of Winona*, 868 N.W.2d 1, 5 (Minn. 2015)). But the mootness doctrine is a “flexible discretionary doctrine,” not a mechanical rule that automatically results in dismissal. *Dean*, 868 N.W.2d at 4 (quoting *State v. Rud*, 359 N.W.2d 573, 576 (Minn. 1984)). For example, an appellate court may consider the merits of an appeal that is technically moot if it “is ‘functionally justiciable’ and presents an important question of ‘statewide significance that should be decided immediately.’” *Id.* at 6 (quoting *Rud*, 359 N.W.2d at 576). “[A]n issue is functionally justiciable when the record contains the raw material traditionally associated with effective judicial decision-making, including a full presentation of both sides of the issues raised.” *Ford*, 933 N.W.2d at 403-04. An appellate court applies a *de novo* standard of review to a district court’s decision as to whether a petition for a writ of habeas corpus is moot. *Id.* at 404.

The supreme court’s opinion in *Ford* is instructive because the nature of the habeas claim and the procedural history are fairly similar to this case. In *Ford*, the habeas petitioner had been placed on supervised release, but his release was revoked because he

violated his release conditions. *Id.* at 397. He later was placed on conditional release, but he was transferred to a county jail because he did not have agent-approved housing in the county in which he had been convicted. *Id.* His release was revoked and he was returned to prison, where he remained for approximately one and one-half years, except for a two-month period in a treatment program in a county jail. *See id.* at 397-98. He then petitioned for a writ of habeas corpus. *Id.* at 398. While the case was pending in the district court awaiting an evidentiary hearing, the commissioner released Ford to an approved residence in Hennepin County, and the commissioner then argued that Ford’s release made his habeas action moot. *Id.* The district court disagreed, considered the merits of the petition, and granted relief. *Id.* at 398. This court reversed the district court on the ground that Ford’s petition was moot. *State ex rel. Ford v. Roy*, No. A17-1895, 2018 WL 3097717, at *8 (Minn. App. June 25, 2018). But the supreme court granted review and, after briefing and argument, determined that Ford’s petition was not moot and was ripe because his “release is only temporary” and “he faces a nonspeculative threat of returning to prison.” *Ford*, 933 N.W.2d at 402-03. In addition, the supreme court reasoned in the alternative that Ford’s appeal satisfied one of the exceptions to the mootness doctrine because it presented “an important issue of statewide significance” and was “functionally justiciable.” *Id.* at 403. The supreme court rejected the commissioner’s request for a remand to the court of appeals, saying, “To return this case for another round of appellate review would fully thwart the very purpose of the writ,” which is “to *speedily test* the propriety of the restraint.” *Id.* at 406-07 (emphasis in original).

In this case, the district court noted that Browneagle had been released after filing his habeas petition and was residing at the Bemidji House. The district court analyzed the mootness issue as follows:

Based on the record before this Court, there is no indication that Petitioner's return to prison is "imminent" or "almost inevitable" or that he will be returned to prison and held beyond his release date solely for the lack of an approved residence. Rather, Petitioner is able to remain residing at Bemidji House indefinitely or until he can locate other housing, so long as he complies with the conditions of ISR. Petitioner's release to the community is only as temporary as he chooses to make it, and not for lack of an approved residence or through any fault of his agent, caseworker, or the DOC.

Consequently, the district court concluded that Browneagle's petition was moot and dismissed the petition on that ground.

The district court's analysis is in tension with the undisputed fact that Browneagle had been released to the Bemidji House five times and had had his release revoked on four occasions. Upon each revocation, Browneagle was required to obtain approval of a residence before he could be released again. His caseworker had difficulty finding housing that complied with all relevant criteria, as described above. The caseworker's difficulty arose in significant part from the fact that Browneagle repeatedly had violated the terms of his release. But for purposes of the issue of mootness, the key question is whether effective relief is possible, not whether relief is warranted. *See Ford*, 933 N.W.2d at 401.

We need not determine whether the district court erred by determining that Browneagle's petition was technically moot. Even if effective relief was not possible at the time of the district court's decision, the circumstances presented a compelling case for

application of the same exception that the supreme court invoked in *Ford*. Because Browneagle has alleged a claim that is similar to the claim alleged in *Ford*, this case also presents an issue of statewide importance. And because Browneagle's asserted right to release was fully briefed in the district court and has been fully briefed on appeal, the important issue is functionally justiciable. In addition, remanding the case to the district court would tend to "thwart the very purpose of the writ," which is "to *speedily test* the propriety of the restraint." *Id.* at 406-07 (emphasis in original). Furthermore, for the reasons stated below, Browneagle's claims do not depend on an evidentiary hearing or on fact-finding by the district court.

Thus, the district court erred by dismissing Browneagle's habeas petition as moot. Because the appeal is functionally justiciable, we will proceed to consider the merits of the appeal instead of remanding it to the district court.¹ *See id.*

II.

Browneagle argues that, in November 2019, he was entitled to habeas relief on the ground that he was being imprisoned in violation of his right under state law to be released to the community in agent-approved housing. Specifically, he argues that the commissioner has a statutory obligation to supervise him in the community while he is on conditional release and that the commissioner must ensure his placement in approved

¹We also are mindful that the supreme court granted review, received briefs, and heard oral arguments in *State ex rel. Young v. Schnell*, No. A17-1741, 2020 WL 614249 (Minn. App. Feb. 10, 2020), after this court twice had determined that the petitioner's habeas claim had been mooted by his release from prison. *See id.* at *1-4; *see also State ex rel. Young v. Roy*, No. A17-1741, 2018 WL 2407259, at *1-2 (Minn. App. May 29, 2018), *stay vacated, rev'd and remanded* (Minn. Oct. 15, 2019).

housing instead of continuing to imprison him on the ground that approved housing is not available. In response, the commissioner argues that Browneagle was not entitled to release because he had not secured an approved residence and because the commissioner was not holding him past his projected release date of February 27, 2020.

“A person imprisoned or otherwise restrained of liberty . . . may apply for a writ of habeas corpus to obtain relief from imprisonment or restraint.” Minn. Stat. § 589.01 (2018). A habeas petition is an appropriate means by which an incarcerated person may “obtain relief regarding the custody imposed, or the length of confinement in a given case.” *State v. Schnagl*, 859 N.W.2d 297, 301 (Minn. 2015). More specifically, a habeas petition may be used to challenge the revocation of conditional release. *See Ford*, 933 N.W.2d at 405; *State v. Schwartz*, 628 N.W.2d 134, 138, 142 (Minn. 2001). At an evidentiary hearing on a habeas petition, the district court “shall proceed, in a summary way, to hear allegations and admit relevant evidence in support or against imprisonment or detention and, at the conclusion of the hearing, dispose of the petitioner in accordance with law.” Minn. Stat. § 589.19 (2018). But an evidentiary hearing is not required if “the petitioner has not alleged sufficient facts to constitute a prima facie case for relief.” *Case v. Pung*, 413 N.W.2d 261, 263 (Minn. App. 1987), *review denied* (Minn. Nov. 24, 1987).

A.

Browneagle’s petition implicates the statutes and administrative rules that govern conditional release of a person who is subject to a lifetime term of conditional release and has been deemed a risk-level-III sex offender. The supreme court has explained the applicable general principles:

Generally, a prison sentence in Minnesota consists of two terms. The “term of imprisonment” is typically the first two-thirds of the sentence, with a supervised-release term comprising the remaining one-third of the sentence. *See* Minn. Stat. § 244.101, subd. 1 (2018); *see also Heilman v. Courtney*, 926 N.W.2d 387, 394 (Minn. 2019) (explaining that “felons generally serve sentences in two parts”). Certain classes of offenders, including some sex offenders, also must complete an additional term of “conditional release.” *See, e.g.,* Minn. Stat. § 609.3455, subds. 6-7 (2018). “[C]onditional release of sex offenders is governed by provisions relating to supervised release.” *Id.*, subd. 8(a) (2018); *see also State ex rel. Duncan v. Roy*, 887 N.W.2d 271, 272 n.1 (Minn. 2016) (“Functionally, conditional release is identical to supervised release.”).

Ford, 933 N.W.2d at 396-97.

If a person who has been convicted of criminal sexual conduct “has a previous or prior sex offense conviction,” the district court, at sentencing, “shall provide that, after the offender has been released from prison, the commissioner shall place the offender on conditional release for the remainder of the offender’s life.” Minn. Stat. § 609.3455, subd. 7(b) (2018). In that event, the person’s release is subject to conditions that “may include successful completion of treatment and aftercare in a program approved by the commissioner, satisfaction of the release conditions specified in section 244.05, subdivision 6, and any other conditions the commissioner considers appropriate.” *Id.*, subd. 8(b). If the person “fails to meet any condition of release, the commissioner may revoke the offender’s conditional release and order that the offender serve all or a part of the remaining portion of the conditional release term in prison.” *Id.*, subd. 8(c).

The commissioner of corrections is generally authorized to impose a wide variety of conditions on conditional release. Minn. Stat. § 244.05, subd. 6(b), (c) (2018). The

commissioner has promulgated administrative rules that specify general requirements for all persons on supervised release and provide for the possibility of special conditions for certain persons. Minn. R. 2940.2000-.2300. In general, if a person violates a condition of conditional release, “the commissioner shall impose sanctions.” Minn. Stat. § 244.05, subd. 6(d). When imposing sanctions, the commissioner “may . . . continue the inmate’s supervised release term, with or without modifying or enlarging the conditions imposed on the inmate; or . . . revoke the inmate’s supervised release and reimprison the inmate for the appropriate period of time.” *Id.*, subd. 3; *see also Ford*, 933 N.W.2d at 397. Upon reimprisonment, the person “shall be assigned a release date and a term of reimprisonment.” Minn. R. 2940.3800. The term of reimprisonment may be as long as six months if the violation is not a criminal offense, is a misdemeanor, or is a gross misdemeanor, *id.*, subp. A.-B., and it may be longer than six months if the violation is a felony offense, if “there is a finding of risk to the public,” or if “repeated violations of the conditions of release occur and the releasee is determined to be unamenable to supervision,” *id.*, subp. C.-D.

A “projected release date” is “a date in the future at which an inmate will be released providing the inmate’s behavior is satisfactory” and “the inmate is not considered to be a risk to the public at the time of release.” Minn. R. 2940.0100, subp. 21. Administrative rules require department personnel to begin planning for an offender’s release 120 days before the projected release date. Minn. R. 2940.1200, subp. 1. A caseworker must assist the offender in preparing a release plan, which allows for the assignment of a supervising agent, who must “verify the appropriateness” of the plan. Minn. R. 2940.1200, subps. 1-3.

“Within 45 to 60 days” of the projected release date, the caseworker shall schedule a review of the release plan by a “program review team.” *Id.*, subp. 4. The recommended release plan “shall be reviewed by the executive officer of the hearings and release unit at least 30 days prior to the inmate’s established release date.” Minn. R. 2940.1300, subp. 1.

B.

Browneagle’s petition also implicates the caselaw that governs the commissioner’s discretion to revoke a person’s conditional release and continue to imprison him.

In *State ex rel. Marlowe v. Fabian*, 755 N.W.2d 792 (Minn. App. 2008), the habeas petitioner, a risk-level-II sex offender, was placed on ISR after serving two-thirds of his sentence. *Id.* at 793. He was released without pre-approved housing arrangements and was unsuccessful in finding housing in the days immediately following his release. *Id.* His release was revoked. *Id.* at 794. His ISR agent attempted to find suitable housing in various counties but was unsuccessful, in part because local corrections agencies were not fully cooperative. *Id.* at 793. Marlowe petitioned for habeas relief, and the district court denied his petition. *Id.* at 794. This court reversed and remanded. *Id.* at 797. We observed that, in light of the commissioner’s administrative rules, prison officials have “authority to restructure an offender’s conditions of release when the original conditions are unworkable.” *Id.* at 796. We noted that it was “clear that a suitable residential placement is available in a neighboring county.” *Id.* We reasoned that, “At the very least, when a condition becomes unworkable at the time of release due to circumstances largely outside the control of an offender, the DOC must consider a restructure or modification of those conditions.” *Id.* at 796-97. We concluded that “the DOC is required to reconsider its

decision to revoke Marlowe’s release” and, specifically, that it “must consider restructuring Marlowe’s release plan and must seek to develop a plan that can achieve Marlowe’s release from prison and placement in a suitable and approved residence, whether in Washington County or in a neighboring county.” *Id.* at 797.

In *Ford*, the habeas petitioner, a risk-level-III sex offender, was placed on supervised release after serving two-thirds of his sentence. 933 N.W.2d at 397. He initially was released to an agent-approved residence in the county of his conviction, and he relocated to a private residence a few months later. *Id.* His release was revoked after he violated the conditions of his supervised release. *Id.* After his prison term expired, he was placed on conditional release but was transferred to the county jail in the county of his conviction because he did not have agent-approved housing. *Id.* His release was revoked again, and he was returned to prison, initially for 90 days and later for another 90 days because he did not have approved housing. *Id.* He was released to a county jail for two months of chemical-dependency treatment, but then was returned to prison, initially for 179 days and later for another 150 days, during which time the department unsuccessfully attempted to find suitable housing. *Id.* at 397-98. Ford petitioned for habeas relief. *Id.* at 398. The district court denied his petition, but this court reversed and remanded. *Id.* (citing *State ex rel. Ford v. Roy*, No. A16-1769 (Minn. App. Feb. 1, 2017) (order)). On remand, the district court conducted an evidentiary hearing and concluded that the commissioner had violated its own internal policies and this court’s *Marlowe* opinion. *Id.* at 400. The district court granted relief in the form of an order that the commissioner “fully comply with its policy and the dictates of *Marlowe* by treating [counties other than the county of

conviction] as Ford’s presumptive release jurisdiction” and to either ““provide supervision in that county, or modify Ford’s conditions of release.”” *Id.*

On appeal, the supreme court considered “whether the Department failed to adhere to the law set forth in *Marlowe*, and if so, whether the relief granted is suited to the scope of the violation.” *Id.* at 405-06 (quotations omitted). The supreme court recited this court’s holding in *Marlowe*, with emphasis on our statement that the department ““*must consider restructuring Marlowe’s release plan and must seek to develop a plan that can achieve Marlowe’s release from prison and placement in a suitable and approved residence.*”” *Id.* at 406 (quoting *Marlowe*, 755 N.W.2d at 797) (emphasis in *Ford*). The supreme court also noted this court’s statement that “the Department ‘has an obligation to fashion conditions of release that are workable and not impossible to satisfy.’” *Id.* (quoting *Marlowe*, 755 N.W.2d at 793). The supreme court affirmed the district court’s order, concluding that “[t]he scope of the district court’s order corresponds to the scope of the Department’s violation of *Marlowe*.” *Id.* at 407-08.

C.

Browneagle relies primarily on the supreme court’s opinion in *Ford* and this court’s opinion in *Marlowe*. The commissioner argues in response that the difficulty in securing agent-approved housing was due to Browneagle’s own conduct and that the obligations imposed by those opinions had not yet arisen when Browneagle filed his habeas petition.

The central holding of *Marlowe*, which was reiterated in *Ford*, consists of three principles. First, as a general matter, the department of corrections ““has an obligation to fashion conditions of release that are workable and not impossible to satisfy.”” *Ford*, 933

N.W.2d at 406 (quoting *Marlowe*, 755 N.W.2d at 793). Second, more specifically, ““when a condition [of release] becomes unworkable at the time of release due to circumstances largely outside the control of an offender, the [department] must consider a restructure or modification of those conditions.”” *Id.* at 406 (emphasis omitted) (quoting *Marlowe*, 755 N.W.2d at 796-97). Third, if an offender’s release is frustrated by difficulties in finding an appropriate residence and a supervising agent, ““the [department] is required to reconsider its decision to revoke [the offender’s] release”” and ““*must consider restructuring [the offender’s] release plan and must seek to develop a plan that can achieve [his] release from prison and placement in a suitable and approved residence,*”” either in the county of conviction or another county. *Id.* at 406 (quoting *Marlowe*, 755 N.W.2d at 796-97) (emphasis in *Ford*).

In this case, the department did not violate *Marlowe* and *Ford* for three reasons. First, the difficulty in finding appropriate housing for Browneagle was *not* ““due to circumstances largely outside [his] control.”” *See id.* at 406 (quoting *Marlowe*, 755 N.W.2d at 797). As described above, Browneagle was released to agent-approved housing upon the expiration of his sentence. His conditional release was revoked four times because he violated multiple conditions of his release other than the condition requiring agent-approved housing. Unlike the offenders in *Marlowe* and *Ford*, Browneagle’s difficulty in obtaining agent-approved housing as of November 2019 was due to his own misconduct. Accordingly, the department’s obligation to ““consider a restructure or modification”” of Browneagle’s conditions of release was not triggered. *See id.* at 406 (quoting *Marlowe*, 755 N.W.2d at 796-97).

Second, Browneagle had not yet reached the end of the revocation period when he filed his habeas petition in November 2019. The department's obligation under *Marlowe* and *Ford* to “consider a restructure or modification” of Browneagle's conditions of release arises only if “a condition [of release] becomes unworkable *at the time of release*.” *Id.* at 406 (emphasis added) (quoting *Marlowe*, 755 N.W.2d at 796-97). Browneagle's conditional release was revoked for 365 days or less, effective February 27, 2019, which meant that his projected release date was February 27, 2020. Browneagle petitioned for habeas relief in early November 2019, more than three months before his projected release date. Browneagle petitioned for habeas relief before the time when his caseworker was required to assign a supervising agent or schedule a review of his release plan. *See* Minn. R. 2940.1200, subp. 2, 4. Browneagle asserts that, because he completed chemical-dependency treatment on July 30, 2019, he was eligible to be released, and thus entitled to be released, at that time. But his release was revoked for as long as 365 days, which means that he was not entitled to be released sooner than 365 days. This case is unlike *Ford*, in which the offender's revocation was extended beyond the initial projected release date, without any apparent reconsideration of the conditions of the offender's release. *See Ford*, 933 N.W.2d at 397-98. Because Browneagle had not yet reached “the time of release” in November 2019, he cannot prove that the department was in violation of *Marlowe* and *Ford* at that time. *See Ford*, 933 N.W.2d at 406.

Third, the relevant persons in the department *were* in fact “reconsider[ing] its decision to revoke [Browneagle's] release,” “consider[ing] restructuring [Browneagle's] release plan,” and “seek[ing] to develop a plan that can achieve [his] release from prison

and placement in a suitable and approved residence,” either in Beltrami County or in other counties, such as Hennepin County and Ramsey County. *See id.* at 406 (emphasis omitted) (quoting *Marlowe*, 755 N.W.2d at 796-97). As described above, Browneagle’s caseworker sent multiple inquiries to agents in Beltrami County, Hennepin County, and Ramsey County. During that time period, the caseworker was in communication with Browneagle and his attorney and assisted them in submitting proposed plans. Browneagle asserts that the department was not fulfilling its duty because a hearing officer stated that the hearings unit would not “intervene with placement issues” and would review his release planning only at the end of the revocation period. That statement is consistent with the applicable administrative rule. *See* Minn. R. 2940.1300, subp. 1.

Thus, Browneagle cannot prove that he is entitled to habeas relief on the ground that, in November 2019, he was being imprisoned in violation of a right under state law to be released to the community to agent-approved housing.

III.

Browneagle last argues that, in November 2019, he was entitled to habeas relief on the ground that he was being imprisoned in violation of his federal constitutional rights to procedural due process and substantive due process. The Fourteenth Amendment to the United States Constitution provides that no person may be deprived of “life, liberty, or property without due process of law.” U.S. Const. amend. XIV, § 1.

A.

We begin by considering Browneagle’s claim of a violation of his federal constitutional right to procedural due process. To determine whether an imprisoned

offender has received due process, it is necessary to ask two questions: (1) “whether the complainant has a liberty or property interest with which the state has interfered” and, if so, (2) “whether the procedures attendant upon that deprivation were constitutionally sufficient.” *Carrillo v. Fabian*, 701 N.W.2d 763, 768 (Minn. 2005).

Browneagle argues that he was imprisoned in violation of his right to procedural due process because, after he completed chemical-dependency treatment on July 30, 2019, the department did not give him a “fair opportunity to contest his extended imprisonment at an adversarial hearing.” Browneagle had had an adversarial hearing in March 2019 in connection with the latest revocation of his conditional release. He was given written notice of his alleged violations, an evidentiary hearing before a hearing officer, representation by an attorney, and a revocation decision that is reflected in a five-page document, which stated that Browneagle’s conditional release was revoked for “365 days or less.” In September 2019, he requested a review hearing, which was denied on the ground that it was premature. The first question is whether Browneagle’s federal constitutional right to procedural due process entitled him to an adversarial hearing in September or November of 2019, before the end of the 365-day revocation period.

In *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593 (1972), the United States Supreme Court held that an offender whose parole was subject to revocation had a protected liberty interest that triggered a right to procedural due process. *Id.* at 487-89, 92 S. Ct. at 2603-04. In *Marlowe*, this court held that an offender whose conditional release had been revoked for failure to have an approved residence and whose revocation period had been extended beyond his projected release date had a protected liberty interest that

triggered a right to procedural due process. 755 N.W.2d at 794-95. Neither of those two opinions speaks directly to the situation in this case, in which an offender had his conditional release revoked for misconduct and was being imprisoned during the revocation period without yet having reached his projected release date.

Browneagle's interest in being released from prison is similar to the offenders in *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1, 99 S. Ct. 2100 (1979), who sought release on parole. *Id.* at 4-5, 7, 99 S. Ct. at 2102, 2104. The Court stated that, to have a protected liberty interest, "a person clearly must have more than an abstract need or desire for it" and "must have more than a unilateral expectation of it" but, rather, must "have a legitimate claim of entitlement to it." *Id.* at 7, 99 S. Ct. at 2103-04 (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709 (1972)). To determine whether the offender had a protected liberty interest, the Court conducted two inquiries. It first inquired into the nature of the interest and the nature of the decision-making process. *Id.* at 7, 99 S. Ct. at 2103. The Court stated that "parole *release* and parole *revocation* are quite different" from each other because "[t]here is a crucial distinction between being deprived of a liberty one has, as in parole, and being denied a conditional liberty that one desires." *Id.* at 9, 99 S. Ct. at 2105. The Court reasoned that a parole-revocation decision relies in significant part on "whether the parolee in fact acted in violation of one or more conditions of parole" while a parole-release decision "is more subtle and depends on an amalgam of elements, some of which are factual but many of which are purely subjective appraisals by the Board members based upon their experience with the difficult and sensitive task of evaluating the advisability of parole release." *Id.* at

9-10, 99 S. Ct. at 2105. The Court determined that the nature of a release decision, by itself, did not give rise to a protected liberty interest. *Id.* at 9-10, 99 S. Ct. at 2105.

The *Greenholtz* Court also inquired into the language used in the state statute governing parole release. *Id.* at 11-12, 99 S. Ct. at 2106. The statute in that case provided, “Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, *it shall order his release unless* it is of the opinion that his release should be deferred because” of one of four specified reasons. *Id.* at 11, 99 S. Ct. at 2106. The Court determined that this language gave rise to a protected liberty interest because “the expectancy of release provided in this statute is entitled to some measure of constitutional protection,” but the Court “emphasize[d] that this statute has unique structure and language” and that the issue “must be decided on a case-by-case basis.” *Id.* at 12, 99 S. Ct. at 2106. In a subsequent opinion, the Court explained the second inquiry as whether state law uses “‘explicitly mandatory language,’ in connection with the establishment of ‘specified substantive predicates’ to limit discretion,” in which event state law gives rise to a protected liberty interest. *Kentucky Dep’t of Corrections v. Thompson*, 490 U.S. 454, 463, 109 S. Ct. 1904, 1910 (1989) (quotations omitted).

In this case, the first *Greenholtz* inquiry is concerned with the nature of the interest and the nature of the decision-making process. *Greenholtz*, 442 U.S. at 7, 99 S. Ct. at 2103. Browneagle’s interest in release from reimprisonment is similar to *Greenholtz*’s interest in being released on parole. *See id.* at 9, 99 S. Ct. at 2105. Likewise, the department’s release-planning process “is more subtle and depends on an amalgam of elements,” including “the difficult and sensitive task of evaluating the advisability of . . . release.” *See*

id. at 9-10, 99 S. Ct. at 2105. Thus, the nature of Browneagle’s interest in being released from reimprisonment and the nature of the decision do not give rise to a protected liberty interest. *See id.*

The second *Greenholtz* inquiry is concerned with whether state law creates a protected liberty interest, *id.* at 11-12, 99 S. Ct. at 2106, which depends on whether state law uses “explicitly mandatory language in connection with the establishment of specified substantive predicates to limit discretion,” *Thompson*, 490 U.S. at 463, 109 S. Ct. at 1910 (quotation omitted). As stated above, if a Minnesota offender’s conditional release has been revoked, a hearing officer is not required to review the offender’s release plan until 30 days before the projected release date. Minn. 2940.1300, subp. 1. Thus, under state law, Browneagle would not have had a protected liberty interest in a review hearing until January 2020.

Thus, in November 2019, Browneagle did not have a protected liberty interest in being released. In light of that determination, he did not have a procedural-due-process right to a review hearing at that time. Therefore, he cannot establish a violation of a right to procedural due process.²

²We are mindful of caselaw questioning whether the *Greenholtz* analysis still is valid after *Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2293 (1995), which criticized and cast some doubt on the second part of *Greenholtz*. *See id.* at 479-8, 115 S. Ct. at 2298-2300; *see also Carrillo*, 701 N.W.2d at 770-72. We are persuaded that both parts of the *Greenholtz* analysis retain their vitality in cases concerning release or revocation because the *Sandin* analysis is limited to cases concerning prison discipline or internal prison regulations. *See, e.g., Carver v. Lehman*, 558 F.3d 869, 872-73 n.5 (9th Cir. 2009), *cert. denied*, 558 U.S. 973 (2009); *Ellis v. District of Columbia*, 84 F.3d 1413, 1417-18 (D.C. Cir. 1996). In any event, it makes no difference in this case because we have concluded

B.

We next consider Browneagle's claim of a violation of his federal constitutional right to substantive due process. The doctrine of substantive due process "protects individuals from certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." *In re Linehan*, 594 N.W.2d 867, 872 (Minn. 1999) (quotations omitted). The supreme court has noted that it is "reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this uncharted area are scarce and open-ended." *State v. Hill*, 871 N.W.2d 900, 905-06 (Minn. 2015) (quotation omitted).

If a person challenges the conduct of an executive-branch officer, the relevant question is whether the officer's conduct "'shocks the conscience,' *Rochin v. California*, 342 U.S. 165, 172, 72 S. Ct. 205, 209 (1952), or interferes with rights 'implicit in the concept of ordered liberty,' *Palko v. Connecticut*, 302 U.S. 319, 325-26, 58 S. Ct. 149, 152 (1937).'" *Hill*, 871 N.W.2d at 906 (quoting *United States v. Salerno*, 481 U.S. 739, 746, 107 S. Ct. 2095, 2101 (1987)). "[O]nly the most extreme instances of governmental misconduct can satisfy the exacting shocks-the-conscience standard, with these acts often evincing deliberate and unjustifiable injurious intent." *Id.* (quotations and alterations omitted).

In this case, the department held Browneagle in prison after his conditional release had been revoked. The department did so pursuant to a decision of a hearing officer, which

that neither part of the *Greenholtz* analysis leads to a determination that Browneagle had a protected liberty interest in a review hearing in November 2019.

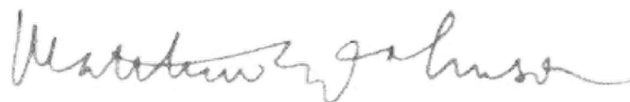
was based on evidence presented at an evidentiary hearing. At that hearing, Browneagle admitted to violating the conditions of his release by possessing explicit photographs of a female friend on his cell phone, hiding an unapproved guest in his closet, possessing a mood-altering medication that had not been prescribed to him, and failing to follow his agent's instructions, and the hearing officer found that he also possessed a dangerous weapon. As a consequence, the hearing officer revoked Browneagle's conditional release for 365 days or less. During the revocation period, Browneagle's caseworker was attempting to find him suitable housing in the community. Browneagle did not have a right under state law to a review hearing until 30 days before the end of the revocation period, which would have been in late January 2020. The imprisonment of Browneagle in November 2019 in these circumstances does not shock the conscience and is not a betrayal of rights implicit with ordered liberty. *See Hill*, 871 N.W.2d at 906.

Thus, Browneagle cannot establish a violation of his right to substantive due process.

DECISION

Browneagle did not have a right in November 2019 to be released from prison and live in the community in agent-approved housing.

Affirmed.

A handwritten signature in dark ink, appearing to read "Matthew Johnson", is centered on the page.