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Judge Frank Dismisses All Remaining Counts in *Karsjens v. Harpstead* with Prejudice. Prospect for Appeal Unknown.

by Cyrus Gladden

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On February 17, 2022, District Judge Donovan Frank of the United States District Court for Minnesota ruled on the long-pending case, *Karsjens v. Harpstead et al.* (originally *Karsjens v. Jesson*), Court File No. 11-cv-03659 (DWF/TNL). That latest ruling dismissed the remaining counts of the complaint in the case with prejudice. Effectively, except for the possibility of yet another appeal in the case, this ended the case with finality after more than ten full years of its litigation fruitless to the plaintiff class and its fourteen Representative Plaintiffs.

Available details follow:

The *Karsjens* Third Amended Complaint, upon which Judges Frank's various rulings in the case decided at various times, contained two divergent areas of focus.

The first involved various internal conditions and rules governing the two confinement facilities of the Minnesota Sex Offender Program (MSOP), when taken as a whole, were alleged to comprise a punitive environment. These included matters such as unreasonable visiting restrictions, double bunked rooms, first amendment violations, failure to provide treatment adequate and meaningful toward the goal of release of those committed, lack of a reasonable grievance procedure, unjust confiscation and destruction of confinees' property without due process, use of random searches, use of extreme restraints during all off-site transport of confinees, excessive punishment for minor rules violations, poor quality and inadequacy of meals, inadequate medical care of confinees, denial of religious freedom, practice, and clergy confidentiality, unreasonable restriction of free speech and free association, unreasonable phone restrictions and rules and exorbitant charges for phone use, unjustified bans on numerous newspapers, magazines, and books, and a long list of other deprivations and restrictions on the activity of confinees.

The other focus concerned lack of less-restrictive alternatives to complete confinement of those committed and duration of confinement without reasonable relation to the purpose for which persons are committed. This focus included these specific failures by MSOP:

(a) not requiring/providing independent periodic review or any regular internal reviews that include forensic risk assessments;

(b) not requiring the State to petition for a reduction in custody for committed individuals meeting statutory requirements for such reduction in custody;

(c) not requiring discharge of committed individuals who are no longer dangerous and/or no longer need inpatient treatment for a sexual disorder;

(d) not providing a judicial by-pass in the reduction in custody process;

(e) not providing a reduction in custody process that is constitutionally adequate; and

(f) not providing policies and conditions of confinement that are reasonably related or narrowly tailored to the purpose of confinement.

After a lengthy period of motions to dismiss and for summary judgment and discovery and some unusual measures such as appointment of and report by a Task Force on civil commitment to MSOP, the *Karsjens* case was tried in 2015.

After a claim for damages was withdrawn, the case was tried to District Judge Frank rather than to a jury. In June 2015, after the trial's conclusion, Judge Frank issued a 76-page set of findings of fact and conclusions of law and ruled in favor of the plaintiffs on their claims relating to that second focus of lack of a less-restrictive alternative to endless/indefinite confinement without relation to a need for such confinement.

Judge Frank ruled that the "Minnesota Civil Commitment and Treatment Act" ("MCTA" – now *Minn. Stat.* Ch. 253D), the state statute underlying the PP/SPP/SDP commitments of all of us, deprives each of us of our right under the Fourteenth Amendment to the U.S. Constitution to "substantive due process."

In reaching this decision, Judge Frank did not rely on the highly questionable constitutionality of those specific formulations of the standard for such commitments. That is the subject of the pending "*Gladden* case," also before Judge Frank (see below). Instead, his ruling in the *Karsjens* case is based primarily on the fact that virtually none of us has ever been released through "treatment completion."

Prison, or Sex-Offender Commitment Facility?

Judge Frank's 2015 decision befitted the history-making stature of the *Karsjens* case. He began by declaring that "[i]t is fundamental to our notions of a free society that we do not imprison citizens because we fear that they might commit a crime in the future," and added that such prohibited "imposition of preventive detention ... strikes at the very heart of what it means to be a free society where liberty is a primary value in our heritage."

He then initially summarized his conclusion by stating that "[t]he overwhelming evidence at trial established that Minnesota's [sex offender] civil commitment scheme is a punitive system that ...indefinitely detains potentially dangerous individuals without the safeguards of the criminal justice system."

Noting the original assurances that MSOP treatment resulting in release would only take from 24 to 32 months, Judge Frank observed that, since then, MSOP has "developed into indefinite and lifetime detention," remarking that only three MSOP detainees had ever been released onto provisional discharge, and none had ever been given a final discharge. In contrast, he stated that other sex-offender commitment states have meanwhile released many of their detainees.

Judge Frank also cited a lack of lesser alternatives to detention in the two main MSOP facilities for those committed and the fact that MSOP does not allow any detainee to attain CPS status until he is has finished the treatment program, concluding that MSOP's "stated goal of treatment and safe release back into the community" has not been observed "in practice."

Judge Frank also took a swipe at MSOP's "Matrix Factors, observing that they "are not used by any other civil commitment program in the country."

Perceiving that MSOP had not been conducting reassessments for any of its detainees except when they are going to the SRB, Judge Frank pointed out that, once again, Minnesota is apparently alone among other commitment states in this. Noting that "risk assessments are only valid for approximately twelve months," Judge Frank explained that "[r]isk assessments need to be performed regularly to account for new research, aging of the individual, and to track an individual's changes through treatment." In response to testimony by defendants that MSOP then planned to start reassessing detainees at the rate of one or two per month, Judge Frank observed that, at this rate, it would take thirty to sixty years to reassess all detainees just once (not annually).

Bypassing the "shocks the conscience" standard applied by the Eighth Circuit Court of Appeals in *Strutton v. Meade*, Judge Frank ruled that the standard applicable to the fundamental right to live free of physical restraint is "strict scrutiny" of the detention. Under that standard, state-actor defendants must show that the law in question is "narrowly tailored to serve a compelling state interest." In this analysis, Judge Frank distinguished the U.S. Supreme Court holding in *Kansas v. Hendricks* (1997) by citing the contrasting facts that Kansas requires an annual recommitment proceeding with a verdict beyond a reasonable doubt, whereas in MSOP, "not one offender has been released from the MSOP program after over twenty years."

Judge Frank added that the "overall failure of the treatment program over so many years is evidence of the punitive effect and application" of MCTA, calling it a series of "chutes-and-ladders" mechanisms for impeding treatment progression.

His order also observed that plea bargains were being used excessively in sex-crime prosecutions, with the commitment process later being used as a substitute for a prison sentence that could have been imposed after a criminal trial. In this connection, Judge Frank noted the plight of those who protest their innocence, whether after plea bargain or jury verdict of guilt, and who find after their commitment that they cannot progress even into Phase 2 unless they 'admit' to what they still claim to be a false conviction.

Judge Frank did not rule upon the *Karsjens* claims in several counts, ruling them obviated by his judgment

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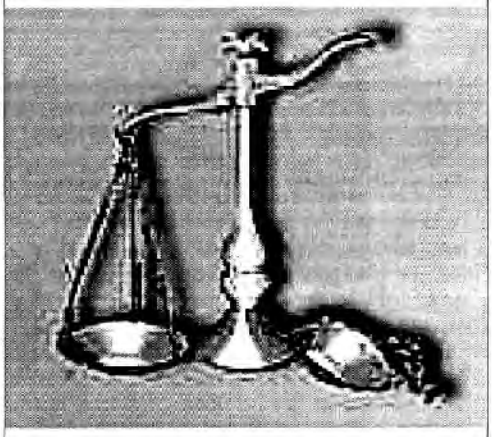

that MSOP was in violation of the more conclusive right to a 'clear path' toward release at a reasonable time.

Following that initial ruling, the State-actor defendants appealed to the federal 8th Circuit Court of Appeals. In 2017, that appellate court overturned Judge Frank's original judgment, on the surprising reasoning that it was necessary to shock the conscience of the court, but that the conscience of the ruling panel of that appellate court was not shocked by the failure of MSOP to release more than three confinees by 2015 (after 20 years of MSOP operations by then) or by its failure to take any of the actions cited by Judge Frank as necessary to carry out its constitutional duties toward that end.

That appellate reliance upon a standard of conscience-shocking disregarded a superseding ruling by the U.S. Supreme Court in *Kingsley v. Hendrickson* (2015) that supplanted that standard with one requiring objective (not subjective) review of the actions and inactions of jailers confining (in that case) a pre-trial detainee. Without examining the subjective intent of those who detain human beings for "malice" or "sadism" (a feat that would require true mind-reading), no determination of conscience–shocking behavior was possible or needed, ruled the High Court.

This inconsistency with *Kingsley* prompted a furor of highly critical (perhaps "scathing" is a better word) commentary about that 8th Circuit opinion and its outcome.

The 8th Circuit remanded the case to Judge Frank but without clear instructions. Judge Frank concluded from the sweeping verbiage of that appellate ruling that *Karsjens* Plaintiffs could not prevail on any of the claims which he had not originally decided. Therefore, he entered judgment dismissing all remaining claims.

This provoked another appeal — this time by the Plaintiffs. Curiously, in February 2021, despite its original ruling, the 8th Circuit ruled in this second appeal that Judge Frank had proceeded too hastily on those remaining counts, again remanding the case to him for proceedings on three such residual "Counts" (5, 6 and 7) of the Complaint.

The ruling by Judge Frank announced by this article followed numerous hearings and suggestions by him to the parties that they try to find some common ground upon which to settle the long-running case. However, the parties were too far apart on their views of the case to do so, forcing Judge Frank's hand.

Judge Frank's latest ruling dismissed all of those three remaining claims in total with prejudice. He seemed apologetic in doing so, stating in his Conclusion,

"This Court is bound by and obligated to follow the law as it currently exists. The Eighth Circuit has determined that the MSOP is constitutional both on its face and as applied. The Court now concludes that based on the governing legal standards, Plaintiff's claims to the conditions of confinement and inadequate medical care also fail."

He then expanded on his sentiments and views of the dictates of basic morality thus: "Notwithstanding, the confinement of the elderly, individuals with substantive physical or intellectual disabilities and juveniles, who might never succeed in the MSOP's treatment program or who are otherwise unlikely to reoffend, remains of serious concern for the Court and should be for the parties as well.[17] [Footnote 17: The Court continues to receive numerous letters from civilly committed individuals and their families members agonizing over the incessant nature of confinement. Moreover, for multiple individuals, civil commitments has proven to be a life sentence.]

The Court continues to believe that politics or political pressure should not compromise Class Members' rights to treatment and eventual reintegration into society ...

The fact that MSOP is constitutionally sound should not deter the State of Minnesota from doing better.[18] [Footnote 18: Notably, as pointed out in *Folson*, the 1MSOP was able to withstand facial and as-applied challenges before the Eighth Circuit based on its representation that it had proper procedures and evidentiary standards in place for Clients to petition for a reduction in custody or release from confinement. See *Karjens* I, 845 F.3d at 409-411. The *Folson* decision indicates immensely troubling flaws in the process which warrant immediate attention. *Folson*, County File No. 62-MN-PR -06-267; Appeal panel File No. AP19-9153 at *6 ("The Commissioner and the MSOP Executive Director have exhibited a brazen disregard for the statutory civil commitment process, evident from the initial hearing where the client rightfully expressed concern that the reduction in custody, even if ordered, was not going to occur.")]"

Thus, it is clear that Judge Frank has held that MSOP's procedures and processes meet minimal requirements of due process under the "shocks-the-conscience" standard imposed highly questionably on the case by the 8th Circuit. In a phrase, this conveys that Judge Frank's hands were tied, such that he had no choice.

However, this says nothing as to the contention of the unconstitutionality of the standards for sex offender commitment under the 1994 legislation that created it in Minnesota and of the evidence and testimony upon which such commitments are based, despite their outrageously anti-scientific nature, as TLP has been reporting on since its first issue, not to mention the procedural due process deficiencies of the way in which such commitment proceedings are conducted.

All of these points, and many supporting points besides, were advanced in a related case filed at the start of 2014, *Gladden v. Swanson et al.* Because it does not concern itself with conditions of confinement and less-restrictive alternatives or release decisions (other than as evidence supporting the claims against the facial provisions and the application of the statutes allowing the underlying commitments, this *Gladden* case cannot be subjected to the conscience-shocking holding by the 8th Circuit in *Karsjens*.

In late summer 2014, the same law firm representing the *Karsjens* plaintiffs was appointed to represent this writer in the *Gladden* case. Because of the laborious intensity of the *Karsjens* litigation, the Gladden case had to be placed on hold status and, ultimately at court request, was withdrawn with leave to re-file when the *Karsjens* case was resolved, if relief in *Karsjens* left any shortcomings requiring further litigation.

In *Karsjens*, there is only one card left in the Plaintiff's hand left to play, if they choose: yet another appeal to the 8th Circuit of this latest ruling by Judge Frank. However, since Judge Frank only did what the 8th Circuit directed him to do, and ruled in conformity with the standard previously laid out by the 8th Circuit, it would certainly seem that any such last appeal would very likely be denied.

Hence, it now seems that the shortcomings left by *Karsjens* certainly do require further litigation, and that the means for such litigation offering the greatest promise for striking down altogether the Minnesota law permitting sex offender commitment as the disguised further incarceration that it truly is are contained in the *Gladden* case and are not presented in any other case.

Therefore, as the saying goes, stay tuned.

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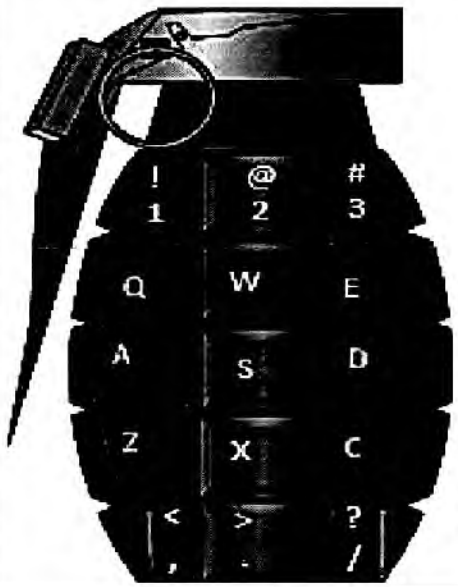
Why is everyone always so sure that it won't be them next time?



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