

In This Issue:

1. Karsjens Dismissed by Judge Frank.	1-3
2. Call for 1st Amendment Violations for New Federal Court Class Action	1
3. New Person-First Guideline	3
4. Gladden Complaint Except Where Expertise Is Required for Due Process and No Science Exists Upon Which to Base Expertise. Due Process Has Been Denied.	3-5
5. Psychopathy & Sexual Deviance Do Not Add to Predictive Validity of Static-99R	5-6
6. SVP 'Tiers' Unjustified under Actuarial Findings as to Actual Sex-Crime Recidivism	6
7. Reply to Minnesota Sex Offender Program Annual Performance Report 2015 - revised, Part 3	6-11
8. Victim of the Month — Chris Krych	11-12
9. Hold the Presses! This Just In!	12

Coming This Year:

- ✓ The Routine & Nonroutine of the Static-99R: The Good, the Bad, & the Very Ugly Got Much Worse in 2015.
- ✓ The Math behind the MnSOST-3.1 Pushed Pencil-Whipping into a Whole New Dimension
- ✓ Far More from the Gladden Complaint
- ✓ Denial of Internet Access to Hold You Incommunicado
- ✓ 3 Pro's Named Mud: The High Cost of Telling a Very Inconvenient Truth
- ✓ Reply to MSOP Whitewash, Part 3
- ✓ 'Stranger Danger' Debunked
- ✓ Experts Barbaree & Blanchard Lay It Down: on Waning Sexually Deviant Acts by Older Former Sex Offenders
- ✓ Moral Vigilantism - Tool to Deprive Sex Offenders of Their Rights and to Dehumanize Them
- ✓ Commitment as 'Predictive Policing' - 'Precrime'
- ✓ First Amendment & the Internet for Us Post-Packingham
- ✓ MSOP Media Censorship vs. Disconnect between Imagery & 'Hands-on' Sex Crimes
- & Tons More!



Winnowing the Wheat from the Chaff since 2016

The Headliner & the Prospects:

Judge Frank Drops the Bomb on *Karsjens* Case. Where to from Here?

By now you surely have heard that the *Karsjens* case has been totally dismissed by Judge Frank. Undoubtedly this came as much of a surprise to you as it did to me. Therefore, a little explanation is in order first.

We start with the Court's splitting of trial in *Karsjens* into two "phases." Phase One, decreed Judge Frank, was to address these issues: (1) whether Minn. Stat. Chapter 253D is unconstitutional on its face and as applied; (2) whether treatment provided by MSOP is constitutionally or statutorily infirm; (3) whether MSOP's treatment program complies with court-ordered treatment; (4) whether confinement is unconstitutional punitive detention; and (5) whether less-restrictive alternatives to confinement are constitutionally required. The Phase One trial took place between Feb. 9, 2015 and March 18, 2015.

Jumping ahead momentarily, Phase Two was to address these other issues: (1) whether confinement conditions constitutes unconstitutional restrictions on freedom of speech, religion, and association; (2) whether confinement procedures constitute unconstitutional search and seizure; and (3) whether the MSOP treatment program and its implementation constitutes a breach of contract, tortious interference with contract, and/or intentional violation of Minn. Stat. Sec. 253B.03(7).

However, Judge Frank entered an order after the first trial (Phase One) requiring Defendants to engage in assessments of all MSOP "clients" to determine whether each of them currently need to remain in confinement under the constitutional



standard for such mental health commitments. That order reserved Counts VII, IX, and X for the projected Phase Two trial.

At that point, the *Karsjens* Defendants appealed to the 8th Circuit Court of Appeals. That appeal reversed that order by Judge Frank, and that reversal opinion also spoke more broadly against the viability of most of the *Karsjens* claims. Nonetheless, the 8th Circuit sent the case back to Judge Frank for "further proceedings" on those remaining claims. A Petition for Writ of Certiorari to the U.S. Supreme Court by plaintiffs was denied by that Court.

Upon remand, Defendants filed a motion for judgment on Counts VII, IX, and X, and also sought apportionment of The Rule 706 Expert costs to Plaintiffs. Defendants also addressed the remaining undecided Phase One counts (III, V, VI, and VII) in light of the 8th Circuit's reversal.

Judge Frank's current dismissal opinion noted that the 8th Circuit ruled that "the Supreme Court...has never declared that persons who pose a significant danger to themselves or others possess a fundamental liberty interest in freedom

internet access here in MSOP, where many are no longer even on parole, should be a given.

Previous litigation by unschooled *pro se* litigants has resulted in a ruling elsewhere that a 'modified' form of the First Amendment restrictions OK'd in *Turner v. Safley* for prisons can be applied in a similar sex offender commitment facility. However, with proper advocacy, no such ruling will be repeated here. We are NOT prisoners. Hence, just like all mental health patients, we have all of our First Amendment rights not posing a direct threat to facility security or safety.

So please send green mail to Cyrus Gladden detailing violations of any of these rights of yours. These will be evidence at the least. Those with many or extreme violations will be asked to be co-plaintiffs. Thanks!



from physical restraint." However, for a proper understanding of this statement, one must know that it is the commitment case itself that must ascertain such a "significant danger" to oneself or to others to warrant the proposed commitment. Until that finding is reached, one cannot be confined at all.

This is a crucial point, since the *Gladden* case challenges the statutory grounds for commitment of sex offenders (at least one of these: a "Sexually Psychopathic Personality" or a "Sexually Dangerous Person" determination). That challenge turns not just on the language of that commitment statute itself, but also on the interpretive decisions applying that statute to many committed sex offenders over the years since passage of that Act (the "MCCTA of 1994" or, as Judge Frank terms it, the "MCTA"). Therefore, until the moment of one's commitment, one does in fact retain a fundamental liberty interest in freedom from physical restraint. Hence, before one can lose that liberty interest, the appropriate standard of substantive due process review must be satisfied.

As Gustafson Gluek has argued in our behalf already, given that physical liberty is at stake, the universally recognized appropriate standard is "strict scrutiny" of the substantive terms of the statute (not to ignore procedural due process, which can be, and usually is, claimed in tandem in such challenge cases). Yet the 8th Circuit opinion ignored this procedural distinction of pre- versus post-commitment status, and hence jumped to an unwarranted conclusion that the apt review standard was instead only the extremely deferential standard of the existence of a "rational basis" for the statute's terms. That much of that 8th Circuit decision is sharply at odds with uniform decisions in other cases. Thus, it is hoped that any appeal now by Plaintiffs in *Karsjens* will at least succeed in gaining a clarifying distinction from the 8th Circuit on this critical point.

As summarized by the 8th Circuit's opinion, these six reasons were relied upon by Judge Frank in ruling the MCTA unconstitutional: (1) MCTA did not require periodic risk assessments of all committed persons; (2) MCTA did not provide for a judicial bypass mechanism (that is, review by the committing court of current continuation of grounds for the commitment, as an alternative to the SRE/SCAP process, which requires a committed sex offender to carry the burden, including factors cumulative to the issue of such continued grounds); (3) MCTA rendered discharge from MSOP more onerous than admission criteria for

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commitment because discharge criteria are more stringent than admission criteria; (4) MCTA impermissibly shifted the burden to petition for a reduction in custody to the committed person; (5) MCTA did not provide less-restrictive alternatives even though the statute indicated that such alternatives would be available; and (6) MCTA did not require state officials to petition for a reduction in custody on behalf of committed individuals who might qualify for a reduction.



Confrontation

My point here is not to re-argue these particular points. Instead, I list these reasons only for the purpose of pointing out that each of them concerns a post-commitment (not pre-commitment) circumstance, and that each of them involves actions or omissions by MSOP or by its administrative superior entities, all as part of the administration of one's then-ongoing commitment. This crucial observation connects to the preceding point about the distinction in rights of those not yet under commitment, versus those in such ongoing commitments. Given that each of these six grounds relied upon by Judge Frank in declaring the MCTA unconstitutional arise from this latter context, the approach taken by the 8th Circuit in using the "shocks the conscience" standard becomes more comprehensible. All cases applying that "shocks the conscience of the court" standard have done so because the alleged wrongs were such actions/omissions by executive-branch officials/employees. Thus, that ridiculously easy-to-satisfy and utterly discretionary (and potentially biased) standard does not apply to the *Gladden* case claims.

Interestingly, the 8th Circuit's opinion quoted Hendricks in justifying detention of those committed even where no treatment is available, but the 8th Circuit extends this to mean that there is no right to treatment at all under the substantive due process guarantee. While there is no Supreme Court case affirmatively recognizing such a right to mental health treatment in commitment, nonetheless, there is no opposing declaration of a lack of such right.

Where some form of effective treatment exists, to decline to provide such treatment can indeed be a constitutional violation, as discussed at length by *Eric S. Janus & Wayne Logan*, in a detailed article, "Substantive Due

Process and the Involuntary Confinement of Sexually Violent Predators," *35 Conn. L. Rev.* 319, at 358 (Winter, 2003) ("...[T]he Jackson line of cases suggests a strong right to treatment, one in which effective treatment facilitates real progress toward community reentry.")

And in fact, the Minnesota Dept. of Corrections proudly trumpets its SOTP sex offender treatment program in MCF-Lino Lakes prison as a comparatively short treatment program claimed as effective at reducing recidivism by sex offenders significantly, based on statistics of post-prison release crime-free conduct by graduates of that program. (Note: the MCTA declares a right to treatment for all committed sex offenders, but says nothing about its length.)

Yet MSOP ignores the successful modality of the aforesaid SOTP program of the DDC, instead inventing its own modality unknown anywhere else - even in other sex offender commitment systems elsewhere in the country. The failure of that purported MSOP modality is self-evident from the fact that, even after double decades of that treatment, MSOP still claims to find its so-called clients too dangerous to release.

That this finding is made even as to the elderly (who all statistics have uniformly found to have no significant rate of recidivism at all) reveals the disingenuousness of that claim. In this context, MSOP's stubborn refusal to abandon its ineffective treatment and replace it with that SOTP treatment mode can indeed be taken as evidence that MSOP is not a genuine treatment system, as all civil commitment systems must be, and hence that such commitment orders violate the substantive due process guarantee as being nothing more than a false front, based on purely political ends of punitive detention, rather than such a genuine system.

Of further note, the 8th Circuit's opinion stated that it concluded that Judge Frank's appealed order did not demonstrate that any one of those six grounds satisfied the conscience-shocking requirement. However, it completely ignored the alternative proposition that, taken cumulatively, all those grounds coalesced in the aggregate to shock a court's conscience.

Nonetheless, in the dismissal opinion now at hand, Judge Frank correctly conceded that his hands are bound by any issues finally disposed of by the appellate court. Whether that question of the aggregate shocking impact was actually decided by the 8th Circuit does not appear to be clear, however. This may be subject of the second appeal now projected. (See Judge Frank's slip opinion, p. 11, citing *U.S. Fid. & Guar. Co. v. Concrete Holding Co.*, 168 F.3d 340, 342 (8th Cir. 1999) ("Subjects an appellate court does not discuss, because the parties did not

raise them, do not become the law of the case by default.")

Judge Frank noted that the Phase One counts not decided by the 8th Circuit's ruling all "challenge Defendants' acts and omissions relating to the creation and implementation of various policies at the MSOP." Even though one of these counts, Count V, "alleges a right to be free from punishment," Judge Frank lumped it with those other Phase One counts, stating that they all "center on the punitive nature of the MSOP..." Even though the "Eighth Circuit has recently affirmed that 'a committed acquittee is entitled to release once he is no longer dangerous or no longer mentally ill,' *Andrews v. Schafar*, 888 F.3d 981, 984 (8th Cir. 2018)," Judge Frank concluded that, the actions and omissions of and within the MSOP must satisfy the conscience-shocking standard imposed by the 8th Circuit in addition to being punitive in nature.

However, where such punitive measures can be tied to the object of a commitment judgment itself, it would appear that this challenge would be to the basis for and operation of such commitment judgments themselves, rather than to post-commitment actions as such, thus removing the punitive aspect from the conscience-shocking arena of executive branch actions and omissions. At slip opinion page 18, Judge Frank explained why he deemed himself unable to do this: "According to Plaintiffs, the trial record supports a finding that 'Plaintiffs' commitment to the MSOP under the Act is punitive in effect' based on the treatment, living conditions, and discharge process, 'the consequence of which is effectively life-long punitive detention.' ...Plaintiffs also point to the lack of periodic risk assessments conducted at the MSOP..." Note that all of the emphasized passages in this quote are internal matters at MSOP. In the *Karsjens* case, these aspects were not mere evidence that could have been combined with evidence of shortcomings in the commitment process itself as allowed by the MCTA, but instead were the sole allegations comprising the counts that were alternatively being spun into sole support for the count of punitive conditions - solely post-commitment.

In response to this, Judge Frank, at page 19, stated, "Even under this alternative theory of liability, the Court once again concludes that the Eighth Circuit's holdings are dispositive of Plaintiffs' remaining Phase One claims. Regardless of the theory of liability alleged, Plaintiffs' Fourteenth Amendment substantive due process claims are analyzed under the two-part test identified by the Eighth Circuit in its *Karsjens* opinion." However, Judge Frank reached this conclusion only because "Plaintiffs' Fourteenth Amendment substantive due process claims" focus on MSOP actions and omissions, rather

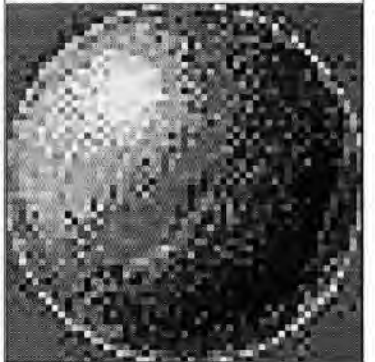
than on the MCTA commitment law, as judicially precedentially interpreted and applied by Minnesota's appellate courts.

In sum to this point, Judge Frank's ruling dismissing the rest of *Karsjens* at this time was, in his view, compelled by the 8th Circuit's opinion, but for the specific reason that the grounds for its counts all focused on MSOP action and inaction. In a different case, such as the *Gladden* case, focusing instead on the commitment proceedings themselves and their anti-scientific grounds, it is clear that the non-executive branch nature of those claims will not be subject to that requirement of shocking a court's conscience.

At pages 23-24, Judge Frank's ruling acknowledges that, at least in theory, "individuals residing at the MSOP may have viable individual claims regarding the application of specific policies to them as individuals." However, this observation was intended merely to point out the difference to *Karsjens* and other class action cases, and to justify Frank's decision to keep the *Karsjens* class intact long enough to make his ruling against all class plaintiffs across-the-board. Thus, any individual claims that simply restate any of the claims raised in the *Karsjens* class action are very likely to face dismissal on grounds of res judicata (that is, something already decided).

In closing (although not having any legal effect), Judge Frank expressed his dismay at "the continued confinement of elderly individuals with a low likelihood of re-offense as an egregious affront to liberty, particularly in light of the pervasive sense of hopelessness at the MSOP. Similarly, the confinement of individuals with cognitive disabilities or juvenile-only offenders who could safely reside in a less restrictive alternative facility or in the community remains of great concern to the Court."

While it remains true that if a Section 1983 federal lawsuit were filed for any of these groups (or even an individual), the same decision standard of "shocking the conscience" makes it unlikely that a favorable judgment would be reached. Nonetheless, a habeas corpus petition by such an individual



Shiny Ball Syndrome

(Continued on page 3)

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might have a better outcome. Such a petition can be pursued *pro se*. Alternatively, a growing number of law firms and solo attorneys in Minnesota are now turning to representation of such habeas cases for sex offenders as a specialty. Recently, even state courts in Minnesota have started to hear those cases with unprecedented impartiality, and some cases have already been successful.

Where to from Here?

In a call to David Goodwin at Gustafson Gluek recently, Attorney Goodwin indicated that an appeal is projected by the *Karsjens* Plaintiffs from this latest ruling by Judge Frank. Goodwin also confirmed that the Gustafson firm intends to go forward with the *Gladden* case, although that *Karsjens* appeal will take first time-priority.

Certain *Karsjens* Plaintiffs have also proposed other legal avenues to pursue for relief. At press time, it remains unclear which, if any, of these alternative avenues will be pursued by that firm. More on such developments in the aftermath of the *Karsjens* loss will be reported as they emerge in sufficient clarity. Meanwhile, please do not generate or pass along rumors about any of these matters. False or garbled reports will only spread confusion and frustration. Believe only what you see in print.

New Person-First Guidelines Mean Never Having to Hear Trash-Talk from Professionals Again.



Hostility Just Leads to Headaches

(Editor's Note: The two article excerpts below specifically address the topic of the chronic, abusive misuse of language to disparage various kinds of sex offenders and sex offenders overall (now: "persons who have sexually offended"). In particular, all psychologists are now ethically mandated to use the new terms in place of the old. This applies to mentions of you, as well as abstract discussions about the topic. Therapists as well should be under these new guidelines.

As the second excerpt illustrates, even the academic periodical *Sexual Abuse* (chronically, no friend to such persons) now demands that such pejorative language cease. While this may not seem important at first, such pejorative terms have legitimized mistreatment of us for decades. Now that more respectful, compassionate language is required instead, it is hoped that matching actions will follow.)

⇒ *Michael C. Seta*, Editor-in-Chief, "Sexual Abuse's New Person First Guideline." 30:5 *Sexual Abuse* 479 (2018)

"...[P]erson-first language is preferred because it is less stigmatizing, potentially more accurate, and more consistent with the publication style guidelines of the American Psychological Association (APA)...."

"Authors are encouraged to be thoughtful about the connotations of language used in their manuscripts to describe persons or groups. Person-first language (e.g., 'persons with sexual offense histories', 'individual who has been adjudicated for ...', 'child/adolescent with sexual behavior problems') is generally preferred because it is often more accurate and less pejorative than terms like 'sex offender'. Terms like 'sex offender' imply an ongoing tendency to commit sex offenses, which is inaccurate for many persons who have been convicted for sex offenses given current sexual recidivism base rates. Similarly, the term suggests a homogeneous group defined and stigmatized on the basis of criminal behaviors that may have taken place infrequently or many years in the past. Person-first language is also consistent with APA style guidelines for reducing bias in written language (see *American Psychological Association*, 2010)...."

⇒ *Gwenda M. Willis & Elizabeth Letourneau*, Guest Editorial: "Promoting Accurate and Respectful Language to Describe Individuals and Groups," 30:5 *Sexual Abuse* 480-483 (2018);

(p. 480) **"Validity of Offense-Based Labels**

"It is well-established that sexual recidivism base rates are low and decline substantially with time spent offense free in the community (*Hanson, Harris, Helmus & Thornton*, 2014; *Hanson, Harris, Letourneau, Helmus & Thornton*, 2018). Yet the use of labels such as 'offender' or 'sex offender' to describe a person or group can imply a trait-like tendency to engage in criminal behavior, inadvertently promoting the inaccurate view of high recidivism risk among all persons who have sexually offended. Such labels also imply homogeneity, yet offense-based categories include diverse individuals with different risk profiles, psychological characteristics and intervention needs. For example, some individuals referred to as 'sex offend-

ers' may have engaged in repeat offending against children who might receive high scores on both static and dynamic risk assessment tools, whereas others may have engaged in a single offense, never done so since, and receive scores indicative of low sexual recidivism risk. Indeed, the latter individual's relative risk of sexual reoffending might be indistinguishable from individuals convicted for nonsexual offenses (see *Hanson et al.*, 2014). In academic publications and beyond, the continued use of normative labels like 'sex offender' risks promoting misperceptions about sexual offending that can ultimately obstruct an individual's rehabilitation, reintegration, and desistance (see *Willis, Levanson & Ward*, 2010). Moreover, such labels can erode the public's support for prevention and treatment efforts (see *Harris & Socia*, 2016). None of us are defined by a single attribute, no matter how salient or sensational. Person-first language helps move beyond simplistic and often inaccurate understandings of people who have offended sexually.

(p. 481) **"Respectful Reporting of Individuals and Groups**

"...In their guidelines for reducing bias in written language, the APA Publication Manual advises authors to 'respect people's preferences: call people what they prefer to be called.' The APA guidelines further state that 'A label should not be used in any form that is perceived as pejorative; if such a perception is possible you need to find more neutral terms' (p. 72).

"Some labels commonly used to categorize persons or groups in the field of forensic/correctional psychology and criminology are based on clinically valid constructs, such as 'psychopath' and 'pedophile.' Although these clinical terms may be useful, they are laden with negative connotations that stigmatize the individuals to whom they are assigned (*Janhoff*, 2015), affecting their well-being and perhaps even increasing their risk to offend (*Jahnke, Schmidt, Geradt, & Hoyer*, 2015). Moreover, these labels also risk homogenizing groups of individuals. For example, the label 'pedophile' might apply equally to someone who has offended repeatedly against multiple prepubescent child victims, someone who has viewed images of child abuse, and to someone who has never acted on his or her attractions. However, the assumption is often that 'pedophile' refers to people with convictions for repeat sexual offenses against children. Importantly, even professionals are susceptible to the stigma of these labels (*Jahnke, Philipp & Hayer*, 2015).

"...[Some] research participants or therapy clients adopt labels such as 'virtuous pedophile' or 'minor-attracted person'....(see also *Malone*, 2014). Using participants' preferred labels is a sign of

respect for their autonomy. Demonstrating respect for persons is an ethical mandate among the clinical professions (*Lo* 2009). ... In addition to respect for others, we adhere to the ethical principles of beneficence (engaging in behavior with a net benefit to others) and justice (treating all fairly) (*Lo* 2009). ...We argue that in all cases, the use of person-first language aligns with the ethical principles of beneficence and justice and in most cases person-first language also aligns with the principle of respect....

(p. 482) **"Person-First Language**

"...Person-first language separates the person from the behavior, condition, or disorder (e.g., 'persons with sexual offense histories,' 'individual who has been adjudicated for...,' 'child/adolescent with sexual behavior problems,' 'man with pedophilic sexual interests'). Person-first language is more accurate and less pejorative than terms like 'sex offender'...."

Gladden Complaint Excerpt: If Expertise Is Needed, but No Science Basis Exists for Expertise, Due Process Is Denied.



Where Expertise Is Required for Due Process and No Science Exists Upon Which to Base Expertise, Due Process Has Been Denied.

In the words of the Court itself, "It 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," adding 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." (*Karsjens et al. v. Johnson Piper et al.*, June 15, 2015 Order, p. 3).

The Court then initially summarized its 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." (Id., p. 4; emphasis

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supplied) This is simply another way to express permanent preventive detention, an action anathematically contrary to the American notion of individual liberty implicit in the United States Constitution's prohibition on Bills of Attainder and its guarantee of substantive due process.

Most fundamentally supporting this is the professional psychological consensus that "the science of sex offender research cannot accurately sort those offenders likely to recidivate from those who are not." John A. Fannel, J.D., Ph.D., in "Punishment By Another Name: The Inherent Overreaching In Sexually Dangerous Person Commitments," 35 New England J. On Crim. & Civ. Confinement 37, At 39 (Winter, 2009).

Dr. Cauley applies this to sex offender commitment by historically recounting that "initially the feeling was that we were able to separate the populations, so that the men at the civil commitment center were much higher risk than men you would find at an outpatient program. But now follow-up studies of recidivism are saying that really may not be all that true, that a high risk offender outpatient or the base rate of re-offense for the average offender on probation, compared to follow-up studies like have been done in Florida, there really isn't a great difference in the re-offense rates, with or without treatment." (Karsjens Trial Tr., v. 10, pp. 2236-37).



Copernicus' heliocentric discovery. Science has always presented inconvenient truths, but only the truth can set you free.

The actual body of 'science' as to such risk prediction is itself largely simply junk science. Other than the diminution of risk of re-offense with increasing age, there is virtually no certainty as to any risk 'factors' pointed to by any school of thought among psychologists.

In sum, when legislators merely guess at risk based on their own personal biases and currently bandied-about myths as to sex offenders, and when psychologists themselves are subject to such subjectivity and

personal biases and work with concepts and tools about which there is grave doubt concerning their scientific validity (much less their subject-to-subject and scorer-to-scorer reliability), there simply are no fact-based standards; all decisions are inherently arbitrary. Confinement of individuals based on such arbitrary decision-making is a failure of strict scrutiny and a denial of substantive due process by definition.

The Court's Finding 13 in that Order in Karsjens contrastingly described the history of Minnesota's original sex-offender commitment law, the "psychopathic personality" statute. That statute was repealed and recreated with changes by the MCCTA of 1994. See 1 Sp 1994 Ch. 1, Art. 1, § 6. It is common knowledge that the original "psychopathic personality" statute was used almost exclusively over its 50-year life, as The Court observed: as "an alternative to criminal punishment, and most often as a means of diversion entirely from the criminal justice system, in avoidance of a criminal charge, or at least a conviction of an existing charge. This was discussed by Eric S. Janus & Wayne Logan, in "Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators," 35 Conn. L. Rev. 319 (Winter, 2003).

This is an important distinction from the MCCTA; the latter Act allows commitment at any time, and was blatantly enacted to prevent the release of sex offenders as they reached the end of their respective prison sentences. Apparently, no MCCTA commitments have ever been sought at or shortly after the time of a criminal conviction, and almost all such commitments arise from petitions filed not long before such prison release. This strongly confirms that the inherent goal of the MCCTA is not treatment to prepare one for release, but instead simply to ensure continued detention of each committed sex offender for as long as possible.

Further, the Court's Finding 14 cites the Commitment Act Task Force within the Psychopathic Personalities Subcommittee of the Minnesota Dept. Of Human Services, whose "Report to the Commissioner of Human Services" recommended a "rewritten sex offender commitment law to circumvent three claimed problems with the criminal justice system." These three "problems" have nothing to do with sex offender treatment, but everything to do with criminal punitivity:

"First, the criminal justice system requires in-court testimony to prove a crime, whereas sex offender commitment proceedings make liberal use of hearsay evidence embedded in the expert testimony. Thus, the task force recommended that sex offender commitment laws can protect society against individuals who may not have been convicted of a sex offense because of the reluctance of young and/or

scared victims to testify against perpetrators of sexual abuse."

"Second, the then envisioned sex offender commitment law would circumvent the limits imposed by strict burdens of proof by allowing the confinement of individuals who 'may be dangerous, but evade conviction due to the high burden of proof required in criminal cases' (as does said law, as authoritatively interpreted and construed by Minnesota appellate courts).

"Third, because the envisioned law wouldn't be limited by double jeopardy and ex post facto protections (as said Act is not, per authoritative holdings of Minnesota appellate courts), it can compensate for the 'comparatively short sentences' for sex offenders by confining individuals after they have completed their criminal sentences." (Minnesota Dept. Of Human Services, Psychopathic Personalities Subcommittee, "Report to the Commissioner, Commitment Act Task Force," pp. 45, 48-50, 1988) (emphases supplied)

In contrast, Lawrence v. Commonwealth, 689 S.E.2d 748 (Va. 2010), representing the approach taken by other states with sex offender commitment legislation, held that in such a commitment trial, an expert's opinion did not have adequate factual foundation to the extent it depended upon assuming the truth of unadjudicated hearsay allegations.

Overall, these goals cited by that Task Force generally tend to support the overall motivation of the legislature as being purely to increase public safety and to be supplementally punitive to sex offenders thought "dangerous." Even though that Commitment Act Task Force "Report to the Commissioner of Human Services" was not directly relied upon by the 1994 Legislature in passing the MCCTA, this passage irrefutably shows the intent behind the SPP/SDP law as being, in substantial part, to serve as a substitute for the criminal process, to alleviate prosecutorial burdens, to eliminate certain constitutional safeguards for defendants in the criminal process, and to serve as a de facto supplemental criminal sentence - lengthening incarceration/confinement. Such an end-run of the criminal process is, by definition, punitive in nature.

As this Court found in Karsjens Finding 30, "[a] significant increase in commitment and referral rates followed the abduction and murder of Dru Sjodin in late 2003. (MSQP Executive Director) Johnston credibly testified that the MSQP experienced a 'tremendous growth' in early 2004 following the Dru Sjodin tragedy, which caused the treatment program to expand 'at an enormous rate.' Hebert credibly testified that the MSQP received over 200 referrals in one month alone in 2003, followed by hundreds

of referrals in subsequent months and years. Benson credibly testified that the Dru Sjodin murder 'had a direct and dramatic impact on the program.'"

As the Court determined in Finding 30, the fact of the stupendous increase in sex offender commitments following the killing of Dru Sjodin by Alfonso Rodriguez strongly supports the inference that filing of SPP/SDP commitment petitions and their grant are directly driven by emotional reactions to specific instances of horrific sex crimes/sexually motivated crimes. This in turn supports the claim that such commitment has nothing to do with particularized findings of the requisite elements of those two alternative commitment formulations, and therefore is a deprivation of substantive due process as applied. This pattern is simply the official version of a lynch mob on a mission in reprisal for a crime.

As the Court further deduced in Finding 31, the fact that the Minnesota legislature also deemed it necessary/advisable to lengthen conditional release and to increase sentencing options as to conditional release of sex offenders serves to bolster the conclusion that the increase in sex offender commitments in Minnesota post-Sjodin/Rodriguez was due to political concerns, some of which had to do with concerns over public safety from sex offenders. This finding also shows that, since that legislation, conditional release is far more effective at preventing re-offense by sex offenders due to increased length of such close supervision and due to greater restrictions of conditional release that are now available from the time of sentencing. Thus, this is an argument against the necessity of sex offender commitment from a public safety perspective.

Findings 35 and 36 describe what occurred in one month (December 2003), in the wake of the Sjodin murder. Finding 35 fails to state that, commencing with that December, the Dept. of Corrections abandoned its prior screening process in favor of simply referring for commitment consideration all Level 3 sex offenders, plus some Level 2 and Level 1 sex offenders thought to present a higher-than-usual risk of re-offense. Finding 36 points out that, for the first time, the DCC selected for referral some who had been on release status for quite some time. (This fails to mention that this group included some who were just ending their sentences on parole.) This last finding also states that, in just that one month, 236 offenders were referred by the DCC for commitment consideration - a figure equal to 70% of all previous such referrals it had made since January 1991, when such referrals began.

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Finding 37 points out that between 2004 and 2008 the average number of persons referred by the DOC each year for sex-offender commitment was 157. While this finding observes that this is six times the annual rate on average between 1991 and 2003, inclusive, it fails to state that it was also more than double the annual number in just the year before the Sjödin murder. Although this finding points out that the annual number of such referrals subsided to 114 per year in 2009, this again fails to note that even this rate was more than half again higher than in 2002.

Most fundamentally of all, sex-offender commitment statutes, including Minnesota's SPP/SDP Act, are not based on psychological science, instead merely on legislative concerns of public safety by preventive detention. "Legislatures typically devised their own concepts, and then required clinicians to make assessments of those concepts." Dennis M. Doren, *Evaluating Sex Offenders: A Manual for Civil Commitments and Beyond* (Sage Publ'ns, 2002), p. 13.

Of course, the competence of psychologists is in the science of psychology, not in politically correct, junk-science hate-and-fear-propaganda legislative concepts. When psychologists purport to testify as to whether a given sex offender meets such unscientific statutory criteria, they are not testifying as experts, but merely as lay opinions as to the law. Such lay opinion testimony as to the law and its application in a given case are strictly forbidden in all courts and no judge can rest a decision in any given case on such lay opinions. Thus, such statutory formulations -- especially those of the SPP/SDP criteria -- are mere unscientific "warrants" for "round[ing] up the usual suspects...."

In fact, Howard Zonana, et al., *Dangerous Sex Offenders: A Task Force Report of the American Psychiatric Association* (1999), "Legal Control of Dangerous Sex Offenders: The Propriety of Civil Commitment," bluntly observes:

"Sexual predator commitment statutes are not fundamentally paternalistic. These statutes reflect a backlash against determinate sentencing reform and are devised to extend the punishment of sex offenders and to protect society. To evade constitutional protections against *ex post facto* laws, to impose indeterminate confinement, and to take advantage of relaxed procedural safeguards, drafters of sexual predator commitment statutes have attempted to cloak their quasi-punitive intent in the language of medical commitment....

"...[I]n some countries, corrupt governments have wielded the machinery of civil commitment to punish dissidents. In

the United States, civil commitments have sometimes been misused to confine social deviants.

"...Typically, sexual predator status is based on a vague and circular determination that an offender has a 'mental abnormality' that has led him to engage in repeated criminal behavior. Because the element of mental abnormality is so vague, it does little or nothing to qualify the requirement for criminal acts. Thus, these statutes have the effect of defining 'mental illness' in terms of criminal behavior.

"Under the medical model, civil commitment is justified when effective treatment is provided....

"Although a body of research indicates that some types of paraphilias may be treatable, this research for the most part concerns patients who are treated voluntarily. ...[T]he task force recognizes that many sex offenders ...refuse available treatment. Thus, there is no evidence regarding the efficacy of available treatments for the group of patients who have little or no motivation for treatment. Moreover, no evidence supports the notion that persons with paraphilias can be treated successfully without their cooperation. Indeed, ...to date there is no clear basis for making the claim that treatment of any class of patients with paraphilias will result in lower rates of recidivism.

"...[T]here is ample anecdotal evidence that those committed as sexual predators cannot benefit from treatment. In many cases, the lack of treatment prospects appears to flow from the lack of a legitimate psychiatric diagnosis. In other instances, it appears that offenders who suffer from paraphilias cannot be treated because they are uncooperative. Regardless of the reason, it is the opinion of the Task Force that confinement without a reasonable prospect of beneficial treatment of the underlying disorder is nothing more than preventive detention and violates the norms of the medical model...."

Congruently, *In re Young*, 857 P.2d at 1021, held that the definition for mental abnormality is "merely circular." See also *State v. Hendricks*, 912 P.2d at 138 (citing *Weston*, 898 F.Supp. at 750) ("The only observed characteristic of the [mental abnormality or personality] disorder is the predisposition to commit sex crimes.").

Carl E. Fisher, David L. Faigman, & Paul S. Appelbaum, "Toward a Jurisprudence of Psychiatric Evidence: Examining the Challenges of Reasoning from Group Data in Psychiatry to Individual Decisions in the Law," 69 *University of Miami Law Review* 685, 692 (Spring 2015), addresses the

problem created by legislative invention of the non-psychological concept of "mental abnormality" as a basis for sex offender commitment:

"...[W]hen the law strays from accepted clinical concepts, such as the invention of a novel 'mental abnormality' definition for 'sexual predator' laws, the fundamental justifications for confining certain people with alleged mental illnesses can become confused."

Note 18: Whereas it is fairly clear that a person suffering from a "mental illness" should receive treatment when civilly committed, the non-medical category of "mental abnormality" creates confusion, since the offender has been civilly committed and might be categorized as "suffering" from a condition, but one that is not an "illness" and not treatable. See, e.g., Am Psychiatric Assn Task Force on Sexually Dangerous Offenders, *Dangerous Sex Offenders II-177* (1999) (tracing the history of "sexual psychopath laws," and noting the "purpose" of such laws as shifting from "therapeutic" to "incapacitative"); W. Lawrence Fitch, "Sexual Offender Commitment in the United States: Legislative and Policy Concerns," 989 *Annals N.Y. Acad. Sci.* 489, 500 (2003); Sameer P. Sarker, "From Hendricks to Crane: The Sexually Violent Predator Trilogy and the Inchoate Jurisprudence of the U.S. Supreme Court," 31 *J. Am. Acad. Psychiatry & L.* 242, 247 (2003). Professor Stephen J. Morse has criticized the hollow definition of mental abnormality. See Stephen J. Morse, "Preventive Confinement of Dangerous Offenders," 32 *J. L. Med. & Ethics* 56, 62 (2004):

"In other words, the definition is simply a (partial) generic description of the causation of all behavior and it is not a limiting definition of abnormality. ...The condition that makes sexual predation mentally abnormal -- congenital or acquired causes of a predisposition -- applies to all behavior and is thus vacuous. It certainly cannot explain why the (inevitable) presence of congenital and acquired causes of a predisposition means that the agent cannot control himself and is not responsible for action that expresses the predisposition."

Certainly, treatment effective at eradicating the "mental disorders" or "abnormalities" relied upon to commit individuals under the SPP/SDP law does not exist.

Psychopathy & Sexual Deviance Do Not Add to Predictive Validity of Static-99R



The Witch Trials at Salem, MA

(Editor's Note: In support of commitment of certain sex offenders, claims have been made that they have sexual deviance and also have shown indications of "psychopathy" (a construct declared by a Dr. Robert Hare of Vancouver, BC, but rejected as a proposed personality disorder by the DSM of the American Psychiatric Ass'n). As the theory goes, these two attributes in conjunction with each other significantly enhance the likelihood of sex-crime recidivism. However, as the following excerpt will show, this is simply not borne out by the statistics. Further, the recidivism predictions derived from the Static-99R (as inaccurate as they are, and without any personal applicability) are as accurate alone as they would be if these two attributes, or either of them, were factored into such Static-99R recidivism predictions. So then: how useful are claims of psychopathy or sexual deviance as a means of predicting a likelihood of recidivism? Well, you decide.)

Jan Looman, Nicola A.C. Morphett & Jeff Abracen, "Does Consideration of Psychopathy and Sexual Deviance Add to the Predictive Validity of the Static-99R," 57 *Int'l J. Law, Offender Therapy & Comparative Criminology*, pp. 939-65 (No. 8, Aug, 2013)

p. 939. Abstract: "...It has ...become common practice to modify risk assessments based on the Static-99/99R because of the presence of psychopathy and indicators of deviant sexual interests, although to date there has been no research validating this procedure. The current research was conducted to fill this gap in the literature. Using a

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sample of 272 sexual offenders, the extent to which psychopathy, sexual deviance, and their interaction added to the predictive validity of the Static-99R was examined. Analyses were conducted using the whole sample as well as subgroups of rapists and child molesters. It was found that although the Static-99R predicted sexual recidivism, adding psychopathy and sexual deviance in a Cox regression analysis did not improve the prediction. This held true for child molesters when examined on their own. For rapists, although psychopathy and sexual deviance did not contribute to the prediction of sexual recidivism, for serious (i.e., violent including sexual) recidivism, the inclusion of psychopathy added to the prediction. Results are discussed in terms of implications for practice."

Text, p. 940: "...[S]ome researchers have not found that psychopathy predicts sexual recidivism. For example, *Barbaree, Seto, Langton and Peacock (2001)* and *Langstrom and Grann (2000)* reported that the PCL-R predicted violent and general but not sexual recidivism in their samples. More recently, *Murrie, Baccaccini, Caperton, and Rufino (2011)* found that psychopathy was unrelated to sexual recidivism in a sample of 333 sexual offenders who underwent an assessment for civil commitment as SVPs."

p. 941: "...It is commonly assumed that the combination of high psychopathy and sexual deviance is a 'deadly combination' (*Hare, 1999*), in that those sexual offenders with both psychopathy and sexual deviance are assumed to reoffend at a very high rate. However, the research results do not lend consistent support for this conclusion. First, a literature review conducted by the first author (J.L.) indicates that there are relatively few studies that examine the combination of psychopathy and phallometrically measured sexual deviance, and second, the findings of the research have been inconsistent."

p. 942: "...[T]here are four published studies addressing the relationship among psychopathy, phallometrically assessed sexual deviance, and recidivism. These studies have produced mixed results with (a) those high on both psychopathy and sexual deviance having a higher sexual re-offense rate than other offenders (*Rice & Harris, 1997*), (b) a strong relationship between the interaction and violent recidivism with a weaker effect for sexual recidivism (*Harris et al., 2003*), (c) a finding that those who are high on both psychopathy and sexual deviance violently reoffend at a higher rate than others but have no effect for sexual recidivism (*Gretton et al., 2001*), and (d) a finding that those who are high on both psychopathy and sexual

deviance reoffend with nonsexual and nonviolent offenses at a higher rate than others (*Gretton et al., 2001; Serin et al., 2001*)."
p. 961: "Current results indicate that the consideration of sexual deviance, psychopathy, and their interaction term is not necessary when the Static-99R score is known and that these additional variables do not contribute significantly to predicting that outcome once the Static-99R score has been accounted for. Thus, the current results do not support the modification of risk estimates based on the Static-99R because of the presence of sexual deviance and psychopathy when sexual recidivism is the outcome of interest." (emphases supplied)

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SVP 'Tiers' Unjustified under Actuarial Findings on Actual Sex-Crime Recidivism

(Editor's Note: "SVP" is a term in wide use in states other than Minnesota - short for "Sexually Violent Predator." It has no connection to psychological science. Where it

has any official meaning whatsoever, such meaning has been defined solely by legislative or administrative decree.

Nonetheless, in pursuit of federal grants, Minnesota has established the same "Tier System" purportedly ranking the relative likelihood of sex offender recidivism by any given sex offender following prison release. The federal act known as "SORNA" requires use of such a 3-tier system of rating a sex offender's likelihood of reoffending after prison release.

In Minnesota, the chief consequences to any given sex offender of this rating involve restrictive conditions of Intensive Supervised Release ("ISR"), community notification provisions which are applicable, registration requirements, residential restrictions imposed by localities, and (of course) applicability of DOC evaluation and recommendation provisions toward sex offender commitment.

Given these important impacts, the question of whether this tier system actually bears any true relationship to sex-crime recidivism rates is a vital one. Get ready for a surprise: *Aaron Kivisto, "Risk & Redemption: Does Social Science Support the Assumption of Lifelong Risk for Sexually Violent Predators?," Res Gestae, May 2017, pp. 18 et seq.*

p. 18: "...Based on NICCC (National Inventory of Collateral Consequences of Conviction) data, there are currently more than 47,000 such [collateral consequences] laws and rules [across the United States], with approximately 790 in Indiana alone."

p. 19: "...Despite the soft deadline of 2011 for states to implement SORNA - with penalties of up to 10 percent of federal Byrne funds as a consequence of failure to implement - to date only 17 states are considered by the Office of Justice Programs to have reached a level of substantial implementation."

p. 22: "...[O]f a vast majority of sex offenders indeed represent a genuinely high risk for committing another sex offense, as would be suggested under SORNA's classification scheme? Two large-scale studies have addressed this very question. In one, commissioned by the National Institute of Justice, researchers compared the predictive accuracy of SORNA classification guidelines to actuarial risk assessment guidelines with a sample of 1,789 adult sex offenders from Minnesota, New Jersey, Florida, and South Carolina. Comparative results of these approaches to classification (offense-based versus actuarial risk-based) resoundingly failed to support the validity of SORNA's 3-tiered offense-based system. Specifically, across all analyses, SORNA's offense-based system was either completely unrelated to future sexual offending or in some cases was actually inversely related to recidivism such that Tier 1 offenders were found to recidivate at rates higher than Tier 3 offenders."

pp. 22-23: "...Further, these findings are nearly identical to results from another study in New York State in which 17,000 sex offenders were reclassified into SORNA's offense-based tiers and, contrary to expectations, offenders classified as Tier 1 (i.e., low risk) recidivated at higher rates than those in Tiers 2 and 3." (emphases supplied)

Reply to Minnesota Sex Offender Program Annual Performance Report 2015 - revised, Part 3 of 4

(Editor's Note: This installment continues the Reply of RAFC to the report by MSDP to the Minnesota Legislature describing its "annual performance" in 2015. The final installment will appear in next month's *LLP*.)



Band-Aid Solutions

14. The Standard of 'Successful Treatment Completion Plus Demonstrated Meaningful Change,' With Recidivism Risk Reduced to 'Very Low Levels,' Effectively Presenting a Demand for a 'Zero-Percent' "Public Safety Guarantee" Before Allowing Release, as Applied by MSDP Officials, the SRB, and the SCAP, Make Release Unattainable by Any MSDP Detainee Except by Those Politically Selected From Time to Time as a Faux Showing That Release Through Treatment is Purportedly Possible.

Most states having sex offender commitment laws have provisions calling for ending a given sex offender's commitment whenever he no longer meets the commitment standard. Minnesota has no such provision. Indeed, in Minnesota, MSDP's provisional release standard (not to entirely end the commitment) is far more restrictive on an end to an detainee's confinement than the standard for commitment is for commencing such confinement. This standard of 'successful treatment completion, plus demonstrated meaningful change,' with recidivism risk reduced to very low levels is shared only by North Dakota. However, North Dakota already has a substantial number and percentage of releasees to date (27, as of 2015, reflecting 32%), compared to its far-smaller total of committed sex offenders to date (56, in 2015). This implies

(Continued on page 7)

(Continued from page 6)

that North Dakota applies its standard far less harshly than does Minnesota. In Minnesota, making matters worse, to allow a given release, MSOP must develop a release plan for the prospective releasee, and it can block any release simply by declining to develop that plan for him.

As explained by *Eric Janus* in *Failure to Protect* (etc.), *supra*, at p. 138:

"...[T]he Wisconsin and Minnesota courts diverged in their interpretations of their respective discharge standards [in sex offender commitments]. In Wisconsin, the courts held that an individual must be released if his risk of re-offense fell below the threshold for commitment, which was substantial probability of re-offense. The Minnesota courts, in contrast, held that discharge would be permitted only if the individual could make an acceptable adjustment to society, an unreliably vague standard that suggests a far lower level of risk than the 'highly likely' standard required for commitment in Minnesota. To put the difference in simple terms, Wisconsin would release people if they no longer fit into the 'most dangerous' category, whereas Minnesota would release only those who fit into the 'least dangerous' category."

After decades of treatment of individuals, the uniform conclusion by MSOP is that each individual remains 'too dangerous to release' (even despite advancing age). *D.M. Doren*, "The Model for Considering Release of Civilly Committed Sexual Offenders," in *A. Schenk & F. Cohen* (eds.), *The Sexual Predator: Law and Public Policy, Clinical Practice*, Vol. III (Kingston, N.J., Civic Research Institute, Inc. 2006), points out that sex offender commitment programs that use a treatment-completion standard for release have a near-zero release rate. This includes Minnesota's MSOP.

Thus, as to pedosexuals, MSOP will always say in excusing its refusal to release same, even after a decade or more of its treatment, that the detainee continues to have pedophilic attractions, and therefore presents some level of risk of re-offense - and hence does not possess a "guarantee" of public safety. Therefore, MSOP is simply a thinly disguised, artificially 'treatment justified' permanent (natural-life) preventive detention scheme.

In an effort at justifying its policies, MSOP states that the sex offender commitment programs of other states "have survived legal challenges because they are designed to provide treatment that has the potential for individuals meaningfully participating in them to reduce their risks sufficiently to be released back into the community." But by

demanding this 'zero-percent' "public safety guarantee," MSOP is not within the contemplation of such judicial decisions elsewhere.

Of course, attractions do not equal actions. Human experience - over history and currently - is filled with those who, notwithstanding having some kind of sexual orientation (a universal human attribute), remain celibate, often over an entire lifespan, and more commonly, after the hormonal ardor of youth has passed, for the balance of a lifespan.

Many of these members of society are in fact pedosexuals, who have simply not acted on their orientation in any criminal way. Hence, the claim by MSOP that a pedosexual will inevitably commit another sex crime is false. Therefore, even as pure incapacitation, (i.e., preventive detention), this is no justification for such preventive detention. Such commitment is instead just punitive in intent and function.

Conversely, however, it is simply impossible to be certain that any convicted sex offender will not sexually reoffend, any more than that any hitherto crimeless pedosexual will not someday commit a sex crime of that nature. Nonetheless, MSOP sets the bar to qualify for release unattainably high: "ensuring that a Level III sex offender never recidivates sexual harm." (MSOP Report, p. 43). Explaining this, MSOP Report, p. 20, states: "Successful treatment reduces risk, but does not eliminate it. In some cases, the reductions achieved through treatment, when weighed against the case as a whole, remain insufficient to guarantee public safety..." Judging from MSOP's lack of releases, it can be inferred that "some cases" refers to all MSOP detainees.

Of course, the only "guarantee" of public safety would be if the probability of recidivism were reduced to zero percent. No treatment of sex offenders known to humanity makes any claim to be able to achieve such a result - or anything close to it. This includes the other states' commitment programs, which aim for lesser, arguably achievable goals. Minnesota's MSOP stands alone in insisting upon such an absolute guarantee of public safety before releasing any given detainee.

Regardless how devoted any given sex offender detained in MSOP is to not ever reoffending, and how personally certain he is that re-offense is not going to happen if released, there is simply no way to sufficiently convince his MSOP captors of those facts. Thus, the 'zero-percent' "public safety guarantee" that MSOP demands for release effectively means that one must die while still detained in MSOP in order to present a zero-percent probability of re-offense. This is simply lifetime permanent preventive detention with just some insincere treatment

layered-on as disguise, both for legal appearances and for placating the detained through fraudulently held-out hope of release.

Occasionally freeing one slave does not abolish the evils of slavery, especially when the slave can be recaptured at any time and returned to involuntary servitude. Analogously, conditionally releasing six individuals out of more than 775 (including those who died in MSOP confinement, most from old age) committed over a twenty-year span - to 'provisional discharge' (far from truly free) - does not cure or remediate the punitive evil of MSOP lifetime preventive detention.



15. MSOP Does Not Anticipate or Intend Any Releases Beyond Such Isolated 'Show Releases' Anytime Within the Foreseeable Future and Is Not Serious About Facilitating Release Through Treatment.

As in preceding sections, *supra* the findings of Dr. Fred Berlin's Report to Schiff Hardin & Waite, etc., at pp. 11-12 as to treatment failure at the parallel Illinois sex offender commitment facility are extraordinarily apt in MSOP as well:

"Given the large numbers of patients, the length of time that many of them have been there, and the small number who have progressed with the support of staff to a less restrictive, although potentially still highly supervised, community-based phase of treatment (let alone, to one of the more advanced phases of inpatient residential treatment), one can only question the resolve of achieving such goals in a timely manner. Thus far, in spite of the fact that the program has been in existence for a number of years, and in spite of that fact there have been estimates by some program staff that treatment may need to average about three years in length, less than a handful of patients have been advanced to the latter phase of the treatment program. It is unclear that the program has recommended any more than three patients for conditional release.

"...I am unaware of any evidence suggesting that long-term institutionalized care has been associated with an enhanced outcome when treating sexually disordered patients. ... In spite of public misperceptions to the contrary, the recidivism rate for many sex offenders treated in the community has been quite low.

"One can ask, 'How can the public be

kept safe?' Alternatively, one can ask, 'How in the context of keeping the public safe, is it also possible to still be fair and just to committed patients in treatment?'

"These two questions are not the same, and only the latter question may lead to a commitment to try to treat patients in as expeditious a fashion as possible. In my judgment, individualized treatment planning seems not to have considered recommending, and trying to assist, even some small percentage of patients in progressing through all five phases of inpatient care at a relatively accelerated rate. In fact, few, if any, patients have ever progressed to level five. Of course, in order for a patient to be able to progress into, and beyond level five, the program would first need to have put into place an established system that would allow for a subsequent lengthy period of intensive community-based supervision, monitoring, support, and the possibility of re-hospitalization if needed, following inpatient discharge. In my professional opinion, to the extent that that sort of individualized treatment planning has not been done, planning to try to get each patient through the system in as safe, and expeditious a fashion, as is possible, that represents a substantial departure from accepted practice, judgment and/or standards in the field of inpatient mental health care, even when one takes into account the nature of the population in treatment."

Exhibit C to the Affidavit of Jannine Hébert (Document 385-1) in the Karsjens case (attached hereto as Appendix C for the Court's convenience) depicts phase comparisons for the quarter-years ending in '2013 3rd Quarter.' Note that a total of only 555 detainees (treatment participants, plus "Admissions") is shown as of the 3rd Quarter of 2013. At that time, approximately 688 detainees were present in MSOP. Hence, the difference reflects 103 detainees not in treatment at that time -- primarily 'refuseniks' who decline to participate in treatment.

This last number has not increased proportionately with the total of MSOP detainees. This reflects the recent change in Dept. of Corrections practice to rigorous enforcement of the ISR directive to MSOP detainees under ISR to participate in MSOP treatment. Violation of this directive is punished by revocation of ISR/Conditional Release ("CR"), with substantial prison terms imposed. This coercion artificially inflates the number of MSOP treatment participants and limits the number of refuseniks to those no longer under ISR/CR. Because the length of sex offense sentences has exponentially in-

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creased over the time that MSOP has been in operation, the pool of those who have completed such sentences-plus-attached-CR has grown only slowly. This singlehandedly accounts for the lack of growth of the number of refusniks.

The decline in the number of Phase 1 participants and the growth of Phase 2 participants since the end of 2011 has been due to two developments. First, the initiation and pendency of the *Karsjens* case inspired some formerly unmotivated Phase 1 participants to believe that this case would result in an order for accelerated release of those in Phase 3 and also those close to completing Phase 2.

More recently, as a second development, the continued increase in Phase 2 participants is due to a deliberate acceleration by MSOP treatment staff of promotion of those in Phase 1 into Phase 2. Since these promotions are often more hasty than the progress of the promoted detainees would appear to warrant, it would seem that this 'wave' of unexpected promotions is due to a deliberate effort by MSOP treatment administration to appear for litigation purposes to be more efficient at treatment than really is the case or their true preference. This also accounts for the very recent (not shown in Appendix C), sudden, large increase in the number of promotions of Phase 2 participants to Phase 3. This suggests that, if the pending litigation ends without judicial grant of the reliefs sought, these latest increases in treatment advancement will cease, and many now promoted will be demoted. This is no genuine improvement; it is mere posturing.

To date, of the approximately 783 who have been committed to MSOP (including at least 53 who have died in such detention), only four MSOP detainees have been released from detention by MSOP, and then only to a status similar to Intensive Supervised Release known as "provisional discharge." All of these were in treatment in MSOP for about 20 continuous years at their release. (This does not include Ray Hubbard, released in the 1990s under MSOP's predecessor agency [Minnesota Sexual Psychopathic Personality Treatment Center - "MSPPPC"], but whose "provisional discharge" was later revoked for nothing more than a psychiatrist's fear that he might eventually reoffend at some unknown time in some unknown scenario). Currently, not counting those 53 who have died, approximately 730 individuals are under commitment to MSOP.

The period of treatment estimated by MSOP officials has escalated from two years initially to four years, then to "several years," as a deliberately vague figure. After that, MSOP officials refused to offer such an

average estimate, instead defending such 20+-year treatment terms, saying defensively that treatment takes "many" years. All of the ills cited by Dr. Berlin in the foregoing quote apply with equally full force against Minnesota's MSOP. Currently, approximately 730 individuals are under commitment to MSOP. It therefore is a reasonable inference that MSOP has not, and still is not seriously undertaking any treatment program intended to result in reasonably expeditious completion of treatment and release of those committed.

"...[I]n 2011, MSOP declared that no releases were anticipated for the foreseeable future. The fact that MSOP's projection of 1109 detainees in MSOP custody by 2020 is based on current rates of commitment, but with no releases confirms that MSOP has no expectation of releases. It is not serious about treatment as a path to release.

"The way that MSOP conducts its treatment program confirms that it is not seriously attempting to advance any detainee toward release, but to the contrary is tacitly, deliberately thwarting such reasonable progress toward release."

(Lawyer X, Deviant Justice - The American Gulag at p. 190)

"In sum, it appears that MSOP clinical staff have spent a great deal of effort inventing rationales for denying treatment advancement and completion to MSOP treatment participants. This again confirms that MSOP is not serious about facilitating releases through treatment." (*Id.*, pp. 192-93).

16. By Its Policy of Non-Release, MSOP Implicitly Acknowledges That Its Treatment Is Such a Failure as to Leave All Plaintiffs Too Dangerous to Release, in Its View.

In this light, especially because MSOP does not have the confidence in its own treatment to release more than one detainee to date of its approximately 730 detainees currently, it is clear that MSOP has no effectiveness at treatment and that MSOP's only claim of recidivism reduction is by reason of sheer preventive detention.

17. The MSOP SRB-SCAP Process, Including Assessments Conducted in That Connection, Shows the Unfairness of the Only Means to Reduction in Custody Level in MSOP, Much Less toward Release.

We start with the federal court's own simple declaration in *Karsjens*: "The Fourteenth Amendment does not allow the state, DHS, or the MSOP to impose a life sentence, or confinement of indefinite duration, on individuals who have committed sexual offenses once they no longer pose a danger to society." (*Karsjens et al. v. Jasson et al.*, June 15, 2015 Order, p. 68). The Constitution

requires a committed person to be released when he no longer meets commitment criteria.

At *Karsjens* Conclusion 31, the federal District Court declared:

"...[S]ection 253D, as applied, is not narrowly tailored because those risk assessments that have been performed have not all been performed in a constitutional manner. The testimony of several risk assessors at the MSOP support a conclusion that the risk assessors have not been applying the correct legal standard when evaluating whether an individual meets the criteria for transfer, provisional discharge, or discharge. For example, Dr. Pascucci's testimony indicated that she did not use the correct standard for discharge under *Call*, which requires that a person be "confined for only so long as he or she continues both to need further inpatient treatment and supervision for his sexual disorder and to pose a danger to the public." *Call*, 535 N.W.2d at 319 (emphasis added). In other words, the Minnesota Supreme Court has indicated that discharge must be granted if the individual is either no longer dangerous to the public or no longer suffers from a mental condition requiring treatment. (See *id.*) Moreover, the MSOP did not use the correct legal standard until after these proceedings commenced in 2011, despite the fact that the Minnesota Supreme Court decided the *Call* case in 1995. Therefore, section 253D, as applied, is not narrowly tailored in that there is no requirement to apply the correct legal standard in risk assessments and it results in a punitive effect and application contrary to the purpose of civil commitment. See *Hendricks*, 521 U.S. at 361-62."

Thus, when a given committed sex offender no longer meets the commitment criteria of the SPP/SOP statute, that commitment must end, if the statute is not to be deemed one aimed at pure infliction of supplemental criminal punishment, and if it is not reduced to sheer preventive detention.



No Exit

A commitment for mental illness can be brought to an end at any time that the committed individual can show that he no longer meets the commitment criteria. An individual committed as SPP/SOP cannot achieve

freedom in that way, but must prove a series of higher standards of an even more vague and impressionistic nature, thus turning on an act of unassailable discretion - which discretion, with only two exceptions to date, has invariably been exercised against such release. The sheer numbers of such denials of release alone demonstrate the unreality of any true standard of any reliability in that decision. In reality, such decisions have been based on a de facto standard of 'any probability above dead zero' of the possibility of commission of a future sex crime. Because there is no method short of death that anyone convicted of any crime can ever prove such a complete lack of any risk of such future recidivism, this is simply preventive detention run riot. It is rank hysteria and categorical hatred in action at its worst.

In this light, especially because MSOP does not have the confidence in its own treatment to release more than three detainees to date of its approximately 730 detainees currently, it is clear that MSOP has no effectiveness at treatment and that MSOP's only claim of recidivism reduction is by reason of sheer preventive detention. The MSOP purported system of both phase advancement and release/reduction in custody is not just irreparably broken; more accurately, it has been irredeemably defective by design from its inception, and remains so to date.

Evidencing this, Dr. Freeman testified as to the SRB that MSOP officials train the SRB members, and that MSOP -- the same entity conducting the sex offender treatment -- is actually controlling scheduling of SRB hearings and the procedure of the SRB. Dr. Freeman testified in the trial that she found this whole arrangement "odd." (Trial Tr., v. 4, p. 822).

The SRB holds a hearing on each petition. Before that hearing, Plaintiffs receive legal assistance but not an independent psychological or psychiatric exam or risk assessment. Further, certain legal arguments, including constitutional claims, cannot be made in these proceedings. MSOP presents risk assessments and other professional opinions at the SRB hearing. *Karsjens*, Tr. 5122: 2-8, PA 975; PX 178, PEXB101-102 (Question 10); PEXB 455-465 (showing that MSOP provides the SRB with relevant Class Member records, the MSOP's SRB Treatment Report, and the MSOP's Sexual Violence Risk Assessment).

The SRB then issues a recommendation. In nearly every instance, the SRB recommends what the MSOP tells them to recommend. *Karsjens*, Tr. 2995: 18-21, PA 917; Tr. 5153: 8-18. MSOP Defendants and MSOP control the SRB operation, including appointing and determining the number of SRB members, PX 177, PEXB 478-479; training

SRB members. Tr. 3240: 16-22, P.A. 930; Tr. 5149: 2-7, P.A. 979; and scheduling SRB hearings. PX 177, PEXB479 (Question 12).

There is no time limit on SCAP decisions and it is not uncommon for this process to take years. *Karsjens* Doc 658 at 76. The process overall, from filing the initial petition to receiving a final SCAP decision does take years. *Karsjens* PX 252, PEXB 317; Tr. 5142: 8-12, PA 977. There are not enough SRB members, Tr. 947: 1-7, PA 741, and therefore not enough hearings to meet the demand. MSOP lacks the staff to complete the reports needed by the SRB and SCAP. Tr. 1501: 10-16; Tr. 1549: 3-10, P.A. 780; PX 100, PEXB 51. Further, the system design builds in delays. Doc 658 at 46; Tr. 19 - 5121: 6, PA 973-974. Mr. Benson admitted the whole process is set up in a way that cannot work to discharge Plaintiff-MSOP detainees. Doc 917 at 68: 5 - 70: 16, PA 556-558.

At a later point in testimony, Dr. Freeman added that she deemed the SRB process unfair to petitioning sex offenders, in that "the State has a risk assessor or an evaluator and the client does not.... [T]here are clinicians that represent the State or the program in [an SRB proceeding], and the client has nobody except their attorney. They have no clinical professional individual representing them or who has had the opportunity to do an assessment for them.... I think that having a committee of individuals who perhaps are not experts on sex offender management and who are trained by the same individuals who run the program could result in unfairness, yes.... [T]he fact that the individuals on the committee aren't necessarily experts on sex offender management could [also] make it unfair for all individuals, yes." (*Id.*, pp. 899-900).

Minnesota's statutes only permit release decisions, and petitions therefore, to be carried on through the SRB-SCAP process; there is no alternative procedure for review of the need for continued sex offender commitment to be conducted by the committing court, or by any court of general jurisdiction. The SCAP has the sole authority to grant a reduction in custody. At the SCAP hearing, "[t]he petitioning party seeking discharge or provisional discharge bears the burden of presenting a prima facie case with competent evidence to show that the person is entitled to the requested relief." *Minn. Stat. § 253D.28*, subd. 2(d). The standard that must be met is "a preponderance of the evidence that the transfer is appropriate." *Minn. Stat. § 253D.28*, subd. 2(e). In contrast, other states' sex offender commitment statutes, including those of Wisconsin and New York, allow committed individuals to petition the committing court (not a board) at any time to be discharged or for a reduction in custody.

When MSOP staff persons perform risk assessments, they do not consistently apply the correct legal standards when evaluating whether a person meets the criteria for transfer or discharge. *Karsjens* Tr. 1647: 22 1648: 5; 1648:14-24, PA 814-815. Risk assessors lack training, resources and consistency. Tr. 1655:18-21, 1656: 2-5, PA 816-817 (no manual or guide exists regarding how to perform risk assessments); Tr. 1647-22 - 1648:24, PA 814-815; Tr. 1648: 14-24, PA 815 (no formal training on legal standards or criteria for release); Tr. 5231: 17-20, PA 986 (no one at MSOP is a certified trainer on actuarial instruments); Tr. 1501: 10-16; Tr. 1549: 4-10, PA 780 (creating delays in Special Review Board (SRB) hearings, because staff vacancies delay necessary risk assessments).



Last Prisoners Awaiting Execution—
French Revolution, 1794

Most shockingly, the testimony of Dr. Anne Pascucci, one of the risk assessors for MSOP and assigned the duty of determining specifically whether a detainee seeking provisional discharge, clearly shows that despite (or perhaps because of) the training she received on that standard by her superior, Dr. Herbert, her understanding is completely incorrect about that standard and how it is to be applied, as the following extended passage reveals:

"Q. When you started, did you have any formal training on the legal criteria to be released from sex offender commitment in Minnesota?"

"A. No.

"Q. Have you ever had any formal training outside the department by a lawyer or some legal training with respect to the statutory requirements in Minnesota for release from civil commitment?"

"A. Outside of DHS is that the Department?"

"Q. Outside of DHS.

"A. No.

"...Q. Have you been trained by any of the lawyers at DHS with respect to the statutory criteria?"

"A. Not formalized; it would be consulting.

"Q. When you do your risk assessments, do you consult with counsel to determine if they agree with your evaluation of the legal criteria?"

"A. No.

"...Q. One of the statutory factors for trans-

fer, for an example, is whether it can be accomplished with a reasonable degree of safety for the public?"

"A. Correct.

"Q. You agree with that?"

"A. Yes.

"Q. What does reasonable degree of safety mean under the law?"

"A. To me, it would mean -- it's kind of hard for me to define. Reasonable would be, to me, is it likely that it can be done with safety.

"Q. I want to make sure I got it right. I wrote it down but it doesn't necessarily mean I got it right. To you, it means that, is it likely that it can be done with safety, is that --"

"A. Well --"

"Q. -- what you said?"

"A. -- simply put, yes.

"...Q. Let's just start with the definition. We can talk more as we go. Is likely more or less than 50 percent?"

"A. It depends on if you're talking about preponderance of the evidence, so it would be 51 percent."

"...Q. Okay. And what is -- on the transfer issue, what is the burden of proof? Who has the burden of proving that it's likely that it can be done with safety? The state of Minnesota or the petitioning patient?"

"A. Well, it depends on -- if you're in the judicial appeal panel, Phase I or Phase II, the burden of proof would be on the client. In Phase II, the burden of proof would be on the state."

"Q. And that was -- you're talking about the Supreme Court Appellate Panel which everybody refers to as the SCAP?"

"A. Correct.

"Q. In the first phase, your view is that the burden is on the petitioner, and in the second phase the burden is on the state; is that right?"

"A. Correct.

"Q. Okay. And you think that burden is the same in Phase I and Phase II, just that it flips?"

"A. I'm not sure I understand the clarification you're asking for.

"Q. Well, you said in the Phase I, the burden is on the petitioner?"

"A. Correct.

"Q. In the Phase II the burden is on the state.

"A. Correct.

"Q. It's the same burden. It just shifts from the petitioner --"

"A. Oh, yeah." (*Trial Tr.*, v. 8, pp. 1647-1652).

All of the foregoing underlined portions of this excerpt are incorrect beliefs as to that state of the law.

Stunningly, Dr. Pascucci testified that she applies the *Call v. Gomez* standard in a way that takes into account a detainee's propen-

sity for non-sexual violence, something clearly contrary to the language of *Call* itself: "Q. ...When you read "continues to pose a danger to the public," as you have written here in Mr. Terhaar's report at page 18, you consider both sexual -- the risk of sexual danger and nonsexual danger, correct?"

"A. Simply, yes." (*Trial Tr.*, v. 8, p. 1694).

Applying this to Eric Terhaar, a juvenile at the time of his crime, Dr. Pascucci testified in this way:

"Q. So in your opinion, Mr. Terhaar is dangerous to the public in a sexual disorder manner?"

"A. There is a probability for that.

"Q. Okay. And when you say "probability," what does that mean?"

"A. That he possesses vulnerabilities that predispose him to violence, including sexual violence.

"Q. Okay. But probability is like, what, 10 percent, 20 percent, 50 percent?"

"A. I can't quantify a probability in this case.

"Q. You do all the time. You use the Stable and the Static and you come up with words like low and moderate and you put percentages on them all the time based on those instruments. Is it low, moderate, high? What's Mr. Terhaar's probability?"

"A. I cannot quantify it." (*Id.*, p. 1692)

Essentially then, Dr. Pascucci opposed Terhaar's release on the ground of an unknown probability of violence of any type, including, but not limited to sexual violence.

Dr. Pascucci also testified that one reason that Terhaar should not be released is because his long institutionalization has given him no life skills (*id.*, p. 1696), irrespective that no such ground for continued commitment exists, either in the statute or in case law pursuant to it.

Dr. Pascucci also agreed with the scientifically false proposition that "deviant sexual arousal is the strongest risk predictor factor," and indicated that this is a factor given prominence in assessing an MSOP detainee for provisional discharge. In point of fact age, not deviance, is the most powerful factor governing probability of re-offense, by itself equal in weight to all other factors combined. This myth of the purported power of "deviance" is simply a rationale to continue to detain someone for natural life, since deviance (i.e., paraphilic sexual orientation) is a lifetime condition with no cure. (*Id.*, p. 1658).

Of further significance, Dr. Pascucci also stated that, in her assessments for provisional discharge, she usually contacts treatment clinicians to seek their input as to treatment "strength/weakness ...how they are doing in treatment." (*Id.*, p. 1660). This,

(Continued on page 10)

(Continued from page 9)

of course, is not properly part of an assessment of likelihood of sexual re-offense by a sex offender. It is purely another impressionistic part of the universally discredited and extremely inaccurate "clinical risk assessment" approach.

Karsjens et al. Findings 147-149 state that since January 1, 2010, the SRB has recommended granting twenty-six petitions for transfer, eight petitions for provisional discharge, and no petitions for discharge. The MSOP supported all of the provisional discharge petitions recommended to be granted by the SRB. As of July 2014, the SCAP has granted transfer to CPS twenty-eight times, provisional discharge once, and full discharge zero times. Not stated in those findings, only one of the eight provisional discharge recommendations was followed by SCAP. This reflects a political bottleneck to release, even when one clearly qualifies for release under MSOP's extreme restrictive decision-making. Also note that no requests for provisional discharge that were unsupported by MSOP were recommended by SRB or granted by SCAP.

In testimony at trial of the *Karsjens* case, Jannina Hébert blamed the "release process" for the failure to release any significant number of MSOP detainees. (Trial Tr., v. 12, pp. 2798-2800).

MSOP Executive Director Johnston testified at that trial that a number of reasons prevented Minnesota from releasing many MSOP detainees, citing as the first reason "community fear" of sex offenders. (Trial Tr., v. 13, p. 2938). Of course, no such criterion or factor is statutorily provided as to MSOP release consideration, whether as to SRB consideration, MSOP support for an SRB petition, or SCAP consideration. That such a political consideration can block release of an MSOP detainee confirms the unconstitutionality of the MSOP commitment scheme as permanent preventive detention.

Johnston also complained of "a lot of [bureaucratic] layers and hoops as impediments to release. (*Id.*, p. 2939), as well as a lack of resources - "resources at the SCAP level, at the SRB level, at the psychology level in our facilities." (*Id.*, p. 2938.) Of course, such impediments and lack of resources were intentionally created by the legislature and/or by MSOP itself. This too is an example of politics deliberately keeping the door closed to release from MSOP.

In addition, Ms. Johnston cited the commitment process itself as committing too many, i.e., including those who should not have been committed. (*Id.*, p. 2945). Again, this was a political decision.

Even more fundamentally, Commissioner Jesson confirmed in testimony that, if the

Court orders provisional discharge for as few as 25 MSOP detainees, the budget of the Dept. of Human Services cannot provide state-owned or contracted housing for even just that number without further legislative authorization. (Trial Tr., v. 5, p. 925). This lack of preparation to accommodate any significant number of releases further demonstrates that MSOP has never been serious about releasing any individuals committed under the MCCTA of 1994 and is not serious about such release at this time.

Karsjens et al. Findings 150-157 reveal that SRB hearings are scheduled by the MSOP. Currently, the SRB may hold up to four hearings a day for a total of sixteen hearings per month, although there are no restrictions on the number of hearings the SRB can hold. Parenthetically, at this rate, were every decision in favor of release, and were every such SRB decision affirmed by SCAP, it would take a theoretical minimum of at least 3 years and nine months to empty MSOP, assuming no more commitments occurred meanwhile. Except for the current pendency of this case, that last assumption is highly dubious.

There is no time limit on the SCAP decisions. The SRB and the SCAP petitioning process, from the filing of the initial petition to receiving a final SCAP decision, can take years. Some petitions can take longer than five years to complete the petitioning process. Backlogs, especially of MSOP-unsupported petitions, are enormous. As of June 2014, approximately 105 SRB petitions were pending decision and 48 petitions were pending a SCAP decision. The shortest number of days between the time any petition was filed and the time of the hearing on that petition was twenty-nine days (Terhaar's case, suggesting political expediting of that particular case for appearances' sake). This expediting occurred only after the Rule 706 Experts issued a report unanimously recommending full discharge for Terhaar, and after the Court issued an order on June 2, 2014, ordering Defendants to show cause why Terhaar's continued confinement is not unconstitutional and why Terhaar should not be immediately and unconditionally discharged from the MSOP. The outcome of that process was merely a transfer of Terhaar to CPS, not a provisional-discharge release for him. Terhaar remains incarcerated to date in CPS at the MSOP St. Peter facility.

MSOP has previously attempted to address delays in the petitioning process, but has not seriously attempted to address the problem recently. In 2013, Commissioner Jesson set a goal of having petitions supported by the MSOP heard more quickly. Obviously, this did nothing to address the huge backlog of MSOP-unsupported petitions,

even though expediting these was likewise within Commissioner Jesson's power. The Court found that this SRB and SCAP process is unduly lengthy and is bogged down with difficult procedures; and that the process denies individuals the services necessary to navigate it. These delays, in substantial part, are a result of insufficient funding and staffing. MSOP lacks sufficient staff to complete the reports needed by the SRB and the SCAP.

The Court, in *Karsjens et al.* Findings 158-160, clarified that Commissioner Jesson determines the number of SRB members and selects the SRB members after an application process. Currently, seventeen or eighteen positions out of twenty-four available positions are filled. A committed individual retains the right to seek a state-court writ of habeas corpus during the petitioning process. *Minn. Stat. § 253B.23*, subd. 5. However, that habeas procedure does not provide for an independent psychologist or psychiatrist to conduct an evaluation of the petitioning committed individual, and the petitioner is not provided counsel as a matter of right. (Parenthetically, the same holds true in any federal habeas corpus proceeding.) No bypass mechanism is available for individuals to challenge their commitment.

As *Id.* Findings 161-165 explain, no one connected to MSOP or the DHS is required under the MCCTA to petition for transfer or reduction in custody of MSOP-detained individuals who meet the statutory requirements for such a reduction in custody. No policy or practice exists at MSOP, or any requirement in MCCTA, that would require MSOP to file a petition on an individual's behalf, even if MSOP knows or reasonably believes that the individual no longer satisfies the statutory or constitutional criteria for commitment or for discharge. Defendants could choose to, and indeed, do have the discretion to file a petition for a reduction in custody on behalf of committed individuals at the MSOP. MSOP knows that at least some Class Members meet the reduction in custody criteria or no longer meet the commitment criteria but continue to be confined in MSOP. Despite its knowledge that individuals have met the criteria for release, the MSOP has never petitioned on behalf of a committed individual for full discharge.

In fact, as observed in Findings 166-170, MSOP never filed a petition for a reduction in custody on behalf of a committed individual before 2013. In fact, MSOP has only filed a petition for a reduction in custody on behalf of a committed individual seven times in the history of the program. Of those seven petitions, six were for individuals in the Alternative Program slated for transfer to Cambridge, but ultimately never transferred to Cambridge. The seventh petition was for Terhaar for transfer to CPS (as mentioned

supra) (Testimony of Dr. Haley Fox, Trial Tr., v. 7, p. 159D). That petition for Terhaar was the only one filed by MSOP for transfer to CPS on behalf of any individual in the history of the program. No one from MSOP told him about the filing of that petition for transfer to CPS. On the contrary, Terhaar intended to seek full discharge from MSOP, not merely such transfer to CPS. Not stated in these findings, it is quite apparent that this was a crafty, surreptitious move by MSOP to falsely cast an appearance to the press that they were moving Terhaar to a status 'closer' to release - ignoring that only one person in recent history has been released from CPS, and then only to provisional discharge. MSOP has no established process or practice to determine whether to petition on behalf of an MSOP detainee.

Findings 171-174 observe that an MSOP detainee must have a fully completed provisional discharge plan to support a provisional discharge petition. MSOP's SRB policy states that when a petition for provisional discharge is supported by the treatment team, the MSOP staff is authorized to assist the individual petitioner with a provisional discharge plan. However, MSOP only assists those in Phase III of treatment with provisional discharge plans; it does not assist those in Phase I or Phase II to create a provisional discharge plan. MSOP does not provide legal advice to its detainees regarding filing a petition.

Thus, Findings 175-176 observed that various MSOP detainees have expressed confusion and uncertainty regarding the petitioning process, and some have been deterred from petitioning due to the daunting petitioning process. Between January 2010 and June 2014, 441 MSOP detainees potentially eligible for discharge had not filed a petition for a reduction in custody.

As the Court summarized in Findings 177-181, MSOP has never supported a full discharge petition and has only supported less than ten petitions for provisional discharge. MSOP will only support a petition for a reduction in custody if the petitioning individual fully completes the treatment program. MSOP has only supported one petition for transfer to CPS from a committed individual in Phase I (i.e., Eric Terhaar). For the very first time, just within the last year, the MSOP has supported one petition for transfer to CPS from an MSOP detainee in Phase II. (Deb McCulloch testified that she believes that "there are people both at Moose Lake and at St. Peter that could be served in a less restrictive environment. But I also believe -- and there's a good example that was presented in the court and in our report that there are people that should be discharged completely from commitment." (Trial Tr., v. 2,

(Continued on page 11)

pp. 255-56

The testimony of Beth Peterson as to MSOP detainee Harley Morris, who died of terminal cancer while in MSOP custody at age 78, is illustrative by way of example. Dr. Peterson testified that Mr. Morris was then on hospice support at Moose Lake. Dr. Peterson conceded that Morris was not then dangerous, and that he should have been transferred outside of the secure facility. Yet, no official or staff person at MSOP ever petitioned for his transfer to a different facility. Dr. Peterson agreed that the Assisted Living Unit at Moose Lake is for patients who are elderly or have serious medical conditions and that there are patients on the Assisted Living Unit that could be transferred out of the secure facility. (Trial Tr., v. 7, pp. 1393-94). Yet, again, MSOP has never petitioned for their transfer to a less restrictive alternative. Anyone in the Assisted Living Unit of MSOP cannot be a danger to the public in any realistic sense.

At *Karsjens* Conclusion 33, this Court declared:

"...[S]ection 253D, as applied, is not narrowly tailored because the discharge procedures are not working as they should at the MSOP. The Court finds that this is the result of the MSOP refusing to petition on behalf of committed individuals; the MSOP failing to provide discharge planning to committed individuals until they are in Phase III, and Defendants' failure to address impediments and delays in the reduction in custody process. These failures further delay Plaintiffs' ultimate discharge from the MSOP. As a result, section 253D, as applied, is not narrowly tailored, and results in a punitive effect and application contrary to the purpose of civil commitment. See *Hendricks*, 521 U.S. at 361-62."

Conditioning restoration of the liberty of any Plaintiff Class Member upon any process of psychological assessment is constitutionally improper. The statutory basis for our confinement, i.e., the MCCTA of 1994, has already been held to deprive each MSOP detainee of substantive due process, both on the face of that statute and as it is applied to same. Given this holding, the only truly appropriate relief is to dissolve each said commitment and to grant every MSOP detainee immediate release without conditions of "provisional release" under that unconstitutional statute.

As a matter of public safety, approximately two-thirds of MSOP detainees remain under intensive supervision administered by the Minnesota Department of Corrections in connection with their ongoing sentence-based paroles. As to the remaining detain-

ees, upon their release, each of them will be subject to the most intensive monitoring and surveillance by police agencies ever known in Minnesota history as to persons not under current investigation for specific crimes.

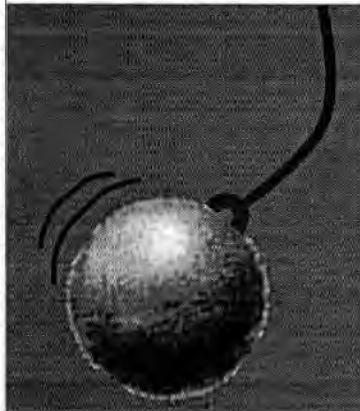
While offering assistance and training in life skills, etc. is helpful, compelling anyone to accept such services as a condition of their rightful freedom is itself also anathema to the Due Process Clause.

18. MSOP's Fraudulent Promises of Release

As stated supra, only 11% of the annual MSOP budget is allocated to treatment. Likewise, only 11% of its staff are involved in treatment. Again, this shows that MSOP does not actually intend 'successful treatment' to be a means of release. Therefore, it deliberately ensures that no one will be declared to have 'successfully treated.' To reduce per diem costs per detainee on average, MSOP actually wants to incarcerate more detainees in its two facilities.

Despite declaring in January 2011 that "...there are several clients who are close to earning provisional discharge," MSOP subsequently released only the two detainees mentioned supra. If this is the definition of "close" in MSOP-speak, then no appreciable change through internal MSOP action can actually be expected in the foreseeable future. Without any serious intent of reform, such MSOP statements are mere puffery to stave off judicial intervention.

Elsewhere in its 2011 Report, MSOP proceeds on the assumption that it will not release any of its detainees at least through 2022. That is permanent preventive detention.



Wrecking Ball

19. The Permanent Preventive Detention Intent of MSOP

Plaintiffs who occasionally do manage to complete a treatment regimen and present themselves for a declaration of eligibility for release are almost invariably delayed for such evaluation and instead are assigned a never-ending repeating series of post-treatment tasks to qualify for such evaluation and/or, when finally evaluated, are

declared not to have sufficiently "meaningfully changed" notwithstanding treatment to qualify for release. Because the only officially deemed means of achieving such "meaningful change" is ostensibly through treatment, these individuals are then remanded to repeat treatment, from the beginning.

Under these true circumstances, "treatment" does not function as, and is not intended to rehabilitate any committed sex offender to a point of release. To the contrary, treatment as thus designed and operated is purely a time-consuming mandatory merry-go-round, to occupy the time and attention of those committed while the true intended natural-life term of their commitment, as pure preventive detention, gradually lapses at each detainee's death. Such commitment whose true primary purpose is such preventive detention, with treatment only as a pointless superficial add-on strictly for appearances' sake, inherently deprives Plaintiffs thus committed of substantive due process.

MSOP policies and practices governing release are inherently unattainable as to any MSOP detainee, and are driven by political control and influence, rather than by any universally accepted and applied academic professional standards for release, effectively amounting to an unattainable "zero-percent-of-recidivism" "guarantee of public safety." This unattainability of release, regardless of mode, intensity, or reasonable duration of treatment, confirms the true permanent preventive detention nature of sex offender commitment pursuant to said Act as this aspect is upheld by Minnesota appellate court holdings.

Unlike other states having sex offender commitment laws, Minnesota lacks a requirement for a periodic report to the committing court regarding each sex offender's allegedly continuing need to remain committed. The issue such reports address elsewhere is whether the committed sex offender continues to meet the commitment standard. Some such "commitment states" require an annual court hearing, while others only hold such a hearing if controverted allegations so require. In some states, the state is required to re-prove the commitment case in court periodically.

In order to gain provisional release, a detainee must be approved by the "Special Review Board" ("SRB") of the Minnesota Department of Human Services, appointed by the Commissioner of that Department. Because of the aforementioned executive order (supra, at ¶ 133), the proposed release must then be approved by the "Supreme Court Appeal Panel" ("SCAP"). However, SRB relies heavily on MSOP treatment team reports and on an MSOP risk assessment in

making its recommendations to SCAP. In turn, SCAP itself also relies greatly on MSOP's assessments of its detainees. MSOP therapists have stated that public pressure is being exerted on both SRB and SCAP to be extraordinarily conservative in release decisions. However, MSOP's own refusal to prepare any release plans (except for the two token releases in 2012-13), demonstrates that MSOP itself also is extraordinarily conservative in decision-making about release.

20. MSOP's Lack of Releases Demonstrates Its Preventive Detention Aim.

At *Karsjens* Conclusion 32, this Court declared:

"...[S]ection 253D, as applied, is not narrowly tailored because individuals have remained confined at the MSOP even though they have completed treatment, can no longer benefit from treatment, or have reduced their risk below either the "highly likely to reoffend" standard or below a "dangerous" standard. The fact that no one has been fully discharged from the MSOP since the program was created and that only three individuals have been provisionally discharged, one of whom was subsequently returned to civil confinement and who passed away at the MSOP, underscores the failure of section 253D, as applied, to be narrowly tailored to confine only those individuals who should remain civilly committed at the MSOP. Therefore, section 253D, as applied, is not narrowly tailored and results in a punitive effect and application contrary to the purpose of civil commitment. See *Hendricks*, 521 U.S. at 361-62."

MSOP release standards are also inconsistent and inherently biased. The failure to release more than four detainees over the life of the MSOP program demonstrates that MSOP practice is a result of orders from political leaders and is not based on professional judgment. MSOP implementation, enforcement, and application of said 1994 Act to its detainees violates their constitutional right to substantive due process protections.

**Victim of the Month:
Chris Krych**

(Editor's Note: This time, *Victim of the Month* focuses not on the victim's sex conviction, its sentence, or claimed grounds for his later commitment process, but instead on the shady process of that commitment proceeding. This story is convoluted, and is best told by Mr. Krych himself.)

(Continued on page 12)

(Continued from page 11)



Back to Business....

"Politically Oriented False Imprisonment

Dakota County convicted me of a non-sexual crime and sent me to the Commissioner of Corrections for 122 months on March 18, 1998, for care, custody, and rehabilitation. (see *Minn. Stat. § 241.01*, subd. 3). The Corrections Program Review Team (PRT) only required that I do a Chemical Dependency (CD) Assessment and follow recommendations (see *Minn. Stat. § 244.03*, Rehabilitative Programs).

I completed a 6 month CD program, did an additional 6 months in another CD program, completed Relapse Prevention, completed Anger Management twice (never mandated/did a second time for personal growth), completed Parenting course (I have no children/using time to better myself), completed the Taking Responsibility for Attitude and Change (TRAC) program, and completed computer courses (10 certificates total). I also saved up my prison wages and sent the Department of Motor Vehicles the \$290 reinstatement fee for future driver's license renewal.

I was not in the custody of Corrections for a sexual conviction; I was not mandated to do any type of sex offender treatment by the Commissioner of Corrections during my term of imprisonment or as part of my Supervised Release (sex treatment was originally snuck on my parole plan (06/30/05 release) and I complained to Executive Director of Release Unit, Jeffrey Peterson, when back on a parole violation and he removed because 'unjustified'). I have never been a subject of Sex Offender Registration or Community Notification and the DOC knew this and knew that I was not a subject of their End of Confinement Review Committee (ECRC).

I successfully completed the RS Eden halfway house's 8 week transitional program three weeks early and moved into my own apartment in the community (03/01/2006) under Intensive Supervised Release (ISR), when Dakota County filed a Civil Commitment petition (#PB-05-10260), and had me apprehended on March 5, 2006, per Judge Karen Asphaug's signed Court Order.

Dakota County Judge Michael J. Mayer had the Preliminary Hearing on March 9,

2006, and made the statement: 'So a sex offender coming out of prison will complete - ECRC is End of Confinement Review Committee. They will review that process and assess an evaluation of Level 1, 2, or 3. This information is referring to that tool. Mr. Krych was not subject to ECRC review, so he did not complete this. Where are they coming up with the scores then for him? They scored him, but they should not have scored him. He was not subject to this process. Tell me how that happens when someone who is not supposed to be scored gets scored or why that happens.'

Judge Mayer further stated, 'I'm having trouble with my decision, Mr. Krych. You have a history of not being respectful to people in authority. You have a history of being very disrespectful to the court system.'

Judge Mayer further stated, 'I think I'm being asked to try another avenue of punishment, when he's done his time, and that troubles me.'

Then he ordered me released back into the community pending Dr. Sweet's recommendation.

Dr. Roger C. Sweet's Report: 'I concur with the opinion of the independent legal counsel [Bertrand Poritsky, judge that committed Linehan] to the SDP/SPP screening committee, that Mr. Krych is not highly likely to commit future acts of harmful sexual conduct. It is ironic that DOC recommended forwarding this case to Dakota County for review. ironic given that he hasn't been mandated to complete sex offender treatment since 1987, hasn't been convicted of a sex offense since 1989 and is not currently subject to predatory Offender registration and therefore is not assigned a risk level nor are there any community notification requirements.'

Judge Mayer stated that he was being 'pressured' by his judicial colleagues and couldn't dismiss the case. Judge Mayer was pressured to take me off the streets and had a second preliminary hearing (Oct. 16th, continued to Oct. 25th, 200

6), and after both of the Court's experts (Roger Sweet & Thomas Alberg) testified I was not an imminent threat in the community towards anybody and should remain free. Judge Mayer stated: 'This is the biggest decision of my life' and ordered me taken into custody on hold status at MSOP's prison. Commitment became a Political given!

Judge Mayer committed me as a Sexually Dangerous Person on 6/7/2007, with pertinent finding: '4. Respondent's diagnosed antisocial personality disorder satisfies the statutory requirement that Respondent had/has manifested a sexual personality disorder or other mental disorder or dysfunction... [Linehan].'

My appellate court attorney, Sean Shands, argued in his brief: '...There is an old saying "just because you are paranoid doesn't mean they are not out to get ya." Mr. Krych paid his debt to society for the crimes he has committed. ...To accomplish this, the trial court has forced a round peg into a square hole. ...[T]he trial court clearly erred in committing Mr. Krych as a Sexually Dangerous Person.' Appeals Court Slam Dunked Me!

Judge Mayer included 'had' in antisocial personality disorder finding because of my community adjustment and the statute only uses 'has' because disorder must be a 'present' disorder. (In *Linehan IV*, the State Supreme Court stated the 'Minnesota SDP Act requires evidence of ...a present qualifying disorder or dysfunction that makes future dangerous conduct highly likely.' 594 N.W.2d at 874). I was successful in the community for 9 months (see MN Supreme Court *Cedrick Ince* case).

I'm 51 years old now and paid all my dues to society and am not a sexual deviant person. I was locked up my juvenile life (St. Croix Camp, Red Wing twice and Sauk Center twice) and became an alcoholic when I became an adult (bad drugs came later).

Judge Mayer stated in his Second Preliminary Hearing Findings: 'Respondent has, to his credit, been maintaining his sobriety, continued to earn an income and abided by all expectations of his probation. He has a support network of AA sponsors and community members.' In 2006 I was a law abiding person and had found my freedom.

I had gotten my driver's license back, had four vehicles (3 registered, 2 insured), went to AA almost daily and had an AA sponsor, reestablished family relationships, and was earning an honest living and paying all my bills. I was a new human being after DOC rehabilitation.

I have been to two SCAP hearings already with family, friends, employers, and supporters in my corner, and have twice been rejected by the 'court system'. I am going on 21 years of sobriety and MSOP claims it's because I am in MSOP and ignores the fact that I was in community twice during this sobriety and did not relapse. MSOP continues diagnosing me as paraphilia unspecified when my last SCAP expert testified that MSOP's misrepresenting the DSM-V with bogus diagnosis.

Dakota County had already committed me to the Minnesota Dept. of Corrections for my antisocial personality disorder (March 18, 1998) and I completed all rehabilitative mandates.

Commitment has only been 'another avenue of punishment' after I 'did (my) time.'

Hold The Presses!!
This Just In!



Doing a Bernie

An investigative reporter noted for coverage opposing sex offender commitment has just contacted me, seeking information for an expose of frauds, graft, and other corrupt practices by officials or staff at each of the facilities of this kind around the country.

This reporter already has a surprising trove of such information from other such facilities, but specifically seeks information pertaining to MSOP's two facilities.

The focus in the projected expose article is on bilking of the states paying for such commitment or of the Feds' various reimbursement programs. This illegal conduct impacts us because perpetuating such corruption requires that we be made to stay put, rather than be freed.

One example we all know about here is the triple billing for MSOP costs (bills to us, 50% wage confiscation, plus bills to counties of commitment). Inflated/nonexistent in-house medical costs are another. Numerous kickbacks as to certain contracts may wind up in officials' pockets, rather than in state coffers.

Any facts you know of that prove or tend to support suspicions of such frauds, graft, outright theft, or other corrupt practices will be helpful in this investigative effort.

Especially helpful will be any records that you may have stumbled across and which you saved.

Also, if you have become aware that staff here have learned of such illegal conduct by other employees or administrative bosses, they may be willing to share what they have learned with that reporter as long as they can be guaranteed anonymity. This reporter states that in fifteen years of investigative journalism, no confiding person has ever lost a job through those expose articles.

Please confar with me as opportunity presents itself to discuss whatever such information you may have on this front. All such information and your identity will be protected. Obviously, do NOT use 'green mail' to me on this subject. Thanks for your help on this project, whatever it may be! Your liberation, and that of all of us, may be greatly accelerated if matters of sufficient impact are uncovered in this way.
