No. _____

In the Supreme Court of the United States

KEVIN SCOTT KARSJENS; DAVID LEROY GAMBLE;
KEVIN JOHN DEVILLION; PETER GERARD LONERGAN;
JAMES MATTHEW NOYER, SR.; JAMES JOHN RUD;
JAMES ALLEN BARBER; CRAIG ALLEN BOLTE; DENNIS RICHARD STEINER;
KAINE JOSEPH BRAUN; CHRISTOPHER JOHN THURINGER;
KENNY S. DAYWITT; BRADLEY WAYNE FOSTER; BRIAN K. HAUSFELD,
AND ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

EMILY JOHNSON PIPER; KEVIN MOSER; PETER PUFFER;
NANCY JOHNSTON; JANNINE HEBERT; ANN ZIMMERMAN,
IN THEIR OFFICIAL CAPACITIES,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1994, Minnesota enacted an indefinite sex offender civil commitment scheme that now confines more than 700 people – the highest per capita commitment rate in the country. During the two decades before trial, not one single person had ever been discharged. Because of the fundamental liberty interests infringed by civil commitment, the district court applied strict scrutiny and found the statute unconstitutional largely because it fails – as written and as-applied – to require a regular, periodic system to identify and timely release people who no longer satisfy the standard for commitment. Due to this flaw, the state does not know, and cannot demonstrate, whether hundreds of committed people continue to meet that standard.

The Eighth Circuit reversed, concluding that civilly committed sex offenders do not possess fundamental liberty rights to which strict scrutiny applies. Instead, the circuit court applied a rational basis test to Petitioners' facial challenge and then, relying on *County of Sacramento v. Lewis,* 523 U.S. 833 (1998), applied a "shocks the conscience" standard to Petitioners' as-applied challenge. The Eight Circuit's decision is at odds with decisions of this Court and directly conflicts with the Minnesota Supreme Court, as well as five other state supreme courts.

The question presented is whether Minnesota's indefinite sex offender civil commitment scheme violates the Fourteenth Amendment's substantive due process clause.

PARTIES TO THE PROCEEDING

Petitioners Kevin Karsjens, David Gamble, Jr., Kevin DeVillion, Peter Lonergan, James Noyer, Sr. James Rud, James Barber, Craig Bolte, Dennis Steiner, Kaine Braun, Christopher Thuringer, Kenny Daywitt, Bradley Foster and Brian Hausfeld were plaintiffs in the district court and appellees in the Eighth Circuit.

Respondents Emily Johnson Piper, Kevin Moser, Peter Puffer, Nancy Johnston, Jannine Hebert, and Ann Zimmerman were defendants in the district court and appellants in the Eighth Circuit.

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Petitioners Kevin Karsjens, David Gamble, Jr., Kevin DeVillion, Peter Lonergan, James Noyer, Sr. James Rud, James Barber, Craig Bolte, Dennis Steiner, Kaine Braun, Christopher Thuringer, Kenny Daywitt, Bradley Foster and Brian Hausfeld respectfully petition for a writ of certiorari to the United States Court of Appeal for the Eighth Circuit in *Karsjens v. Piper*, No. 15-3485.

OPINIONS BELOW

The judgment of the United States Court of Appeal for the Eighth Circuit is reported at 845 F.3d 394 (8th Cir. 2017), and reproduced in the appendix hereto ("Pet. App.") at 1. The Eighth Circuit's order denying rehearing en banc is not reported, but is reproduced here at Pet. App. 159.

JURISDICTIONAL STATEMENT

The judgment and opinion of the United States Court of Appeal for the Eighth Circuit was entered on January 3, 2017. Pet. App. 1. The Eighth Circuit denied rehearing en banc on February 22, 2017. Pet. App. 159. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Minn. Stat. § 253D, "Minnesota Commitment and Treatment Act: Sexually Dangerous Persons and Sexual Psychopathic Personalities," is reproduced at Pet. App. 161.

INTRODUCTION

This case involves the scope and strength of the bedrock constitutional principle that "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause[.]" *Foucha v. Louisiana,* 504 U.S. 71, 80 (1992). *See also Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (stating that "[a] statute permitting indefinite detention" raises serious constitutional problems, because "[f]reedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that Clause protects.") (citation omitted).

In 1994, Minnesota enacted arguably the broadest sex offender civil commitment scheme in the country, which is administered as the Minnesota Sex Offender Program (MSOP). Hundreds have been civilly committed during the past twenty-plus years, but no one ever gets discharged. Pet. App. 88.[1] During those two decades, the population of the MSOP increased dramatically to now confine more than 700 people. Pet. App. 89.

The fatal flaw of Minnesota's civil commitment scheme, and the crux of this Petition, is its failure– by statute or implementation – to meaningfully ensure on a regular, periodic basis that people committed to the

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[1] The Eighth Circuit did not dispute the district court's findings of fact.

MSOP continue to satisfy the standards for commitment. *See Kansas v. Hendricks*, 521 U.S. 346, 368 (1997) (upholding scheme that imposes detention upon "a small segment of particularly dangerous individuals" and provides "strict procedural safeguards," including yearly review of confinement before a judge); *United States v. Salerno*, 481 U.S. 739, 747, 750-52 (1987) (stressing "stringent time limitations," the narrow application of the pretrial detention act, and the presence of strong judicial safeguards); *Foucha*, 504 U.S. at 81-83 (striking down Louisiana's detention of people who were no longer mentally ill because the scheme of confinement was not carefully limited). In effect, Minnesota's failure to implement adequate periodic reviews establishes a death-in-confinement sentence without any of the safeguards of the criminal legal system, lacking any assurance that continued confinement is legally justified.

After a lengthy trial, the district court concluded that Minnesota's sex offender civil commitment scheme violated due process, facially and as-applied, because it infringed fundamental liberty rights and was not narrowly tailored to meet the state's compelling interests, in large part because of its failure to require regular, periodic review to assure that those committed continued to satisfy the standards for commitment.

The Eighth Circuit reversed. In a significant departure from constitutional principles, this Court's substantive due process jurisprudence, and the decisions of other state and federal appellate courts, the Eighth Circuit concluded that sex offender civil commitment does not involve a fundamental liberty

interest. Instead, the circuit court concluded that "persons who pose a significant danger to themselves or others" do not "possess a fundamental liberty interest in freedom from physical restraint." Pet. App. 21. Finding no fundamental right at stake, the circuit court applied rational basis review to the facial challenge. With respect to the substantive due process challenge to the statute as-applied, the circuit court relied on *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), and imposed a "shocks the conscience" burden on Petitioners' claims. As a matter of law, the circuit court concluded that Petitioners failed to show any conduct that shocked the conscience and dismissed their claims. Pet. App. 28-29.

Now is a particularly important time for this Court to set out clearly that the indefinite deprivation of liberty that accompanies civil confinement implicates a fundamental right and to place the burden squarely on the government to demonstrate that its legislative response is narrowly tailored to meet a compelling state interest. The Eighth Circuit's ruling makes clear that it is not just those labeled as sex offenders who risk losing a fundamental liberty interest. By collapsing the nature of the right and the compelling state interest inquiries, the circuit court created constitutionally impermissible sub-classes of rights holders – those who have a fundamental right to liberty and those who do not. This approach means that any group perceived as potentially dangerous to the public – the mentally ill, people with alien status, or those previously convicted of chronic criminal behavior, for example – could find themselves with diminished constitutional rights when facing civil commitment or detention. Such a rule of law cannot stand under our

Constitution, especially when its subjects are some of the most politically powerless, despised, and vulnerable among us.

STATEMENT OF THE CASE

In 1994, Minnesota's legislature enacted what has become the most sweeping sex offender civil commitment statute in the United States. *See* Pet. App. 161. The enactment followed the Minnesota Supreme Court's decision to vacate a civil commitment order in a highly-charged and politically salient case, *In re Linehan*, 518 N.W. 2d 609 (Minn. 1994), involving a man with a record of multiple sexual assaults of young women. There, the court found that the government had not met its high burden of proving that Linehan had an "utter lack of power to control himself," the then-existing test for commitment under Minnesota law. *Id.* at 614.

A political and media firestorm erupted after the Minnesota Supreme Court's decision. The Governor of Minnesota immediately called a special legislative session and, then, after just 97 minutes of debate, the legislature unanimously passed Minnesota's current sex offender civil commitment statute. *See In re Linehan*, 557 N.W.2d 171, 198 (Minn. 1996) *affirmed*, 594 N.W.2d 867 (Tomljanovich, J., dissenting).

In the two decades since the enactment of Minn. Stat. § 253D, the total number of civilly committed sex offenders in Minnesota has ballooned to more than 700 and the state projects that the number of civilly committed sex offenders will continue to grow to over 1,200 by 2022. Pet. App. 89. At the time of the trial in 2015, over twenty years after the statute's enactment,

no one had ever been discharged from civil commitment under the statute.[2] Pet. App. 142.

Minnesota's statute, in sharp contrast to other sex offender commitment statutes, including the Kansas statute that this Court approved in *Hendricks*, 521 U.S. 346, fails to require regular, periodic risk assessments of all people committed to MSOP to assure that they continue to meet the standard for commitment, and in practice, the MSOP does not conduct regular risk assessments. Pet. App. 115. Hundreds of civilly committed people in Minnesota have never received a risk assessment and hundreds more have risk assessments that are outdated and therefore invalid. Pet. App. 115, 128. As a result, the MSOP does not know which people in custody continue to satisfy the standards for commitment. Pet. App. 115. Even more troubling is that the MSOP knows, for some of the people in custody, that they in fact satisfy discharge criteria but the MSOP takes no action to facilitate their discharge. Pet. App. 126.

Petitioners filed a *pro se* class action in 2011 under 42 U.S.C. § 1983 claiming, among other things, that Minnesota's sex offender civil commitment statute deprives them of substantive due process.[3] In their

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[2] After the trial and the District Court's Findings of Fact, Conclusions of Law and Order, one person whose only offenses were committed as a juvenile was discharged over the repeated objections of the state. As of 2016, four people have been provisionally discharged but remain under MSOP control with strict conditions and restrictions.

[3] Gustafson Gluek PLLC entered an appearance on behalf of Petitioners and the purported class in January 2012 pursuant to

amended pleadings, Petitioners alleged that Minn. Stat. § 253D is unconstitutional on its face and as-applied because the nature and duration of Minnesota's indefinite civil commitment scheme is not reasonably related or narrowly tailored to the purpose of commitment. Petitioners specifically alleged that the statute failed to require or provide independent periodic review to assess whether committed people continued to meet the standards for commitment. Petitioners also alleged that the punitive policies, procedures, and practices of Defendants deprived class members of the constitutional right to be free from punishment in violation of the Fourteenth Amendment.

In 2015, after a nearly six-week bench trial, the district court held that the Minnesota statute violates substantive due process because the ongoing indefinite detention under a civil statute implicates the "fundamental right to live free of physical restraint," which is a "curtailment of [plaintiffs'] liberty." Pet. App. 133. The district court applied strict scrutiny to the due process claims[4] and underscored that "when the standard for commitment is no longer met or when the standard for discharge is satisfied, the state has no authority to continue detaining the confined individual

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a request from the Minnesota Federal Bar Association's *Pro Se* Project, which seeks to align Minnesota counsel and *pro se* civil litigants in Minnesota federal court. On July 24, 2012, the district certified a Rule 23(b)(2) class of all civilly committed people in the MSOP. *Karsjens v. Jesson*, 283 F.R.D. 514 (D. Minn. 2012).

[4] No party contested the compelling state interest implicated in confining sex offenders who present a "real, continuing, and serious danger to society." Pet. App. 139 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 372 (1997) (Kennedy, J., concurring)).

at the MSOP." Pet. App. 140. Ultimately, the district court concluded, in relevant part, that the statute as written "is not narrowly tailored because [it] indisputably fails to require periodic risk assessments" and thus "the statute, on its face, authorizes prolonged commitment, even after committed individuals no longer pose a danger to the public[.]" Pet. App. 135-136. The district court also concluded that the statute is "not narrowly tailored" in its implementation because, among other reasons, MSOP "do[es] not conduct periodic risk assessments of civilly committed individuals." Pet. App. 140. Although under the statute a committed person can trigger a risk assessment by filing a petition for release, the evidence at trial showed that for hundreds of committed people, this provision simply fails to guarantee that commitment ends when the basis for the commitment no longer exists. Pet. App. 140-41 (the district court found, and defendants admitted, that for hundreds of currently committed persons, the state does not know whether they continue to satisfy the criteria for ongoing commitment). Finally, the district court concluded that "[t]he overwhelming evidence at trial established that Minnesota's civil commitment scheme is a punitive system that segregates and indefinitely detains a class of potentially dangerous individuals without the safeguards of the criminal justice system." Pet. App. 80.

The Eighth Circuit reversed. In doing so, the circuit court recharacterized Petitioners' liberty interests and recast the question as whether – because of the compelling state interest in public safety – "persons who pose a significant danger to themselves or others" have a fundamental liberty interest in freedom from

indefinite confinement at all. The Eighth Circuit ruled that no such fundamental right existed, set "rational basis" as the appropriate level of scrutiny, and concluded that the Minnesota statute satisfied that scrutiny.

Then, relying on this Court's opinion in *Lewis*, the circuit court concluded that the district court incorrectly focused its as-applied analysis "only on whether there was a fundamental right at issue" when, according to the Eighth Circuit, it should have first asked whether "the state defendants' actions were conscience-shocking." The circuit court found, as a matter of law, that the defendants did not engage in conscience-shocking behavior *and*, no fundamental liberty interest was at stake. Therefore, the court concluded the statute as-applied survived rational basis review. The Eighth Circuit did not address the district court's conclusion that the statute has an impermissibly punitive effect.

On February 22, 2017, the Eighth Circuit rejected a timely filed motion for rehearing en banc. Pet. App. 159. This Petition followed.

REASONS FOR GRANTING THE PETITION

I. The Eighth Circuit's Ruling Conflicts With This Court's Fundamental Rights Jurisprudence And Bedrock Principles of Constitutional Law.

A. The Decision Below Undervalues The Right To Be Free From Massive Deprivations of Physical Liberty.

"[A]s a matter of due process," civil confinement is only permissible so long as the basis for the initial commitment exists; once the rationale for commitment disappears, the confinement must end. *Foucha*, 504 U.S. at 77 (citing *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975)) ("Even if the initial commitment was permissible, it could not constitutionally continue after that basis no longer existed.") (internal quotation marks omitted). Therefore, commitment must cease when the person "has recovered his sanity ***or*** is no longer dangerous." *Jones v. United States*, 463 U.S. 354, 368 (1983) (citing *O'Connor*, 422 U.S. at 575-76) (emphasis added).

The well-established foundation for these holdings is that "[f]reedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that [the due process clause] protects." *Zadvydas*, 533 U.S. at 690; *see also Foucha*, 504 U.S. at 80. Although this Court has never squarely addressed the question presented in this case – whether the liberty impaired by civil commitment is a fundamental liberty interest – it has certainly recognized time and time again that "civil commitment for any purpose constitutes a

significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979); *see also Foucha*, 504 U.S. at 80 ("[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action); *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982).

This Court has found that involuntary civil detainment is only proper in "certain narrow circumstances." *Hendricks*, 521 U.S. at 357. Therefore, a civil commitment scheme must either be limited in duration or contain important procedural protections to ensure it ends when circumstances no longer justify confinement. In *Hendricks*, for example, this Court upheld Kansas's civil commitment scheme in large part because it required an "annual review to determine whether continued detention was warranted." *Id*. at 353. In *Salerno*, 481 U.S. 739, this Court upheld a pretrial detention scheme in part because of its "stringent time limitations" and the fact that it was reserved for the most "serious of crimes." *Id*. at 747. In contrast, this Court has struck down confinement schemes that are indefinite in duration and do not account for changed circumstances that might eliminate the need for secure confinement. *See Zadvydas*, 533 U.S. at 691-92 (striking down a scheme confining aliens because it was potentially permanent); *Foucha*, 504 U.S. at 82-83 (finding a due process violation because the statute did not require discharge when the basis for confinement ended). The principle that a person always has a fundamental right to liberty underpins each of these decisions. To be sure, the government can limit that right with a narrowly tailored solution to a compelling governmental interest.

But when that reason evaporates, the person's fundamental right prevails. *Zadvydas*, 533 U.S. at 691-92; *see also Jones*, 463 U.S. at 368.[5]

The Eighth Circuit's decision conflicts with this Court's rulings and the basic constitutional principle that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Salerno*, 481 U.S. at 755. As explained *supra*, the circuit court ruled that persons who "pose a significant danger to themselves or others" do not possess "fundamental liberty interests." Pet. App. 21. Only by first diminishing the basic constitutional rights held by the Petitioners could the circuit court apply a lesser standard of review and uphold the statute. But

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[5] The reasons for placing strict limitations on civil confinement are obvious. A person confined due to a serious mental illness or because of insanity, or a person labeled a sexually dangerous offender, can recover and successfully reenter society. *See e.g. O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) (finding that although a person is mentally ill, if they are not also dangerous and can live safely in the community, commitment cannot continue). Offenders' brains develop, and criminal and dangerous behavior concomitantly declines with age. Robert J. Sampson & John H. Laub, *Life-Course Desisters? Trajectories of Crime Among Delinquent Boys Followed to Age 70*, 41 CRIMINOLOGY 301, 315 (2003) ("Aging out of crime is thus the norm—even the most serious delinquents desist."), *available at* http://scholar.harvard.edu/files/sampson/files/2003_crim_laub_1.pdf. The presumption of rehabilitation and recovery is the foundation of the criminal sentencing system, which allows for release for all but the most dangerous in society. Those principles are no less important in the civil commitment context, where people are potentially indefinitely confined for a condition that is often not permanent. *See Foucha v. Louisiana*, 504 U.S. 71, 81-82 (1992) (recognizing the likelihood of a person regaining sanity).

the Constitution does not provide less protection to certain groups or less entitlement to fundamental rights.

The Eighth Circuit's framing of the question in such a narrow fashion mirrors the reasoning soundly rejected by this Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). In *Obergefell*, this Court refused to narrowly identify the right at issue as a "right to same-sex marriage." *Id.* at 2602. Instead, the Court cited a string of cases involving, for example, interracial marriage, *see Loving v. Virginia*, 388 U.S. 1 (1967), where the right is defined as the "right to marry in its comprehensive sense," and rejected the notion of a subclass for same-sex marriages. *Obergefell*, 135 S. Ct. at 2602. The question in those cases was whether the state had crafted a narrowly tailored response to meet a compelling interest in denying the fundamental right to marriage. *Id*. at 2598. Similarly, here the Eighth Circuit incorrectly framed the right at issue as the right of "persons who pose a significant danger to themselves or others… [to] freedom from physical restraint," Pet. App. 21, rather than as a right of all persons to be free from the total and often permanent deprivation of physical liberty that accompanies civil commitment. Since there is no dispute that the confinement of "persons who pose a significant danger to themselves or others" can constitute a compelling state interest, the appropriate question here is whether Minnesota's civil commitment scheme is narrowly tailored to meet that objective. The undisputed facts and the district court's findings demonstrated it is not, either on its face or as implemented, in large part because it lacks the necessary protection of regular,

periodic review to ensure that confinement extends only so long as its justification remains.

B. The Eighth Circuit Erected A New Hurdle That Petitioners Must Overcome Before Obtaining Relief From Excessive Governmental Infringement on a Fundamental Right.

The Eighth Circuit misapplied the test for analyzing substantive due process challenges. This Court has created two strands of substantive due process doctrine that differ depending on whether the challenged action is taken by an individual executive branch official or is part of a legislative scheme. When a plaintiff challenges an individual executive branch official's discretionary actions, he or she must show that the actions "shock[] the conscience" and are an affront to the "decencies of civilized conduct." *Rochin v. California*, 342 U.S. 165, 172-73 (1952). But when a plaintiff challenges legislation and proves the government has infringed on "fundamental rights and liberties" that are "deeply rooted in this Nation's history and tradition," *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997), the government must show that the legislative scheme is narrowly tailored to a compelling state interest. *Id.* at 721.

Petitioners challenged the civil commitment statute and its implementation over more than two decades. The Eighth Circuit nonetheless concluded that challenges to such legislation in this manner must prove *first* conscience-shocking behavior and *second* that the deprivation involves a "fundamental right." Pet. App. 23-24 (holding that a "court should determine both whether the state defendants' actions were

conscience-shocking and if those actions violated a fundamental liberty interest") (citing *Moran v. Clarke*, 296 F.3d 638, 651 (8th Cir. 2002) (en banc) (Bye, J., concurring) (plaintiff "must demonstrate *both* that the official's conduct was conscience-shocking [] and that the official violated one or more fundamental rights") (emphasis in original)).

The Eighth Circuit's reasoning erroneously relies upon footnote eight of *Lewis*, 523 U.S. 833, which explained that "a case challenging executive action on substantive due process grounds, like this one, presents an issue antecedent" to the fundamental rights question, namely "whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Id*. at 847 n. 8. There is nothing controversial or new about *Lewis* requiring a showing of conscience-shocking behavior as an antecedent to proving a due process violation when it comes to "executive abuse of power." *Id.* at 846. This Court "for half a century now" has "spoken of the cognizable level" as "that which shocks the conscience." *Id*. Importantly, though, *Lewis* clearly distinguished between "legislation [and] a specific act of a governmental officer that is at issue." *Id*. Indeed, the Court granted review in *Lewis* not to resolve any questions about the interplay of the two strands of due process doctrine, but rather to resolve a sub-issue *within* the shocks the conscience strand. *Id.* at 839 (granting certiorari "to resolve a conflict among the Circuits over the standard of culpability on the part of a law enforcement officer for violating substantive due process in a pursuit case.").

There is no indication that the *Lewis* Court intended to scrap its approach, developed over the course of a half-century, for claims that a statute, either as written or as implemented, violates substantive due process. *See Troxel v. Granville*, 530 U.S. 57, 65-67 (2000) (finding a Washington nonparental visitation statute unconstitutional because it involved fundamental rights and did not meet a "heightened" protection test); *Chavez v. Martinez*, 538 U.S. 760, 775 (2003) (citing *Glucksberg* and noting that fundamental liberty interests cannot be infringed without narrow tailoring); *Kerry v. Din*, 135 S. Ct. 2128, 2133 (2015) (citing *Reno v. Flores*, 507 U.S. 292, 301-302 (1993) and also finding that fundamental rights are subject to strict scrutiny).

Lewis presents a completely different type of due process claim than the one alleged by Petitioners. In *Lewis*, a single executive actor (a police officer) caused the death of a motorist during a high-speed automobile chase seeking to apprehend a suspected criminal. *See generally*, *Lewis*, 523 U.S. 833. The Court adopted a more demanding "shocks the conscience" standard to require that such constitutional claims against government officials impose a higher burden of proof than common law torts. *Id.* at 848-49. But there is nothing in *Lewis* that questioned or replaced the *Glucksberg* fundamental rights prong of substantive due process analysis.

The Eighth Circuit's departure from this Court's substantive due process jurisprudence concerning civil commitment stands alone. Petitioners could not locate another federal appellate court or state court of last resort that interprets *Lewis* to apply to substantive due

process challenges to systemic and persistent implementation of legislative schemes, such as those raised in this case. *See Hawkins v. Freeman*, 195 F.3d 732, 739 (4th Cir. 1999) (explaining, post-*Lewis*, "[i]f the claimed violation is by legislative enactment (either facially or as-applied), analysis proceeds by a different two-step process that does not involve any threshold 'conscience-shocking' inquiry."); *see also* Robert Chesney, *Old Wine or New? The Shocks-the-Conscience Standard and the Distinction Between Legislative and Executive Action*, 50 SYRACUSE L. REV. 981, 1015–16 (2000) ("As one commentator explained, substantive due process analysis is on its firmest footing when applied to systematic governmental action" because "substantive due process claims on the whole are steered away from the less-defensible arena of claims of individual wrongs and towards the more hospitable in which substantive due process claims address government actions broadly impacting the relationship between the governors and the governed.") (internal quotation marks omitted).

II. The Eighth Circuit's Ruling Conflicts With The Decisions of the Minnesota Supreme Court And Other State And Federal Courts.

The Eighth Circuit created an irreconcilable conflict with at least six state supreme courts, including the Supreme Court of Minnesota, when it ruled that indefinite civil commitment does not implicate a fundamental right that requires application of heightened scrutiny. That ruling is also in serious tension with decisions from other federal courts and state supreme courts that have applied strict scrutiny

to liberty interests in equal protection challenges to civil commitment.

In direct conflict with the Eighth Circuit, the Minnesota Supreme Court has held that the civil commitment statute implicates fundamental rights, and thus strict scrutiny should be applied.[6] In *In re Blodgett*, 510 N.W.2d 910 (Minn. 1994), the court held, "[t]o live one's life free of physical restraint by the state is a fundamental right… [t]he state must show a legitimate and compelling interest to justify any deprivation of a person's physical freedom." *Id*. at 914 (internal citations omitted). Similarly, *In re Linehan*, 557 N.W.2d 171 (Minn. 1996), *affirmed*, 594 N.W.2d 867, found that "the fundamental right to liberty is at stake" and therefore the commitment statute "is subject to strict scrutiny." *Id.* at 181. The Eighth Circuit ignored the Minnesota Supreme Court's findings from *Blodgett* and *Linehan* on the appropriate standard of review for facial challenges to the commitment statute and instead proceeded with its own analysis.

Other state supreme courts have also held that the indefinite loss of physical liberty that accompanies civil commitment implicates a fundamental right. *See Commonwealth v. Knapp*, 441 Mass. 157, 164 (Mass. 2004) (explaining that "[t]he right of an individual to be free from physical restraint is a paradigmatic fundamental right," and any "[c]onfinement, therefore,

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[6] Although these cases upheld the constitutionality of the civil commitment statute, they are distinguishable from this case because evidence from the over twenty years of implementation of the statute now exists to support Petitioners' claims.

must be narrowly tailored to further a legitimate and compelling governmental interest"); *In re Treatment and Care of Luckabaugh*, 568 S.E.2d 338, 347 (S.C. 2002) ("a person's interest in freedom from bodily restraint is at the core of the liberty protected by the Due Process Clause from arbitrary governmental actions" and thus "we apply strict scrutiny analysis") (internal citation and quotation omitted); *State v. Post*, 541 N.W.2d 115, 129-130 (Wis. 1995) (holding that "[f]reedom from physical restraint is a fundamental right" and applying strict scrutiny analysis); *In re Young*, 857 P.2d 989, 1000 (Wash. 1993), *superseded by statute as recognized in In re Detention of Thorell*, 72 P.3d 708 (Wash. 2003) (finding civil commitment to "impinge on fundamental rights" and applying strict scrutiny); *see also Atwood v. Vilsack*, 725 N.W.2d 641, 648 (Iowa 2006) (applying strict scrutiny to a substantive due process challenge to its sex offender civil commitment scheme; however, since the challenged part of the statute survived strict scrutiny, the Iowa Supreme Court believed it "unnecessary [] to resolve the question whether the petitioners' claimed interest is fundamental"). Petitioners could not locate a case where a state court of last resort or federal appellate court, other than the Eighth Circuit in this case, concluded that civil commitment does not implicate a fundamental right.

In the Fourteenth Amendment equal protection context, additional courts have ruled that civil commitment implicates a fundamental right. *See In re Smith*, 178 P.3d 446, 453 (Cal. 2008) (holding that "[s]trict scrutiny is the appropriate standard against which to measure equal protection claims of disparate treatment in civil commitment" because "personal

liberty is at stake") (internal citations and quotation marks omitted); *In re Care and Treatment of Norton*, 123 S.W.3d 170, 173-174 (Mo. 2004) (finding that "civil commitment… impinges on the fundamental right of liberty" and applying strict scrutiny); *Williams v. Meyer*, 346 F.3d 607, 616 (6th Cir. 2003) ("[a]ny difference in treatment of involuntarily detainees is subject to strict scrutiny."). The Eighth Circuit sharply departed from accepted case law, including from the highest court in Minnesota, to find no fundamental liberty right present and therefore refusing to apply strict scrutiny.

III. This Case Is An Ideal Vehicle To Decide The Urgent and Important Question Presented.

The foundational nature of the liberty right at stake, the magnitude of the violation, and the number of people harmed by the violation all point towards the urgency of review in this case. The right to be free from indefinite physical restraint is at the heart of the Constitution's protection of liberty. Yet, because of the failure to provide meaningful, regular opportunities for assessment and release under Minnesota's civil commitment scheme, this most fundamental of rights is in jeopardy, not for a single person, but for hundreds of people indefinitely, and perhaps permanently confined, without the benefits or protections of the criminal process.

The fundamental nature of the right is matched in importance by the magnitude of the violation. Indeed, the district court recognized that when a "statutory scheme 'is so punitive in purpose or effect'" it must be treated as having "established criminal proceedings for

constitutional purposes." Pet. App. 134-135 (quoting *Hendricks*, 521 U.S. at 361). In this case, the district court found that Minnesota's civil commitment scheme, on its face and as-applied, is not narrowly tailored and results in a punitive effect and application contrary to the purpose of civil commitment. Pet. App. 145 (citing *Hendricks*, 521 U.S. at 361-62); *see also Kansas v Crane*, 534 U.S. 407, 412 (2002) (emphasizing the danger that civil commitment become "a mechanism for retribution or general deterrence.") (citation and quotation marks omitted). This is not a statute where the Minnesota legislature worked to "limit[] confinement to a small segment of particularly dangerous individuals" while establishing "strict procedural safeguards." *Hendricks*, 521 U.S. at 368. To the contrary, Minnesota's legislature enacted a dramatically expanded sex offender civil commitment scheme after just 97 minutes of debate, in the wake of public outcry over the Minnesota Supreme Court's decision in *In re Linehan*, 518 N.W.2d 609 (Minn. 1994). *See also Carver v. Nixon*, 72 F.3d 633, 655-56 (8th Cir. 1995) (explaining that legislative enactments normally, "while perhaps not always perfect, include[] deliberation and an opportunity for compromise and amendment, and usually committee studies and hearings."); Joanna Woolman, *Going Against the Grain of the Status Quo: Hopeful Reformations to the Sex Offender Civil Commitment in Minnesota – Karsjens v. Jesson,* 42 MITCH. HAMLINE L. REV. 1363, 1381-84 (2016) (describing the panicked atmosphere and the lack of serious deliberation that resulted in the 1994 statute). Since that time, MSOP's population has climbed to over 700 people, the highest per capita commitment rate in the country. Pet. App. 89.

As its implementation has made clear, the breadth of the law was clearly designed for the purpose of continuing confinement, without ensuring that the statute applied only to a "narrow[] [] class of persons," *Hendricks*, 521 U.S. at 358, or providing adequate mechanisms to ensure that confinement was strictly limited to its necessary duration. For example, there is no provision for "immediate release upon a showing that the individual is no longer dangerous or mentally impaired." *Id.* at 368-69. Nor does the statute require meaningful periodic risk assessments or demand that MSOP affirmatively facilitate release when a person no longer satisfies the commitment criteria. *See generally id.* at 346 (approving a civil commitment scheme that required the state to demonstrate annually that the person met the statutory standards justifying admission); *Foucha*, 504 U.S. at 82 (civil commitment statute unconstitutional because confinement continued beyond its justification); Pet. App. 114-115. On its face, this is a scheme that shows little regard for whether the people it confines will ever be released.

Reviewing twenty years of experience, the evidence at trial confirmed the punitive thrust of the statute. *Compare Seling v. Young*, 531 U.S. 250 (2001) (involving an *ex post facto* challenge to a civil commitment program as applied to a single person at a certain moment in time rather than a broad pattern of implementation over a period of many years), *with Karsjens*, 845 F.3d 394. MSOP does not provide regular periodic risk assessments for its civilly committed population, and therefore, the state does not know if hundreds of people even meet the standards for commitment or discharge. Pet. App. 115, 128 (risk assessments are only valid for approximately one year,

and more than 400 committed persons have never received a risk assessment). Moreover, the MSOP admits that it knows many committed elderly and mentally challenged people who can be safely treated in the community rather than the MSOP's high security facilities. Pet. App. 126. This situation, where potentially hundreds of people languish behind lock and key when the state cannot demonstrate they should be there, requires this Court's immediate intervention.

A clear standard of review needs to be announced now before the issues presented here arise again. Twenty states (including Minnesota) have laws that provide for the civil commitment of sex offenders, many of which are being challenged on due process grounds. Indeed, there are two pending cases in the Eighth Circuit alone. *See Van Orden v. Schaefer*, 129 F.Supp.3d 839, 867 (E.D. Mo. 2015) (holding that the Missouri sex offender civil commitment statute violates due process, even on rational basis review, because, among other reasons, its "risk assessment and release procedures [] are wholly deficient"); *Willis v. Palmer*, No. C12-4086-MWB (N.D. Iowa) (post-summary judgment and pending trial on whether the Iowa sex offender civil commitment statute violates due process). Recently the district court in *Van Orden* vacated its order finding Missouri's sex offender civil commitment statute to be unconstitutional as-applied to reconsider its findings in light of the Eighth Circuit's decision in *Karsjens*. *See Van Orden*, 09-cv-00971-AGF, (E.D. Mo. May 9, 2017) (order vacating the remedies trial). Moreover, given the fear that continues to surround sex offenses and the people who commit them, not to mention the relative political powerlessness of those

who are civilly confined, additional protections and caution are unlikely to be added through the legislative process absent a court ruling that requires the change.

This Court has a unique and unequivocal obligation to guard the most vulnerable, despised, and politically powerless among us against majoritarian encroachment on fundamental rights and liberties. *See United States v. Carolene Products, Inc.*, 304 U.S. 144, 152 n.4 (1938) (noting that "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . . may call for a correspondingly more searching judicial inquiry"); *McCleskey v. Kemp*, 481 U.S. 279, 343 (1987) (Brennan, J., dissenting) ("[t]hose whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society's demand for punishment. It is the particular role of courts to hear these voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life."). The Eighth Circuit did the opposite in this case. By finding that no fundamental liberty interest existed, applying rational basis review and requiring Petitioners to prove conscience-shocking behavior, the circuit court sent a clear and dangerous message that federal courts are not going to intervene in state civil commitment schemes - even when the result is effectively permanent confinement without any basis for believing that the confined pose a continuing risk to society. This Court should not allow that dangerous impression to stand.

This case is the ideal vehicle for the Court to address these important issues. The factual record was well-developed through a nearly six-week bench trial, and the Eighth Circuit took no issue with the district court's findings of fact. Pet. App. 2-3. Furthermore, there are no outstanding procedural issues to address. The dispositive issue is the appropriate standard of scrutiny to apply. *Id.* The district court's clear factual findings, which are well-supported by an extensive factual record and a vast amount of undisputed evidence, make this the perfect opportunity for the Court to clarify and establish the proper standard of review for substantive due process claims invoking fundamental rights issues, particularly in the civil commitment context. The record provides over twenty years of evidence about Minnesota's implementation of its civil commitment statute and allows this Court to reach a clear and well-supported decision regarding the existence of fundamental liberty rights and the subsequent analysis under which due process claims should proceed. This case thus presents a straightforward way to resolve these issues and prevent proliferation of confusing rulings such as the one reached by the Eighth Circuit in *Karsjens*.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 15-3485

[Filed January 3, 2017]

Kevin Scott Karsjens; David Leroy Gamble; Kevin John DeVillion; Peter Gerard Lonergan; James Matthew Noyer, Sr.; James John Rud; James Allen Barber; Craig Allen Bolte; Dennis Richard Steiner; Kaine Joseph Braun; Christopher John Thuringer; Kenny S. Daywitt; Bradley Wayne Foster; Brian K. Hausfeld, and all others similarly situated

Plaintiffs - Appellees

v.

Emily Johnson Piper; Kevin Moser; Peter Puffer; Nancy Johnston; Jannine Hebert; Ann Zimmerman, in their official capacities

Defendants - Appellants

Minnesota House of Representatives

Amicus on Behalf of Appellant(s)

Eric Steven Janus; American Civil Liberties

Union of Minnesota)
Amici on Behalf of Appellee(s))
_____)

Appeal from United States District Court
for the District of Minnesota - Minneapolis

_____

Submitted: April 12, 2016
Filed: January 3, 2017

_____

Before MURPHY, COLLOTON, and SHEPHERD, Circuit Judges.

_____

SHEPHERD, Circuit Judge.

Class plaintiffs, civilly committed sex offenders, bring a facial and as applied challenge under 42 U.S.C. § 1983, claiming their substantive due process rights have been violated by Minnesota's Civil Commitment and Treatment Act and by the actions and practices of the managers of the Minnesota Sex Offender Program (MSOP). The Minnesota state defendants in this action are managers of MSOP—Emily Johnson Piper, Commissioner of the Minnesota Department of Human Services; Kevin Moser, MSOP Facilities Director at Moose Lake; Peter Puffer, MSOP Clinical Director; Nancy Johnston, MSOP Executive Director; Jannine Herbert, MSOP Executive Clinical Director; and Ann Zimmerman, MSOP Security Director (collectively "state defendants"). After several months of litigation, including a six-week bench trial, the district court found for plaintiffs and entered an expansive injunctive order. The district court applied incorrect standards of scrutiny when considering plaintiffs' claims, thus we

reverse the finding of substantive due process violations and vacate the injunctive relief order. We remand to the district court for further proceedings to address the remaining claims.

I.

A. Minnesota Statutory Structure

In 1994, the Minnesota legislature enacted the Minnesota Civil Commitment and Treatment Act: Sexually Dangerous Persons and Sexual Psychopathic Personalities (MCTA). MCTA is now codified at Minnesota Statute § 253D. Under the MCTA, a county attorney in Minnesota may petition a state district court to civilly commit a sexually dangerous person[1] or a person with a sexual psychopathic personality[2] to a secure treatment facility. Minn. Stat. Ann. § 253D.07(1)-(2). If the county attorney demonstrates by clear and convincing evidence that a person is a

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[1] MCTA defines "sexually dangerous person" as "a person who: (1) has engaged in a course of harmful sexual conduct . . . ; (2) has manifested a sexual, personality, or other mental disorder or dysfunction; and (3) as a result, is likely to engage in acts of harmful sexual conduct . . . ." Minn. Stat. Ann. § 253D.02(16).

[2] MCTA defines "sexual psychopathic personality" as "the existence in any person of such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of personal acts, or a combination of any of these conditions, which render the person irresponsible for personal conduct with respect to sexual matters, if the person has evidenced, by a habitual course of misconduct in sexual matters, an utter lack of power to control the person's sexual impulses and, as a result, is dangerous to other persons." Minn. Stat. Ann. § 253D.02(15).

sexually dangerous person or has a sexual psychopathic personality, "the court shall order commitment for an indeterminate period of time and the committed person shall be transferred, provisionally discharged, or discharged, only as provided in this chapter." Minn. Stat. Ann. § 253D.07(3)-(4). A person subject to commitment under MCTA is entitled to be represented by counsel, and if the person does not provide counsel for himself, the court appoints a qualified attorney to represent the person. Minn. Stat. Ann. § 253D.20.

Once committed under MCTA, a committed person or the executive director of the Minnesota Sex Offender Program may petition for a reduction in custody, which includes "transfer out of a secure treatment facility,[3] a provisional discharge,[4] or a discharge from

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[3] "The following factors must be considered in determining whether a transfer [out of a secure treatment facility] is appropriate: (1) the person's clinical progress and present treatment needs; (2) the need for security to accomplish continuing treatment; (3) the need for continued institutionalization; (4) which facility can best meet the person's needs; and (5) whether transfer can be accomplished with a reasonable degree of safety for the public." Minn. Stat. Ann. § 253D.29(1).

[4] "The following factors are to be considered in determining whether a provisional discharge shall be granted: (1) whether the committed person's course of treatment and present mental status indicate there is no longer a need for treatment and supervision in the committed person's current treatment setting; and (2) whether the conditions of the provisional discharge plan will provide a reasonable degree of protection to the public and will enable the committed person to adjust successfully to the community." Minn. Stat. Ann. § 253D.30(1).

commitment.[5]" Minn. Stat. Ann. § 253D.27. The petition is "filed with and considered by a panel of the special review board." Id. These panels consist of "members experienced in the field of mental illness," including at least one "psychiatrist or a doctoral level psychologist with forensic experience" and one attorney. Minn. Stat. Ann. § 253B.18(4c). The special review board must hold a hearing and "issue a report with written findings of fact and shall recommend denial or approval of the petition to the judicial appeal panel.[6]" Minn. Stat. Ann. § 253D.27(3), (4). An appeal of the recommendation of the special review board may be made by the committed person, the county attorney, or the commissioner of the Department of Human Services (DHS) to the judicial appeal panel. Minn. Stat. Ann. § 253D.28. At a hearing, the judicial appeal panel receives evidence and makes a de novo consideration of the recommendation of the special review board. Id. Appeals of the decision of the judicial appeal panel may be made to the Minnesota Court of Appeals. Id.; Minn. Stat. Ann. § 253B.19(5).

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[5] "A person who is committed as a sexually dangerous person or a person with a sexual psychopathic personality shall not be discharged unless it appears to the satisfaction of the judicial appeal panel, after a hearing and recommendation by a majority of the special review board, that the committed person is capable of making an acceptable adjustment to open society, is no longer dangerous to the public, and is no longer in need of inpatient treatment and supervision." Minn. Stat. Ann. § 253D.31.

[6] "The Supreme Court shall establish an appeal panel composed of three judges and four alternate judges appointed from among the acting judges of the state." Minn. Stat. Ann. § 253B.19(1).

"A committed person may not petition the special review board any sooner than six months following either" the entry of the initial commitment order by the district court or appeal therefrom or resolution of a prior petition including exhaustion of any appeal rights. Minn. Stat. Ann. § 253D.27(2). The MSOP executive director may, however, petition for reduction in custody at any time. Id.

B. Minnesota Sex Offender Program (MSOP)

The State of Minnesota established, under the vested authority of the Commissioner of DHS, the MSOP. Under law, MSOP is to "provide specialized sex offender assessment, diagnosis, care, treatment, supervision, and other services to civilly committed sex offenders . . . [which] may include specialized programs at secure treatment facilities . . . , consultative services, aftercare services, community-based services and programs, transition services, or other services consistent with the mission of the Department of Human Services." Minn. Stat. Ann. § 246B.02. MSOP maintains three main facilities to treat persons committed under MCTA. The largest facility is a secure facility located in Moose Lake, Minnesota, and it houses persons who are in the earliest stages of treatment. The second, secure facility is located in St. Peter, Minnesota, and it houses inmates who have progressed beyond the initial phase of treatment. A third facility known as Community Preparation Services (CPS) is located outside the secure perimeter in St. Peter. CPS is designed for persons in the final stages of treatment who are preparing for reintegration into the community.

Beginning in 2008, MSOP adopted a three-phase treatment program. Phase I focuses on rule compliance, emotional regulation, and treatment engagement, but individuals do not receive any specific sex offense therapy. In Phase II, MSOP provides therapy that focuses on identifying and addressing patterns of sexually abusive behaviors. MSOP emphasizes discussion and exploration of the committed individual's history of sexually offensive behaviors along with the motivations of those behaviors. When a committed person reaches Phase III, MSOP builds on the skills learned in Phase II and focuses on reintegration into the community. Advancement through the phases is based on a Goal Matrix where the individual's treatment process is scored using various factors. Although the MSOP Treatment Manual states that a committed person could be initially assigned to any phase of the program, no MSOP official could recall a person being assigned to anything but Phase I at the Moose Lake facility.

The district court found that since its inception in 1994, MSOP has accepted approximately 714 committed individuals, but no committed individual has been fully discharged from MSOP and only three people have been provisionally discharged from the program. The committed individuals represent about 4% of Minnesota's registered sex offenders. Minnesota officials project that the number of civilly committed sex offenders will grow to 1,215 by 2022. Minnesota has the highest per capita population of civilly committed sex offenders in the nation.

C. Claims

In December 2011, plaintiffs filed a pro se suit, pursuant to 42 U.S.C. § 1983, challenging the conditions of their confinement and certain MSOP policies and practices. The focus of the initial complaint concerned housing conditions, property possession, searches, visitation rights, disciplinary procedures, vendor choices, vocational training, and access to electronic devices. The complaint also claimed that MSOP did not provide constitutionally adequate treatment and thus violated plaintiffs' due process rights. After obtaining counsel in January 2012, plaintiffs filed a First Amended Complaint raising generally the same claims as in the original complaint and seeking class certification. The district court granted class certification.

As litigation progressed, including discovery, the district court, in an effort to reach a settlement agreement, ordered the DHS commissioner to create a fifteen-member "Sex Offender Civil Commitment Advisory Task Force" to "examine and provide recommended legislative proposals to the Commissioner on the following topics:

> A. The civil commitment and referral process for sex offenders;
> B. Sex offender civil commitment options that are less restrictive than placement in a secure treatment facility; and
> C. The standards and processes for the reduction in custody for civilly committed sex offenders."

The court later ordered the creation of a MSOP Program Evaluation Team to evaluate the class plaintiffs' treatment placement and phase progression.

In August 2013, plaintiffs moved for a declaratory judgment finding the MCTA unconstitutional on its face and as applied to plaintiffs. The plaintiffs argued that the statute is unconstitutional on its face because the statutory discharge standards are more difficult to overcome than the initial statutory commitment standards. For a person to be committed, the state has to show the person is a sexually dangerous person or a person with a sexual psychopathic personality and that the person is highly likely to reoffend. However, discharge under MCTA requires a showing that the person is "no longer dangerous." In comparison to the commitment criteria, the plaintiffs argued the discharge standard is more stringent. The plaintiffs also claimed the statute is unconstitutional as applied because no person committed has ever been fully discharged from MSOP and because there is no automatic, independent, periodic review of an individual's need for continuing commitment. In February 2014, the court denied plaintiffs' motion for declaratory judgment and issued detailed instructions to the four Rule 706 experts it had appointed to assist the court in understanding the complexities of the case.[7]

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[7] Federal Rules of Evidence permit district courts to appoint independent experts to assist the court understand complex and difficult issues. Fed. R. Evid. 706 (court may "[o]n a party's motion or on its own" appoint an expert to serve on behalf of the court).

D. Bench Trial

The district court proposed hearing the matter in a bench trial. The state defendants objected, arguing that they had preserved the right to a jury trial. In response, plaintiffs moved to again amend their complaint to clarify their allegations and to remove any damages claim from the complaint. The magistrate judge granted the motion to file the Third Amended Complaint that clearly set forth facial and as applied claims based on due process violations and removed any damages claim. Because there were no longer damages claims and plaintiffs were only seeking injunctive relief, the district court ordered that the case be submitted at a bench trial.

Phase I of the bench trial occurred from February 9, 2015 to March 18, 2015. During the six-week trial, the district court heard testimony from all four Rule 706 experts, several named plaintiffs, and MSOP employees and staff. Following the trial, the district court entered a broad order finding MCTA unconstitutional facially and as applied. The court held that Minnesota's civil commitment scheme for sex offenders is a punitive system without the safeguards found in the criminal justice system. It also held that MCTA "is not narrowly tailored and results in a punitive effect and application contrary to the purpose of civil commitment." Specifically, the district court concluded:

> section 253D is facially unconstitutional for the following six reasons: (1) section 253D indisputably fails to require periodic risk assessments and, as a result, authorizes prolonged commitment even after committed

> individuals no longer pose a danger to the public and need further inpatient treatment and supervision for a sexual disorder; (2) section 253D contains no judicial bypass mechanism and, as such, there is no way for Plaintiffs to timely and reasonably access the judicial process outside of the statutory discharge process to challenge their ongoing commitment; (3) section 253D renders discharge from the MSOP more onerous than admission to it because the statutory discharge criteria is more stringent than the statutory commitment criteria; (4) section 253D authorizes the burden to petition for a reduction in custody to impermissibly shift from the state to committed individuals; (5) section 253D contemplates that less restrictive alternatives are available and requires that committed individuals show by clear and convincing evidence that a less restrictive alternative is appropriate, when there are no less restrictive alternatives available; and (6) section 253D does not require the state to take an affirmative action, such as petition for a reduction in custody, on behalf of individuals who no longer satisfy the criteria for continued commitment.

The district court also determined MCTA was unconstitutional as applied for six reasons:

> (1) Defendants do not conduct periodic independent risk assessments or otherwise evaluate whether an individual continues to meet the initial commitment criteria or the discharge criteria if an individual does not file a

> petition; (2) those risk assessments that have been performed have not all been performed in a constitutional manner; (3) individuals have remained confined at the MSOP even though they have completed treatment or sufficiently reduced their risk; (4) discharge procedures are not working properly at the MSOP; (5) although section 253D expressly allows the referral of committed individuals to less restrictive alternatives, this is not occurring in practice because there are insufficient less restrictive alternatives available for transfer and no less restrictive alternatives available for initial commitment; and (6) although treatment has been made available, the treatment program's structure has been an institutional failure and there is no meaningful relationship between the treatment program and an end to indefinite detention.

In reaching its conclusions as to both Counts 1 and 2, the facial and as-applied challenges, the district court applied "strict scrutiny, placing the burden on the state to show that the law is narrowly tailored to serve a compelling state interest" because "Plaintiffs' fundamental right to live free of physical restraint is constrained by the curtailment of their liberty." The court noted it would address the remaining claims in the Third Amended Complaint in a second phase of the trial and in a separate order.

E. Injunctive Relief

In a subsequent order, the district court directed MSOP to "conduct independent risk and phase placement reevaluation of all current patients at

MSOP." The court provided detailed directions as to how and when the reviews were to be conducted, including identifying certain individuals to be evaluated first, and directed MSOP officials to file petitions for reduction in custody for all persons found eligible for such relief through the reevaluation. Defendants' compliance with the court's directives are to be monitored by a special master who has "authority to monitor compliance with the remedies" and "authority to implement and enforce the injunctive relief imposed by the Court and to mediate any dispute between the parties with regard to the implementation of the remedies." The order further noted that the court "contemplates" entering "further specific relief against Defendants" in subsequent orders, foreseeing directions as to MSOP's treatment structure and discharge process, training for MSOP employees, periodic evaluation of MSOP by external experts, and the development of a statewide public education campaign.

II.

The state defendants appeal the district court's entry of declaratory judgment and the district court's grant of injunctive relief. First, they allege structural due process error based on the district judge's bias against them. Second, the state defendants argue three jurisdictional defects. Lastly, the state defendants dispute the district court's determinations on the merits, focusing specifically on whether the district court applied the proper standards of scrutiny to the plaintiffs' due process claims. All issues raised by the state defendants concern questions of law, which we review de novo. See Highmark Inc. v. Allcare Health Mgmt. Sys., Inc., 134 S. Ct. 1744, 1748 (2014)

(recognizing that questions of law are reviewed under de novo standard of review).

A. Judicial Bias

The state defendants claim that the district court pre-judged the case against them, violating their due process rights to a neutral decisionmaker. In support of this argument, state defendants first point to various comments made by the district court that are critical of MSOP and remarks suggesting that state officials should make drastic changes to the program. For instance, in one order, the district court concluded with the statement, "The program's systemic problems will only worsen as hundreds of additional detainees are driven into MSOP over the next few years. The politicians of this great State must now ask themselves if they will act to revise a system that is clearly broken, or stand idly by and do nothing, simply awaiting Court intervention." (Doc. 427 at 69 (footnote omitted).) Just prior to the bench trial, the court denied the state defendants' motion to dismiss the Third Amended Complaint and for summary judgment. In that order, it stated, again in conclusion, "It is difficult for the Court to understand why the parties have not resolved this case in a manner that would address clients' concerns, serve the public interest, promote public safety, and serve the interests of justice for all concerned. Justice requires no less." (Doc. 828 at 43.)

Second, the state defendants argue that the Rule 706 experts were improperly used by the court to aid the plaintiffs in preparing and presenting their case. Although not appealing the court's appointment of the Rule 706 experts, the state defendants argue that the court used those experts to prosecute the plaintiffs'

case and this demonstrates that the court had assumed the mantle of an advocate.

Third, the state defendants note that the Third Amended Complaint was filed almost three years after the commencement of the case and matched the court's September 9, 2014 order as to the issues the court wished to address in the bench trial. Again, the state defendants are not challenging the district court's order allowing the plaintiffs to file the Third Amended complaint; rather, the state defendants argue that it was improper for the court to counsel the plaintiffs on the claims it should present to the court. This Third Amended Complaint also had the effect of forcing a bench trial as the three previous versions of the complaint contained damages claims but the Third Amended Complaint only sought equitable relief.

Finally, the state defendants argue that the district court ordered the creation of a task force to provide legislative proposals for settlement purposes. The state defendants claim that the district court's order providing for the creation of the task force provided that the report prepared by the task force would not be admissible at trial, but the court admitted the report at the bench trial and then considered and relied upon the report in deciding the case. The state defendants also claim the district court influenced who would be appointed to that task force. This process, the state defendants claim, also demonstrates improper judicial advocacy.

The state defendants argue the result of these various district court actions was obviously biased fact-finding by the court. According to the state defendants, the court assumed the role of an advocate

instead of a neutral magistrate. Based on this alleged bias, the state defendants request that this court overturn the decisions of the district court as the bias constitutes a structural error requiring "automatic reversal."

Parties to litigation are "entitled to due process, the essence of which is a fair trial before a tribunal free from bias or prejudice." Gardiner v. A.H. Robins Co., 747 F.2d 1180, 1191 (8th Cir. 1984) (citing In re Murchison, 349 U.S. 133, 136-37 (1955)). "Ordinarily, when unfair judicial procedures result in a denial of due process, this court could simply find error, reverse and remand the matter." Reserve Mining Co. v. Lord, 529 F.2d 181, 185 (8th Cir. 1976). In those cases where the court has found a biased or prejudiced district judge resulted in a due process violation, the evidence of bias was overwhelming. For instance, in Gardiner, the district judge "stated that he believed the truth of plaintiffs' allegations, adding that he had become an advocate for plaintiffs and that he was, in fact, prejudiced." 747 F.2d at 1192.

In this matter, the state defendants point to a handful of remarks made over the course of months of litigation. These comments do give some cause for concern; if they are not premature remarks on the merits of the litigation, then they could in some instances be construed as policy pronouncements that risk straying beyond the judicial role. We are not convinced, however, that the actions and statements complained of, individually or collectively, establish that the district court was biased. Instead, the decisions of the district court in appointing the Rule 706 experts, allowing for a late amendment to the

complaint, and appointing the task force were arguably done in an effort to streamline the complicated case and attempt to reach an amicable settlement between the parties.[8] Further, unlike cases such as Gardiner, where one party was not allowed to present their case to the court, the district court did not prevent the state defendants from presenting their case to the district court in a six-week bench trial, and the district court gave due consideration to all arguments. In further proceedings, moreover, we are confident that the district court will be sensitive to avoiding even the appearance of bias or prejudgment of the merits.

B. Jurisdiction

The state defendants raise three challenges to the jurisdiction of the district court in this matter. First, the state defendants argue the plaintiffs lacked standing to challenge MCTA. The state defendants argue the latest version of the complaint alleges violations of the plaintiffs' liberty interests, but the plaintiffs have not identified a named plaintiff or a member of the class who would be entitled to discharge if reevaluated. Instead, the plaintiffs merely speculate that some of them or some of the members of the class would be subject to discharge upon completion of a risk assessment. According to the state defendants, because the alleged harm is speculative, the plaintiffs have not shown an actual deprivation of their liberty, and thus they lack standing to bring this action.

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[8] Neither the class plaintiffs nor the state defendants objected to the creation of the Task Force.

We reject this argument. "Article III establishes three elements as a constitutional minimum for a party to have standing: (1) 'an injury in fact,' meaning 'the actual or imminent invasion of a concrete and particularized legal interest'; (2) a causal connection between the alleged injury and the challenged action of the defendant; and (3) a likelihood that the injury will be redressed by a favorable decision of the court." Sierra Club v. U.S. Army Corps of Eng'rs, 645 F.3d 978, 985-86 (8th Cir. 2011) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). "This means that, throughout the litigation, the plaintiff 'must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.'" Spencer v. Kemna, 523 U.S. 1, 7 (1998) (quoting Lewis v. Cont'l Bank Corp., 494 U.S. 472, 477 (1990)). Here, we agree with the class plaintiffs that they have standing because their claim is not that they are all entitled to release but rather that their constitutional rights are being violated because MCTA and MSOP's implementation of MCTA violates the due process clause. The class plaintiffs are seeking certain procedural protections such as periodic reviews of their confinement and placement in appropriate facilities. All plaintiffs are committed under MCTA and detained in MSOP. Thus, if their allegations are true, the plaintiffs have suffered a concrete injury caused by the challenged action that could be redressed by appropriate injunctive relief.

Next, the state defendants argue that this action is barred under Heck v. Humphrey, 512 U.S. 477 (1994), and Preiser v. Rodriguez, 411 U.S. 475 (1973), because it is an attempt to use 42 U.S.C. § 1983 to challenge the fact or duration of their confinement and such claims

can be brought only in a habeas petition under 28 U.S.C. § 2254. "[A] state prisoner's claim for damages is not cognizable under 42 U.S.C. § 1983 if 'a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence,' unless the prisoner can demonstrate that the conviction or sentence has previously been invalidated." Edwards v. Balisok, 520 U.S. 641, 643 (1997) (quoting Heck, 512 U.S. at 487). This action, however, would not necessarily imply the invalidity of any of the plaintiffs' commitment. See Huftile v. Miccio-Fonseca, 410 F.3d 1136, 1140 (9th Cir. 2005) (noting Heck applies to civilly committed persons as well as prisoners). They do not allege that their initial commitment was invalid. Nor is it alleged that any specific class members should be immediately released. Instead, the plaintiffs claim that they should receive relief including regular, periodic assessment reviews to determine if they continue to meet the standards for civil commitment. It is conceivable that upon receiving an assessment none of the plaintiffs would be eligible for release, despite the district court's finding otherwise. Because the injunctive relief sought would not necessarily imply the invalidity of the plaintiffs' commitment, this action is not barred under Heck or Preiser.

Finally, the state defendants challenge the subject matter jurisdiction of the federal courts under the Rooker-Feldman doctrine. The defendants claim plaintiffs are seeking through this action to reverse "hundreds" of state-court judgments that have held MCTA to be constitutional when raised by individual defendants challenging the application of MCTA to them. "The Rooker-Feldman doctrine is narrow; it applies only to 'cases brought by state-court losers

complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.'" Edwards v. City of Jonesboro, 645 F.3d 1014, 1018 (8th Cir. 2011) (quoting Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284 (2005)). "The doctrine thus occupies a 'narrow ground' and does not 'stop a district court from exercising subject-matter jurisdiction simply because a party attempts to litigate in federal court a matter previously litigated in state court.'" Banks v. Slay, 789 F.3d 919, 922 (8th Cir. 2015) (quoting Exxon Mobil Corp., 544 U.S. at 284, 293). As previously discussed, the class plaintiffs are not seeking review and rejection of state court judgments nor are the plaintiffs claiming to have suffered harm because of prior state court judgments which have held MCTA constitutional. Through this action, plaintiffs are seeking prospective injunctive relief based on a theory that the MCTA violates their fundamental liberty rights. Therefore the narrow Rooker-Feldman bar does not apply to this action.

C. Standards of Scrutiny

The district court held that, because the committed individuals have a fundamental right to liberty, strict scrutiny was the proper standard of scrutiny to apply to plaintiffs' facial and as-applied due process claims. The district court therefore determined MCTA had to be narrowly tailored to achieve a compelling governmental purpose and that it failed to meet this narrow tailoring both facially and as applied. We disagree with application of the strict scrutiny standard.

i. Facial Due Process

The United States Constitution guarantees that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "The Supreme Court has not expressly identified the proper level of scrutiny to apply when reviewing constitutional challenges to civil commitment statutes." United States v. Timms, 664 F.3d 436, 445 (4th Cir.), cert. denied, 133 S. Ct. 189 (2012). However, to date, the strict scrutiny standard applied by the district court is reserved for claims of infringements on "fundamental" liberty interests upon which the government may not infringe "unless the infringement is narrowly tailored to serve a compelling state interest." Reno v. Flores, 507 U.S. 292, 302 (1993). According to the Supreme Court, "fundamental rights and liberties" are those "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (internal citations and quotation marks omitted).

Although the Supreme Court has characterized civil commitment as a "significant deprivation of liberty," Addington v. Texas, 441 U.S. 418, 425 (1979), it has never declared that persons who pose a significant danger to themselves or others possess a fundamental liberty interest in freedom from physical restraint. See Foucha v. Louisiana, 504 U.S. 71, 116 (1992) (Thomas, J., dissenting) (criticizing the majority's analysis of a due process challenge to a civil commitment statute because, "[f]irst, the Court never explains whether we are dealing here with a fundamental right, and . . .

[s]econd, the Court never discloses what standard of review applies"). Rather, when considering the constitutionality of Kansas's Sexually Violent Predator Act, the Court stated "[a]lthough freedom from physical restraint 'has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action,' that liberty interest is not absolute." Kansas v. Hendricks, 521 U.S. 346, 356 (1997) (quoting Foucha, 504 U.S. at 80). The Court noted that many states provide for the involuntary civil commitment of people who are unable to control their behavior and pose a threat to public health and safety, and "[i]t thus cannot be said that the involuntary civil confinement of a limited subclass of dangerous persons is contrary to our understanding of ordered liberty." Id. at 357 (citing Addington, 441 U.S. at 426). When considering the due process implications of a civil commitment case, the Supreme Court stated "[a]t the least, due process requires that the nature and duration of commitment bear some *reasonable relation* to the purpose for which the individual is committed." Jackson v. Indiana, 406 U.S. 715, 738 (1972) (emphasis added).

Accordingly, the proper standard of scrutiny to be applied to plaintiffs' facial due process challenge is whether MCTA bears a rational relationship to a legitimate government purpose. See id.

ii. As-Applied Due Process

When it considered the proper standard to apply, the district court stated substantive due process protected against two types of government action: action that shocks the conscience or action that interferes with rights implicit in the concept of ordered

liberty. The district court then proceeded to discuss how the state defendants' actions interfered with the class plaintiffs' liberty interests to be free from restraint and thus was subject to a strict scrutiny analysis. The district court applied the improper standard to consider an as-applied challenge when it determined there were two types of government action that could violate the class plaintiffs' substantive due process rights.

Following the Supreme Court's decision in County of Sacramento v. Lewis, 523 U.S. 833 (1998), this court held to prevail on an as-applied due process claim, that the state defendants' actions violated the plaintiffs' substantive due process rights, the plaintiffs "must demonstrate *both* that the [state defendants'] conduct was conscience-shocking, *and* that the [state defendants] violated one or more fundamental rights that are 'deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.'" Moran v. Clarke, 296 F.3d 638, 651 (8th Cir. 2002) (en banc) (Bye, J., concurring and writing for a majority on this issue) (emphasis in original) (quoting Glucksberg, 521 U.S. at 720-21 (1997)). The district court, citing to a pre-Lewis decision of United States v. Salerno, 481 U.S. 739, 746 (1987), used the former disjunctive standard and focused only on whether there was a fundamental right at issue, and having determined that there was a fundamental right at issue, the district court applied a strict scrutiny test to both the facial and as-applied challenges.

As indicated above, however, the court should determine both whether the state defendants' actions were conscience-shocking and if those actions violated a fundamental liberty interest. To determine if the actions were conscience-shocking, the district court should consider whether the state defendants' actions were "egregious or outrageous." See Montin v. Gibson, 718 F.3d 752, 755 (8th Cir. 2013) (quoting Burton v. Richmond, 370 F.3d 723, 729 (8th Cir. 2004)). To meet this high standard, we have explained that the alleged substantive due process violations must involve conduct "so severe . . . so disproportionate to the need presented, and . . . so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience." Moran, 296 F.3d at 647 (quoting In re Scott Cnty. Master Docket, 672 F. Supp. 1152, 1166 (D. Minn. 1987)). Accordingly, the district court applied an incorrect standard in considering the class plaintiffs' as-applied substantive due process claims.

D. Substantive Due Process

i. Facial Challenge

The district court announced six grounds upon which MCTA was facially unconstitutional under the strict scrutiny standard—(1) MCTA did not require periodic risk assessments of all committed persons, (2) MCTA did not provide for a judicial bypass mechanism, (3) MCTA rendered discharge from MSOP more onerous than admission because discharge criteria was 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 although the statute indicated such 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. As we held above, the appropriate standard is whether MCTA bears a reasonable relationship to a legitimate government purpose. To prevail in a facial challenge, the class plaintiffs bear the burden of "establish[ing] that no set of circumstances exists under which [MCTA] would be valid." See United States v. Salerno, 481 U.S. 739, 745 (1987). None of the six reasons the district court found MCTA facially unconstitutional under the strict scrutiny review survives the reasonable relationship review.

Reasonable relationship review is highly deferential to the legislature. No one can reasonably dispute that Minnesota has a real, legitimate interest in protecting its citizens from harm caused by sexually dangerous persons or persons who have a sexual psychopathic personality. See Addington, 441 U.S. at 426 ("[T]he state . . . has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill."). The question then is whether MCTA is reasonably related to this interest. The burden to prove the statute is not rationally related to a legitimate government interest is borne by the class plaintiffs, whereas the burden to show that a statute is narrowly tailored to serve a compelling government interest is borne by the state. See FCC v. Beach Comm'ns, Inc., 508 U.S. 307, 314-15 (1993) ("On rational-basis review, . . . those attacking the rationality of the legislative classification have the burden 'to negate every conceivable basis which might

support it.'" (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)); Republican Party of Minn. v. White, 416 F.3d 738, 749 (8th Cir. 2005) ("The strict scrutiny test requires the state to show that the law that burdens the protected right advances a compelling state interest and is narrowly tailored to serve that interest." (citations omitted)).

The Minnesota Supreme Court has had opportunity to consider whether the then-applicable Minnesota commitment statute violated due process. In In re Blodgett, 510 N.W.2d 910, 916 (Minn. 1994), that court held, "[s]o long as civil commitment is programmed to provide treatment and periodic review, due process is provided. Minnesota's commitment system provides for periodic review and reevaluation of the need for continued confinement." The next year, the Minnesota Supreme Court heard Call v. Gomez, 535 N.W.2d 312 (Minn. 1995), and considered a due process challenge to MCTA. Referring back to Blodgett, the court held, "once a person is committed, his or her due process rights are protected through procedural safeguards that include periodic review and re-evaluation, the opportunity to petition for transfer to an open hospital, the opportunity to petition for full discharge, and the right to competent medical care and treatment." Id. at 318-19.

MCTA is facially constitutional because it is rationally related to Minnesota's legitimate interests. The district court expressed concerns about the lack of periodic risk assessments, the availability of less restrictive alternatives, and the processes for seeking a custody reduction or a release. MCTA provides "proper procedures and evidentiary standards" for a

committed person to petition for a reduction in his custody or his release from confinement. See Hendricks, 521 U.S. at 357. Any committed person can file a petition for reduction in custody. Minn. Stat. Ann. § 253D.27(2). The petition is considered by a special review board consisting of experts in mental illness and at least one attorney. Minn. Stat. Ann. § 253B.18(4c)(a). That panel conducts a hearing and issues a report with recommendations to a judicial appeal panel consisting of Minnesota district judges appointed to the judicial appeal panel by the Chief Justice of the Supreme Court. Minn. Stat. Ann. §§ 253D.27(3)-(4), 253B.19(1). Through this process, the committed person "has the right to be represented by counsel" and the court "shall appoint a qualified attorney to represent the committed person if neither the committed person nor other provide counsel." Minn. Stat. Ann. § 253D.20. Appeal of the decision of the special judicial panel may be taken the Minnesota Court of Appeals. Minn. Stat. Ann. §§ 253D.28, 253B.19(5). Finally, a committed person is entitled to initiate a new petition six months after the prior petition is concluded. Minn. Stat. Ann. § 253D.27(2).

We conclude that this extensive process and the protections to persons committed under MCTA are rationally related to the State's legitimate interest of protecting its citizens from sexually dangerous persons or persons who have a sexual psychopathic personality. Those protections allow committed individuals to petition for a reduction in custody, including release; therefore, the statute is facially constitutional.

ii. As-Applied Challenge

We agree with the state defendants that much of the district court's "as-applied" analysis is not a consideration of the application of MCTA to the class plaintiffs but is a criticism of the statutory scheme itself. For instance, the court found that the statute was unconstitutional as applied to the plaintiffs because the state defendants do not conduct periodic risk assessments. However, the class plaintiffs acknowledge that MCTA does not require periodic risk assessments but those assessments are performed whenever a committed person seeks a reduction in custody. The district court also found as-applied violations in aspects of the treatment received by the committed persons, specifically concluding that the treatment program's structure has been an "institutional failure" and lacks a meaningful relationship between the program and an end to indefinite detention. However, we have previously held that although "the Supreme Court has recognized a substantive due process right to reasonably safe custodial conditions, [it has not recognized] a broader due process right to appropriate or effective or reasonable treatment of the illness or disability that triggered the patient's involuntary confinement." See Strutton v. Meade, 668 F.3d 549, 557 (8th Cir. 2012) (alteration in original) (quoting Elizabeth M. v. Montenez, 458 F.3d 779, 788 (8th Cir. 2006)). Further, as the Supreme Court recognized, the Constitution does not prevent "a State from civilly detaining those for whom no treatment is available." Hendricks, 521 U.S. at 366. Nevertheless, as discussed previously, to maintain an as-applied due process challenge, the class plaintiffs have the burden of showing the state actors'

actions were conscience-shocking and violate a fundamental liberty interest. See Moran, 296 F.3d at 651.

None of the six grounds upon which the district court determined the state defendants violated the class plaintiffs' substantive due process rights in an as-applied context satisfy the conscience-shocking standard. Having reviewed these grounds and the record on appeal, we conclude that the class plaintiffs have failed to demonstrate that any of the identified actions of the state defendants or arguable shortcomings in the MSOP were egregious, malicious, or sadistic as is necessary to meet the conscience-shocking standard. Accordingly, we deny the claims of an as-applied due process violation.

III.

Accordingly, we reverse the district court's finding of a constitutional violation and vacate the injunctive order. We remand this matter to the district court for further proceedings on the remaining claims in the Third Amended Complaint.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil No. 11-3659 (DWF/JJK)

[Filed October 29, 2015]

Kevin Scott Karsjens, David Leroy Gamble, Jr., Kevin John DeVillion, Peter Gerard Lonergan, James Matthew Noyer, Sr., James John Rud, James Allen Barber, Craig Allen Bolte, Dennis Richard Steiner, Kaine Joseph Braun, Christopher John Thuringer, Kenny S. Daywitt, Bradley Wayne Foster, Brian K. Hausfeld, and all others similarly situated,	)
Plaintiffs,	)
Lucinda Jesson, Kevin Moser, Peter Puffer, Nancy Johnston, Jannine Hébert, and Ann Zimmerman, in their official capacities,	)
Defendants.	)

FIRST INTERIM RELIEF ORDER

Daniel E. Gustafson, Esq., Karla M. Gluek, Esq., David A. Goodwin, Esq., Raina Borrelli, Esq., Lucia G.

Massopust, Esq., and Eric S. Taubel, Esq., Gustafson Gluek PLLC, counsel for Plaintiffs.

Nathan A. Brennaman, Deputy Attorney General, Scott H. Ikeda, Adam H. Welle, and Aaron Winter, Assistant Attorneys General, Minnesota Attorney General's Office, counsel for Defendants.

Eric S. Janus, Esq., William Mitchell College of Law; and Teresa J. Nelson, Esq., ACLU of Minnesota, counsel for Amici Curiae.

Michael O. Freeman, Hennepin County Attorney, John L. Kirwin, and Theresa Couri, Assistant Hennepin County Attorneys, Hennepin County Attorney's Office, counsel for Amicus Curiae.

INTRODUCTION

On June 17, 2015, this Court concluded the liability phase of this class action litigation with respect to Counts I and II of Plaintiffs' Third Amended Complaint. (*See* Doc. No. 966.) In its Findings of Fact, Conclusions of Law, and Order, the Court found that the Minnesota Civil Commitment and Treatment Act ("MCTA"), Minn. Stat. § 253D, is unconstitutional on its face and as applied. (*See id*. at 66.) This case is now before the Court in its post-trial Remedies Phase. After consideration of all submissions and argument, and for the reasons discussed below, the Court enters its First Interim Relief Order, enjoining Defendants as described below.[1]

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[1] The Court's Order enjoining Defendants begins on page 39.

BACKGROUND

I. Procedural History

In its June 17, 2015 Findings of Fact, Conclusions of Law, and Order, the Court concluded that "Minnesota's civil commitment statutory scheme is not narrowly tailored and results in a punitive effect and application contrary to the purpose of civil commitment and that [the Minnesota Sex Offender Program ("MSOP")], in implementing the statute, systematically continues to confine individuals in violation of constitutional principles." (*Id.*) The Court's Order included detailed findings that demonstrate the basis for the Court's conclusion that Minnesota's statutory scheme for committing sex offenders and Defendants' operation of the MSOP are unconstitutional.[2]

In particular, the Court found that the problems that have plagued the MSOP for decades are deeply systemic. The Court suggested "there is something very wrong with this state's method of dealing with sex offenders in a program that has never fully discharged anyone committed to its detention facilities in Moose Lake and St. Peter since its inception in 1994," (*id*. at 4), despite Defendants' knowledge that there are individuals at the MSOP who could be safely treated in a less secure environment, (*id*. at 21), or no longer meet the criteria for continued commitment, (*id*. at 47). The

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[2] The Court encourages readers to review its seventy-six page Findings of Fact, Conclusions of Law, and Order (Doc. No. 966) in conjunction with this First Interim Relief Order. The Court's detailed findings summarize the systemic nature of the constitutional violations surrounding the MSOP's operation and give important context for the remedies ordered herein.

MCTA establishes a complex system in which actors at multiple levels of state government play a role.[3] At multiple stages in this system, Defendants' actions and inactions have led to the continued operation of an unconstitutional scheme that unjustifiably detains hundreds of committed individuals in this state. At the initial commitment stage, Defendants have failed to establish less restrictive alternatives to commitment at the secure facilities at Moose Lake and St. Peter. (*See id.* at 20-21.) Thus, committing courts have no options to authorize an individual to be committed to a less restrictive facility even though the MCTA contemplates this possibility. (*See id.* at 21.) During an individual's commitment, Defendants do not periodically assess committed individuals to ensure they continue to meet statutory standards for commitment. (*Id.* at 36-37.) Defendants also fail to proactively petition for discharge on behalf of individuals who are found to no longer meet statutory criteria for commitment. (*See id.* at 47.) The MSOP has only filed seven petitions for a reduction in custody on behalf of committed individuals

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[3] Although this case only involves specific named Defendants in their official capacities as senior managers of the MSOP, the Court necessarily analyzes Minnesota's civil commitment scheme in full awareness of the many state actors who play a role in the system's continued operation. *See id.* at 9 (statutory enactment by the Minnesota Legislature); *id.* at 10 (civil commitment proceedings initiated by state county attorneys); *id.* (initial commitment findings determined by a state court); *id.* at 11 (supervision, care, and treatment under the authority of the Commissioner of the Department of Human Services); *id.* at 22 (power to halt efforts of administrative officials exercisable by the Governor); *id.* at 41 (sole authority to grant reductions in custody in the Supreme Court Appeal Panel); *id.* at 42 (authority to review Supreme Court Appeal Panel Decisions vested in the Minnesota Court of Appeals).

since the inception of the program, and these seven petitions were only filed after this litigation commenced. (*Id.*) Prior to 2013, the MSOP had never filed a petition for a reduction in custody on behalf of a committed individual. (*Id.*) For those committed individuals who seek to petition on their own behalf, the process is daunting and Defendants do not provide legal advice to committed individuals seeking to file a petition. (*See id.* at 48.) Also, the Court found there to be a significant backlog in petitions pending decision before the Special Review Board ("SRB") and the Supreme Court Appeal Panel ("SCAP"). (*See id*. at 44-45.) Specifically, the Court indicated "[t]he SRB and the SCAP petitioning process . . . can take years." (*Id.* at 44.) Defendants are ultimately responsible for scheduling SRB hearings, (*id.*), and have the authority to appoint SRB members. (*Id.* at 46.) Also, Defendants' recommendations to the SRB carry significant weight in whether an individual is ultimately recommended for provisional discharge or discharge. (*Id.* at 44.) And at the time of trial, "[s]ince January 1, 2010, the SRB has recommended granting . . . no petitions for discharge." (*Id.*)

Since the MCTA was enacted, the population of committed sex offenders in Minnesota has increased dramatically. (*See id.* at 12.) The Court found that Minnesota has both the lowest rate of release from commitment and the highest per-capita population of civilly committed sex offenders in the nation. (*Id.*) By 2022, the state projects that 1,215 individuals will be civilly committed for sex offenses. (*Id.*) The cumulative effect of Defendants' actions and inactions throughout the state's entire civil commitment system led the Court to conclude that "the MSOP has developed into

indefinite and lifetime detention" for the hundreds of individuals under Defendants' control.[4] (*Id.* at 11.)

In addition, the Court found that Defendants have been on notice of these systemic problems for several years. Plaintiffs initiated this litigation in December 2011. (*Id.* at 8; *see also* Doc. No. 1.) Both prior to and during this case, the MSOP has been the subject of critical scrutiny by various evaluators recommending changes to improve the program. (*See* Doc. No. 966 at 15-16 (describing evaluations and recommendations by the Governor's Commission on Sex Offender Policy in January 2005, the MSOP Site Visit Auditors every year since 2006, the Office of the Legislative Auditor for the State of Minnesota in March 2011, the Sex Offender Civil Commitment Advisory Task Force in August 2012, the MSOP Program Evaluation Team in November 2012, and the Rule 706 Experts in December 2013).) And in recent legislative sessions, Minnesota

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[4] Notably, the state originally disclaimed the notion that confinement under Minnesota's sex offender civil commitment scheme would constitute indefinite detention. *See In re Linehan*, 557 N.W.2d 171, 188 (Minn. 1996) (finding that "model patients" were expected to complete the program in approximately thirty-two months and finding that, in light of this finding, the program was remedial and not punitive in nature). As of October 2012, the MSOP's own phase progression design time line indicated that a "model client" could progress through treatment in six to nine years, yet that has not been the reality. (*See* Doc. No. 966 at 31.) At trial, committed individuals explained that they never contemplated a program of indefinite duration at the time they were committed. (*See id.* at 70 n.10 ("Steiner was told that he would be committed for three to four years, consistent with the representations made by the state to the Minnesota Supreme Court in *In re Linehan*, 557 N.W.2d 171, 188 (Minn. 1996). Steiner has been committed to the MSOP for twenty-three years.").)

legislators have introduced bills to implement several changes to the MSOP and Minnesota's civil commitment scheme, putting Defendants on further notice of the need to implement substantial reforms.[5] (*Id.* at 16-17.)

Defendants' own actions also demonstrate that they have been on notice of the problems at the MSOP and have considered implementing changes similar to the remedies the Court imposes today. For example, in 2013 Defendants purportedly started a process to implement rolling risk assessments outside of the normal petitioning process.[6] (*Id.* at 37-38.) The same year, Minnesota Department of Human Services ("DHS") Commissioner Lucinda Jesson ("Commissioner Jesson") set a goal of speeding up the hearing process for petitions supported by the MSOP. (*Id.* at 45.) Commissioner Jesson also testified that since this lawsuit began DHS entered into third-party contracts, albeit limited, to establish less restrictive alternatives to the Moose Lake and St. Peter facilities. (*Id.* at 22-23.) The Court's findings clearly illustrate that Defendants were on notice of the systemic problems resulting from their own deliberate actions and inactions in operating the MSOP.

In light of these findings and the many, many more found in the Court's June 17, 2015 Order, the Court

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[5] These bills did not pass in the Minnesota legislature. (*Id*. at 17.)

[6] The Court notes that several individuals from the MSOP credibly testified that they had never heard about this rolling risk assessment process, purportedly established by Commissioner Jesson in 2013. (*Id.* at 37-38.)

concluded that Minnesota's civil commitment scheme, Minn. Stat. § 253D, is unconstitutional on its face and as applied under the Due Process Clause of the Fourteenth Amendment. (*See id*. at 66.) In particular, the Court concluded that section 253D is facially unconstitutional for six reasons:

> (1) section 253D indisputably fails to require periodic risk assessments and, as a result, authorizes prolonged commitment even after committed individuals no longer pose a danger to the public and need further inpatient treatment and supervision for a sexual disorder; (2) section 253D contains no judicial bypass mechanism and, as such, there is no way for Plaintiffs to timely and reasonably access the judicial process outside of the statutory discharge process to challenge their ongoing commitment; (3) section 253D renders discharge from the MSOP more onerous than admission to it because the statutory discharge criteria is more stringent than the statutory commitment criteria; (4) section 253D authorizes the burden to petition for a reduction in custody to impermissibly shift from the state to committed individuals; (5) section 253D contemplates that less restrictive alternatives are available and requires that committed individuals show by clear and convincing evidence that a less restrictive alternative is appropriate, when there are no less restrictive alternatives available; and (6) section 253D does not require the state to take any affirmative action, such as petition for a reduction in custody, on behalf of individuals

> who no longer satisfy the criteria for continued commitment.

(*Id.* at 66-67.) The Court concluded that section 253D is unconstitutional as applied for six reasons:

> (1) Defendants do not conduct periodic, independent risk assessments or otherwise evaluate whether an individual continues to meet the initial commitment criteria or the discharge criteria if an individual does not file a petition; (2) those risk assessments that have been performed have not all been performed in a constitutional manner; (3) individuals have remained confined at the MSOP even though they have completed treatment or sufficiently reduced their risk; (4) discharge procedures are not working properly at the MSOP; (5) although section 253D expressly allows the referral of committed individuals to less restrictive alternatives, this is not occurring in practice because there are insufficient less restrictive alternatives available for transfer and no less restrictive alternatives available for initial commitment; and (6) although treatment has been made available, the treatment program's structure has been an institutional failure and there is no meaningful relationship between the treatment program and an end to indefinite detention.

(*Id.* at 67.) The Court concluded that substantial changes needed to be made to Minnesota's sex-offender civil commitment scheme to remedy the ongoing affront to constitutional principles embedded in the MSOP's continued operation. The Court granted Plaintiffs'

request for declaratory relief with respect to Counts I and II and ordered the parties to participate in a Remedies Phase pre-hearing conference "to discuss the relief that they find appropriate with respect to both Counts I and II." (*Id.* at 75.)

On August 10, 2015, the parties participated in the Remedies Phase pre-hearing conference to discuss possible relief. (Doc. No. 1003.) The pre-hearing conference was presided over by the undersigned, along with United States Magistrate Judge Jeffrey J. Keyes and Special Master former Minnesota Supreme Court Chief Justice Eric J. Magnuson. Attorneys for Plaintiffs and Defendants were in attendance, along with Governor Mark B. Dayton, Representative Kurt L. Daudt (Speaker of the House), Senator Thomas M. Bakk (Majority Leader of the Senate), Attorney General Lori Swanson, and other interested stakeholders invited by the Court. (*See id.*; Doc. No. 966 at 75 (listing individuals whom the Court urged to attend and participate in the pre-hearing conference).) The Court was hopeful that the parties would use this conference to productively address the issues identified in the Court's Findings of Fact, Conclusions of Law, and Order. Unfortunately, this did not occur.

II. Remedies Proposals

On August 12, 2015, the Court issued a Scheduling Order requiring the parties to submit remedy proposals and supporting briefs and setting a hearing for September 30, 2015, to receive any argument regarding remedies. (*See* Doc. No. 1006.)

On August 14, 2015, Defendants submitted a letter to the Court indicating that they "[would] not be asking

the Court to order particular remedies against them in this case" based on their position that "the sex offender civil commitment statute and Defendants' administration of the Minnesota Sex Offender Program are constitutional." (Doc. No. 1007.) They also indicated that they planned to respond to Plaintiffs' proposed remedies. (*Id.*)

On August 19, 2015, Plaintiffs submitted a Remedies Proposal and Brief in Support of the Remedies Proposal. (Doc. No. 1009.) Plaintiffs argue that the scope of the Court's remedial authority is broad and assert that any remedies that may require additional state funding are properly within the Court's discretion. (*See id.* at 10.) Plaintiffs propose numerous specific remedies that the Court should impose on Defendants, including risk assessments of committed individuals at the MSOP, creation of less restrictive alternative facilities, improvements to the MSOP's treatment program and discharge process, comprehensive training for MSOP employees, and a statewide public education campaign about sex offenders and civil commitment. (*Id.* at 20-30.) Unless certain changes are made, Plaintiffs argue, the Court must eliminate the entire MCTA. (*Id.* at 19.)

On September 4 and 8, 2015, respectively, the Hennepin County Attorney ("HCA") and the American Civil Liberties Union of Minnesota ("ACLU-MN") and Professor Eric S. Janus ("Professor Janus") filed motions for leave to file Amicus briefs concerning remedies. After the Court granted these motions, (Doc. Nos. 1019, 1020), on September 14, 2015, the Amici Curiae filed their submissions with the Court. (Doc. Nos. 1021-1023.) On September 21, 2015, the HCA also

filed a letter submission indicating that the county attorneys from six other Minnesota counties wished to join in the HCA's Amicus Memorandum.[7] (Doc. No. 1025.)

The HCA supports some of Plaintiffs' proposed remedies, including the creation of less restrictive alternatives and requiring periodic risks assessments. (*See* Doc. No. 1023 at 6-8.) The HCA also advocates expediting SRB hearings to improve the reduction-in-custody process for committed individuals. (*See id.* at 8-9.) However, the HCA argues that several remedies are beyond the Court's authority such as modifying the commitment or discharge standard, changing the burden of proof for reduction in custody, and supplanting the three-judge appeal panel process. (*See id.* at 9-19.)

The ACLU and Professor Janus highlight the long history of the state's flawed civil commitment system and point out the "legislative intransigence" that has allowed the constitutional infirmities at the MSOP to persist. (*See* Doc. No. 1021 at 15-17, 19.) These Amici argue that the Court must impose remedies that are substantive rather than merely procedural in order to measure the impact of the remedies and to hold the state accountable. (*Id.* at 4-5, 18.) In particular, Amici propose that the Court establish benchmarks to reduce the number of individuals committed at the MSOP and to increase the number of individuals placed in less restrictive alternatives. (*See id.* at 14, 18.) The ACLU

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[7] The county attorneys joining the HCA's Amicus Memorandum included the county attorneys from Anoka, Dakota, McLeod, Ramsey, Washington, and Wright counties.

and Professor Janus also recommend substantive changes to clarify the risk threshold that justifies continued commitment. (*See id.* at 18-19.) Finally, Amici argue that "the only truly effective remedy may be the possibility of shutting down the MSOP system." (*Id.* at 19.)

On September 21, 2015, Defendants filed a Brief on Remedies in response to Plaintiffs' proposed remedies. (Doc. No. 1026.) Defendants argue that Plaintiffs' proposed remedies exceed constitutional limits placed on a federal district court's authority. (*Id.* at 2.) In particular, Defendants assert there are federalism concerns and separation of powers issues raised by the Court's exercise of authority in this matter. (*Id.* at 5-8.) Defendants assert that "the Minnesota Legislature may consider initiatives that relate to remedies proposed by Plaintiffs" which would "obviate Court consideration of the proposed remedies." (*Id.* at 3.) In addition, Defendants describe many of Plaintiffs' proposed remedies as "practically impossible for . . . Defendants to accomplish." (*Id.* at 4.) According to Defendants, Plaintiffs' proposals "contemplate a total re-shaping of Minnesota sex offender civil commitment law, which would significantly impact the state executive branch, the Minnesota judicial branch, the Minnesota Legislature, county attorneys, and even local governments and communities." (*Id.* at 22.) Finally, Defendants argue that Plaintiffs' proposed remedies constitute improper individualized relief in this Rule 23(b)(2) class action. (*Id.* at 26.)

On September 24, 2015, Plaintiffs filed a Reply Brief with the Court. (Doc. No. 1029.) On September 30, 2015, the undersigned heard arguments from the

parties on the remedies proposed by Plaintiffs and Amici and any objections to those proposals. (Doc. Nos. 1030, 1034.) Hennepin County Attorney Michael Freeman also presented arguments at the September 30, 2015 hearing. (*See* Doc. No. 1034.)

DISCUSSION

I. The Scope of the Court's Equitable Authority

The Remedies Phase of this class action litigation requires the Court to exercise its equitable authority. "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 12 (1971) (quoting *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294, 300 (1955)). "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Id.* at 15. The Court's broad equitable powers are tempered by the principle that "judicial powers may be exercised only on the basis of a constitutional violation." *Id.* at 16.

The Supreme Court has identified three factors to guide federal district courts in crafting equitable remedies. First, "the nature of the . . . remedy is to be determined by the nature and scope of the constitutional violation." *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) (citing *Swann*, 402 U.S. at 16). In other words, federal courts may impose remedies that "are aimed at eliminating a condition that . . . violate[s] the Constitution or . . . flow[s] from such a violation." *Id.* at 282. Second, the remedy "must indeed be remedial in

nature, that is, it must be designed as nearly as possible 'to restore the victims of [unconstitutional] conduct to the position they would have occupied in the absence of such conduct.'" *Id.* at 280 (quoting *Milliken v. Bradley*, 418 U.S. 717, 746 (1974) (*Milliken I*)); *see also id.* at 280 n.15 ("[T]he ultimate objective of the remedy is to make whole the victims of unlawful conduct."). Third, the Court "must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Id.* at 280-81. With respect to the third factor, courts need not tolerate undue delay or excuses—such as insufficient funding—in the state authorities' attempts to remedy constitutional infirmities. As the Supreme Court has explained, "[S]tate and local authorities have primary responsibility for curing constitutional violations. 'If, however, '[those] authorities fail in their affirmative obligations . . . judicial authority may be invoked.'" *Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1978) (quoting *Milliken*, 433 U.S. at 281).

This case involves highly sensitive and politicized issues that implicate important questions of federalism and the separation of powers. To properly balance the myriad interests of all parties affected by this litigation, the Court remains attentive to the proper limits on its equitable powers and can only grant such relief as is authorized by law. However, at the same time, the Court fully expects Defendants to act swiftly to remedy the pervasive constitutional infirmities at the MSOP in accordance with this Order. As the Court has previously stated, the Court "has an obligation to all citizens to not only honor their constitutional rights, but to do so without compromising public safety and the interests of justice. The balance is a delicate and

important one, but it can and will be done." (Doc. No. 966 at 69.)

II. First Interim Relief

As noted above, determining the proper remedy and its scope requires the Court to consider the nature of the constitutional violation justifying relief. *See Swann*, 402 U.S. at 16 ("[T]he nature of the violation determines the scope of the remedy."). Thus, the Court will briefly summarize the constitutional infirmities outlined in detail in its June 17, 2015 Findings of Fact, Conclusions of Law, and Order. (*See* Doc. No. 966 at 51-65.)

The Court concluded that section 253D is unconstitutional under the Due Process Clause of the Fourteenth Amendment of the United States Constitution, which provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV § 1. The civil commitment of individuals results in a significant curtailment of liberty, infringing the fundamental right to live free of physical restraint. *See, e.g.*, *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.") (internal citation omitted)).

When a fundamental right is involved, courts must subject the law to strict scrutiny, placing the burden on the government to show that the law is narrowly tailored to serve a compelling state interest. *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). To satisfy this standard, the Court determined that

section 253D must ensure that individuals are committed no longer than necessary to serve the state's compelling interests. The purpose for which an individual is civilly committed to the MSOP must be to provide treatment to those committed and to protect the public from individuals who are both mentally ill and pose a substantial danger to the public as a result of that mental illness. *See Call v. Gomez*, 535 N.W.2d 312, 319 (Minn. 1995). The purpose may not be to impose punishment for past crimes or to prevent future crimes. *See Kansas v. Hendricks*, 521 U.S. 346, 373 (1997) (Kennedy, J., concurring) ("If the civil system is used simply to impose punishment after the State makes an improvident plea bargain on the criminal side, then it is not performing its proper function.").[8]

Applying strict scrutiny, the Court found that "section 253D, on its face and as applied, is not

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[8] Several individuals committed to the MSOP were allowed to plead to lesser criminal charges, not fully aware of what it would mean to be civilly committed. (*See* Doc. No. 966 at 70.) Also, the Minnesota Department of Corrections ("DOC") has frequently referred offenders for civil commitment, despite the availability of intensive supervised release following an offender's prison sentence on the criminal side. (*Id.* at 72.) Under Minnesota law, first-time sex offenders are mandatorily placed on conditional release for ten years following a prison sentence, and repeat sex offenders are mandatorily placed on conditional release for life. (*Id.* at 71 (citing Minn. Stat. § 609.3455, subds. 6, 7).) Such conditional release could include intensive supervision, GPS monitoring, daily curfews, alcohol and drug testing, and other conditions. (*Id.*) Minnesota's reliance on the civil commitment process in lieu of the criminal justice system in criminal sexual conduct cases compounds the systemic problems at the MSOP. For a complete discussion of these issues, see the Court's June 17, 2015 Findings of Fact, Conclusions of Law, and Order. (*Id.* at 70-72.)

narrowly tailored and results in a punitive effect and application contrary to the purpose of civil commitment." (*See* Doc. No. 966 at 65 (citing *Hendricks*, 521 U.S. at 361-62.) In particular, the Court concluded that section 253D is facially unconstitutional for six specific reasons and unconstitutional as applied for six specific reasons, as outlined above. These numerous, systemic constitutional violations dictate the scope of the Court's power to fashion suitable remedies.

The Court may impose a "systemwide remedy" when constitutional violations result in a "systemwide impact." *See Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406, 420 (1977) (citing *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 213 (1973)). This is precisely what the Court found in this case. The constitutional infirmities at the MSOP have created a widespread and deleterious impact on Minnesota's entire sex offender civil commitment system. The Court, therefore, must exercise its equitable authority to remedy the system as a whole. In doing so, the Court will begin by choosing some initial remedies that must be instituted first.

The record in this case contains ample evidence that the current assessment process and procedures for seeking release from the MSOP are constitutionally inadequate. Defendants have no meaningful idea of the status of persons committed, which of those persons continue to meet the criteria for commitment, and whether those persons are confined under conditions that remain appropriate. The class-wide remedy for those circumstances is that Defendants must promptly assess those persons it currently has confined, starting

with those who are most likely to be mis-classified (and in many cases those who are also the most vulnerable) such as the elderly and individuals with disabilities. Defendants must have those assessments performed by independent qualified examiners using the appropriate standards. In addition, Defendants must not continue to confine individuals who are improperly detained. As is more fully set forth in this Order, these remedies will ensure that those committed still meet the commitment criteria and will allow the terms of commitment to be tailored to the appropriate level of liberty deprivation. Due to the systemic nature of the problems at the MSOP and the fact that Defendants have been on notice of the program's deficiencies for many, many years, the Court expects prompt compliance with this Order on an expedited time line as outlined below.

A. Independent Risk Assessments and Phase Placement Reevaluation

In this First Interim Relief Order, the Court orders Defendants to promptly conduct independent risk and phase placement reevaluation of all committed individuals currently committed to the MSOP. These independent risk assessments will fulfill four distinct purposes. First, they will determine whether committed individuals continue to meet the constitutional standard for commitment. Second, they will determine whether committed individuals could be appropriately transferred or provisionally discharged. Third, they will determine whether committed individuals could be housed in or monitored by a less restrictive alternative. Fourth, they will determine whether committed individuals are in the proper treatment phase. Defendants shall complete the

assessments in the order specified by the Court below, starting first with those individuals who have been identified during this litigation as eligible for a reduction in custody, next with the elderly, individuals with substantive physical or intellectual disabilities, and juvenile-only offenders,[9] and finally with all remaining committed individuals at the MSOP. The Court orders Defendants to complete these reevaluations on designated time lines and to provide detailed plans relating to these reevaluations as outlined below.

The Court has the authority under *Milliken* to order Defendants to conduct immediate independent risk assessments and phase placement reevaluation of all MSOP patients. First, these remedies are "aimed at eliminating a condition that . . . violate[s] the Constitution or . . . flow[s] from such a violation." *Milliken*, 433 U.S. at 282. In its June 17, 2015 Findings of Fact, Conclusions of Law, and Order, the Court found that Defendants' application of section 253D resulted in unconstitutional deprivations of liberty in contravention of the Fourteenth Amendment's Due Process Clause because:

> (1) Defendants do not conduct periodic, independent risk assessments or otherwise evaluate whether an individual continues to meet the initial commitment criteria or the discharge criteria if an individual does not file a

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[9] The Court uses the term "juvenile-only offenders" to refer to committed individuals at the MSOP with no adult convictions. At the time of trial, there were sixty-seven juvenile-only offenders committed to the MSOP. (*See id.* at 19 n.6.)

> petition; (2) those risk assessments that have been performed have not all been performed in a constitutional manner; (3) individuals have remained confined at the MSOP even though they have completed treatment or sufficiently reduced their risk; . . . and (6) although treatment has been made available, the treatment program's structure has been an institutional failure and there is no meaningful relationship between the treatment program and an end to indefinite detention.

(Doc. No. 966 at 67.) The Court explained, "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." (*Id.* at 68.)

Defendants argue that the Court "has the authority only to cure constitutional violations established by the record, not to require Defendants to determine whether such violations exist." (Doc. No. 1026 at 17.) In particular, Defendants claim that proposals relating to risk assessments and treatment progress reviews are improper because they "are not aimed at remedying a condition held to violate the Constitution, but rather seek to determine whether any class member committed to MSOP is entitled to a reduction in custody." (*Id.*) The Court disagrees. The record could not be more clear. The MCTA does not require Defendants to conduct periodic risk assessments to ensure that committed individuals continue to meet

statutory requirements for commitment.[10] (Doc. No. 966 at 36.) Defendants' own witnesses "admit that they do not know whether many individuals confined at the MSOP meet the commitment or discharge criteria." (*Id.* at 60.) Further, not only did risk assessors at the MSOP not begin using statutory criteria in risk assessment reports until late 2010 or early 2011, (*id.* at 40), but the MSOP risk assessors do not receive any training on the constitutional standards for discharge or commitment. (*Id.*) And astonishingly, the standard identified by the Minnesota Supreme Court in 1995 in *Call v. Gomez* was not utilized in the MSOP's risk assessments until June 2014. (*Id.* at 41.) The proper remedy for the constitutional infirmity of the continued commitment by Defendants of individuals who may no longer pose a danger to society is to conduct independent risk assessments to ensure that individuals continue to be committed under constitutional standards and are in the proper treatment phase[11] with the possibility of moving toward eventual release.

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[10] The Court notes that this aspect of Minnesota's civil commitment scheme is in contrast with the large majority of states, including the "best practice" states of Wisconsin and New York, which require annual risk assessments. (*See id.* at 36; *see also* Amicus Brief of ACLU-MN and Professor Janus (Doc. No. 1021 at 14) (describing Wisconsin and New York as "best-practice states").)

[11] See the Court's June 17, 2015 Findings of Fact, Conclusions of Law, and Order (Doc. No. 966 at 23-35) for a complete discussion of the MSOP treatment program and the problems associated with individual treatment progress and treatment phase placement.

Second, these remedies are indeed remedial in nature because they will restore those committed at the MSOP to the position they would have been in absent the wrongful conduct of Defendants. *See Milliken*, 433 U.S. at 280. In other words, conducting risk assessments and reevaluating each committed individual's treatment phase placement will start the process of correcting a systemic constitutional violation that has resulted in the unconstitutional confinement of those held at the MSOP for years. If Defendants had operated a constitutional civil commitment program from the MSOP's inception, each committed individual would have been routinely assessed to ensure that they were committed "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). Defendants claim that the record at trial does not support a finding "that any Plaintiff is being unconstitutionally detained." (Doc. No. 1026 at 20.) Defendants argue, "[b]ecause there was no evidence that any Class representative—let alone the entire Class—is entitled to a less restrictive setting or freedom, there is no remedy needed to 'restore' Plaintiffs 'to the position they would have occupied in the absence of' the purported unconstitutional conduct." (*Id.* at 19 (quoting *Milliken*, 433 U.S. at 280).) Denying any proven harm to Plaintiffs, Defendants argue that the Court's remedial power is narrowly limited. (*Id.* at 20.) The Court rejects this argument.

Defendants are rehashing arguments that this Court has already considered in the liability phase of this litigation. The Court concluded that Defendants' application of section 253D is unconstitutional "because

Defendants apply the statute in a manner that results in Plaintiffs being confined to the MSOP beyond such a time as they either meet the statutory reduction in custody criteria or no longer satisfy the constitutional threshold for continued commitment." (Doc. No. 966 at 60.) Based on testimony of Defendants' own witnesses, the Court found that "a full risk assessment is the only way to determine whether a committed individual meets the discharge criteria." (*Id.* at 36.) By not doing these assessments, Defendants are essentially burying their heads in the sand, rather than doing what is required of them to run a constitutional program—make sure that those committed continue to pose a danger to the public. The only way to adequately remedy the long-standing constitutional violations at the MSOP now is to immediately assess all committed individuals to ensure that the fact and conditions of their confinement meet constitutional standards.

Third, the Court imposes these remedies taking full consideration of "the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *See Milliken*, 433 U.S. at 281. Defendants cite numerous limitations described by Commissioner Jesson that purportedly inhibit the MSOP's ability to conduct risk assessments of all committed individuals at the MSOP. (*See, e.g.*, Doc. No. 1026 at 24-25 ("Defendants know from experience the challenge of recruiting the highly qualified forensic evaluators needed to conduct risk assessments.").)[12]

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[12] Commissioner Jesson cites "shortage of qualified staff," potentially lengthy administrative processes for hiring independent contractors, and "limited ability to divert funds" as

Also, in critiquing Plaintiffs' proposed remedies, Defendants cite to a case in which the Supreme Court rejected a federal court injunction that was deemed "inordinately—indeed wildly—intrusive." (*See id.* at 22-23 (quoting *Lewis v. Casey*, 518 U.S. 343, 362 (1996)).)[13] This First Interim Relief Order avoids such improper intrusion by deferring to state authorities' expertise to carefully devise a specific plan for implementation. In this First Interim Relief Order, the Court identifies the assessments that Defendants must complete to come into compliance with constitutional standards and leaves the implementation of those assessments in the general control of state authorities at the MSOP.

The Court has fully considered Defendants' claims regarding the timing and feasibility of conducting risk assessments of all committed individuals at the MSOP, but these assessments must be done. The State of Minnesota has elected to establish this sex offender civil commitment program, and it is Defendants' responsibility to ensure that it is operated in a constitutional manner. *Cf. Welsch v. Likins*, 550 F.2d

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barriers to conducting immediate risk assessments. (Doc. No. 1027 at 2-8.)

[13] In *Lewis*, the injunctive order sought to protect inmates' rights of access to the courts and counsel and "specified in minute detail the times that libraries were to be kept open, the number of hours of library use to which each inmate was entitled (10 per week), the minimal educational requirements for prison librarians (a library science degree, law degree, or paralegal degree), the content of a videotaped legal-research course for inmates (to be prepared by persons appointed by the Special Master but funded by [the Arizona Department of Corrections]), and similar matters." *See Lewis v. Casey*, 518 U.S. 343, 347 (1996).

1122, 1132 (8th Cir. 1977) ("If Minnesota chooses to operate hospitals for the [developmentally disabled], the operation must meet minimal constitutional standards, and that obligation may not be permitted to yield to financial considerations."). Due to the systemic problems at the MSOP of which Defendants have been on notice for years, the Court emphasizes that Defendants must make the implementation of these remedies their top priority and must implement these processes in an expedited fashion to quickly resolve the constitutional infirmities at the MSOP.

B. Discharge-Related Remedies

In this Order, the Court also orders remedies relating to the discharge or transfer of committed individuals following the assessments described above. If the independent risk assessment of any individual concludes that the individual should be fully discharged, transferred, or receive a reduction in custody, the MSOP must seek the release or reduction in custody of that individual to the appropriate placement by immediately filing a petition with the SRB. Should Defendants wish to challenge the assessment that an individual should be fully discharged, transferred, or receive a reduction in custody, the burden shall be on Defendants to prove that such individual's commitment or current level of custody is appropriate by clear and convincing evidence. Throughout the petitioning process, Defendants must provide all petitioners with access to experienced independent counsel and professional experts. Defendants must ensure that the SRB and SCAP hearings following the independent risk assessments proceed in a timely manner and in no case

conclude more than 120 days after the petition has been filed on behalf of a patient. Defendants must ensure that less restrictive alternatives are available to accommodate the placement of all individuals found eligible for a reduction in custody. Such alternatives could include, for example, facilities developed and run by DHS, facilities in which DHS has entered into third-party contracts to provide services to committed individuals, or intensive supervision and treatment of committed individuals, using means such as GPS monitoring, daily curfews, and no-contact orders, among other things.[14] For individuals found eligible for discharge, Defendants must provide transitional services and discharge planning needed to facilitate the individual's successful transition into the community. Following the treatment phase placement reevaluation of each individual at the MSOP, Defendants shall immediately move any individual who is determined to

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[14] Although the parties devoted little if any attention to this possibility at trial or during the Remedies Phase of this litigation, the Court notes that community supervision of sex offenders under intensive supervision and monitoring should be considered a valid less restrictive alternative to commitment in any facility. As noted in the Court's June 17, 2015 Findings of Fact, Conclusions of Law, and Order, Grant Duwe, Director of Research at the DOC has stated, "[M]any high-risk sex offenders can be managed successfully in the community. The cost of civil commitment in a high-security facility also implies that this type of commitment should be reserved only for those offenders who have an inordinately high risk to sexually reoffend." (Doc. No. 966 at 69; *see also* Doc. No. 1022, ¶ 2, Ex. 1, at 9.) Other states have successfully implemented such alternatives in their sex offender civil commitment schemes. (*See, e.g.*, Doc. No. 966 at 11-12 (describing programs in Wisconsin and New York that utilize supervised release or "strict and intensive supervision and treatment").)

be in an improper treatment phase into the proper treatment phase. If Defendants wish to object to the movement of any individual, the matter must be submitted to the Special Master for resolution. The Court orders Defendants to provide a detailed plan to the Special Master describing how Defendants will implement these remedies at the MSOP as outlined below.[15]

The Court has the authority under *Milliken* to order Defendants to implement the remedies relating to discharge described above. First, these remedies are appropriate given the nature and scope of the constitutional violations relating to the MSOP's discharge process. *See Milliken*, 433 U.S. at 280, 282. Defendants contend that "[t]he Constitution does not require MSOP staff to petition for reduction in custody on behalf of clients." (Doc. No. 1026 at 13.) Defendants also argue that Minnesota statutes already provide for state-funded attorneys for committed individuals seeking release, (*id.* at 9 (citing Minn. Stat. § 253D.20)), provide access to independent examiners, (*id.* at 16 (citing Minn. Stat. § 253D.28, subd. 2(c))), and place the burden on Defendants to challenge discharge, (*id.* at 15 (citing Minn. Stat. § 253D.28)). Defendants also challenge the Court's authority to

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[15] The Court notes that Defendants' plan must establish a means of expedited release for those individuals who are found to no longer meet the constitutional standards for commitment. If the Court is not satisfied that Defendants' proposed plan achieves this requirement, the Court may impose more drastic remedies such as enjoining enforcement of the statutory scheme requiring committed individuals to utilize the SRB and SCAP process for release from the MSOP.

order Defendants to ensure the availability of less restrictive alternatives, claiming "[t]here is no Fourteenth Amendment right to treatment in a least restrictive alternative setting." (*Id.* at 12 (citing *Beaulieu v. Ludeman*, 690 F.3d 1017, 1031-33 (8th Cir. 2012).) These arguments ignore the Court's clear findings of unconstitutionality in its June 17, 2015 Findings of Fact, Conclusions of Law, and Order. The Court concluded section 253D is facially unconstitutional because:

> (4) section 253D authorizes the burden to petition for a reduction in custody to impermissibly shift from the state to committed individuals; (5) section 253D contemplates that less restrictive alternatives are available and requires that committed individuals show by clear and convincing evidence that a less restrictive alternative is appropriate, when there are no less restrictive alternatives available; and (6) section 253D does not require the state to take any affirmative action, such as petition for a reduction in custody, on behalf of individuals who no longer satisfy the criteria for continued commitment.

(Doc. No. 966 at 67.) Similarly, the Court concluded section 253D is unconstitutional as applied because:

> (4) discharge procedures are not working properly at the MSOP; [and] (5) although section 253D expressly allows the referral of committed individuals to less restrictive alternatives, this is not occurring in practice because there are insufficient less restrictive alternatives available

> for transfer and no less restrictive alternatives available for initial commitment[.]

(*Id.*) Significantly, the Court found that "[t]he MSOP knows that there are Class Members who meet the reduction in custody criteria or who no longer meet the commitment criteria but who continue to be confined at the MSOP." (*Id.* at 47.) As part of this litigation, the Rule 706 Experts identified two such individuals whose situations are likely representative of many more individuals confined at the MSOP. The Rule 706 Experts issued a report recommending that Defendants transfer or provisionally discharge the MSOP's one committed female, Rhonda Bailey. (*See id.* at 18-19.) Bailey was never transferred, despite testimony of the MSOP's Clinical Director that the MSOP had the ability to contract with in-state and out-of-state facilities to place her in another setting. (*Id.* at 19.) The Rule 706 Experts also unanimously recommended that Defendants fully discharge another committed individual from the MSOP. (*See id.* at 45 (describing the recommendation to fully discharge Eric Terhaar, a juvenile-only offender at the MSOP).) Despite knowledge that there are individuals who no longer meet commitment criteria, the MSOP has never filed a petition on behalf of a committed individual for full discharge from the program. (*Id.* at 47.)

In addition, Defendants have full control to schedule SRB hearings and to appoint individuals to the SRB, yet Defendants have allowed lengthy delays in the SRB process and significant backlogs to delay decisions on individual petitions for transfer, provisional release, or discharge. (*Id.* at 44-46, 56.) Finally, despite the testimony of MSOP representatives that "there are

committed individuals at the MSOP, including some of the sixty-seven juvenile-only offenders at the MSOP, who could be treated safely in a less secure facility," (*id.* at 21), and the testimony of Commissioner Jesson that she had identified specific individuals at the MSOP who could be transferred to a less restrictive facility, (*id.* at 22), Defendants have failed to provide a sufficient number of such facilities, either by their own creation or through third-party contracts. (*Id.* at 21-23; *see also id.* at 47 (noting that the MSOP has filed petitions for reduction in custody on behalf of seven committed individuals, six of whom were never ultimately transferred).) In fact, history has shown just how systemic the problem is when the Governor of the State of Minnesota intervened to halt all transfers to less restrictive facilities to await a possible legislative solution that has never, after several attempts, come to fruition. (*See id.* at 22.) Simply put, in light of the evidence and the Court's findings, the Court has the authority to order Defendants to implement remedial measures to ensure that committed individuals are not detained longer than necessary due to these systemic constitutional violations in the discharge process at the MSOP.

Second, these discharge-related remedies are truly remedial in nature. *See Milliken*, 433 U.S. at 280. For many of the same reasons outlined above, these remedies to the MSOP's discharge process will have the effect of restoring committed individuals to the position they would have held had the MSOP been operating constitutionally all along. If Defendants know that an individual no longer meets constitutional standards for commitment, the program may not continue to detain that individual at the MSOP. The Court's discharge-

related remedies ordered below will help ensure that individuals committed at the MSOP are not detained beyond such time as the constitution permits. Importantly, putting committed individuals into the position they would have been in had the MSOP been operating constitutionally all along requires Defendants to provide transitional services to individuals who are deemed eligible for discharge. Defendants have offered no reintegration services to individuals committed to the MSOP until they have reached the final phase of treatment, (s*ee* Doc. No. 966 at 24), so individuals in earlier treatment phases have received no assistance with discharge planning whatsoever (*id.* at 24-25). Because Defendants' reevaluation of committed individuals may require provisional or complete discharge of committed individuals who have not received any reintegration services from the MSOP, Defendants must provide these services in accordance with this Order to provide a full remedy to those who have been subject to unconstitutional confinement at the MSOP.

Third, the Court imposes these remedies with appropriate deference to state and local authorities. *See Milliken*, 433 U.S. at 280-81. The Court acknowledges that Minnesota statutes as enacted may include some of the relief the Court imposes today. *See, e.g.*, Minn. Stat. § 253D.20 (providing a right to counsel for committed individuals "at any proceeding under [Chapter 253D]"). As applied, however, Defendants have not ensured that the discharge process is operating properly to confine individuals at the MSOP

for only so long as the Constitution allows.[16] The Court also imposes this relief in full consideration of Commissioner Jesson's claims regarding difficulty of implementing these discharge-related remedies.[17] In deference to the interests of state authorities in "managing their own affairs," *Milliken*, 433 U.S. at 281, the Court invites the participation of Defendants and other state actors to propose in detail how they will shape the particular discharge process to fully comply with this Order.

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[16] *See* Amicus Brief of ACLU-MN and Professor Janus (Doc. No. 1021 at 4) ("[T]he State's persistent two-decades of 'slow-walking' the procedural protections that were theoretically already in the law demonstrates that proper process is not sufficient to guarantee a non-punitive purpose. If the past two decades have proved anything, it is that procedural due process, standing alone, cannot protect against the subterfuge of an intent to punish.").

[17] Commissioner Jesson suggested that a requirement to petition on behalf of committed individuals would create "a number of difficulties," including determining whose belief should trigger a determination that a petition is appropriate and what should be done if a committed individual does not wish to petition when the MSOP initiates the process. (*See* Doc. No. 1027 at 14.) Jesson also described the "limited availability of MSOP forensic evaluators and treatment psychologists" as barriers to increasing the frequency of SRB hearings. (*See id.* at 9-10.) Further, Jesson claimed the MSOP has virtually no authority to impose remedies related to the provision of counsel or experts for committed individuals and suggests that these remedies are already included in Minnesota statutes. (*See id.* at 18.) Finally, Jesson described numerous barriers to creating additional less restrictive alternatives for committed individuals, including limited funding, lengthy time lines to build or repurpose facilities, licensing and approval requirements, and community opposition which Jesson described as "a serious, or insurmountable, obstacle." (*See id.* at 10-14; *see also* Doc. No. 1026 at 25.)

C. Annual Independent Risk Assessments

Finally, the Court orders Defendants to establish a plan to conduct annual, independent risk assessments to determine whether each client continues to satisfy civil commitment requirements and whether each client's treatment phase placement is proper. The discharge-related remedies outlined above should apply identically following these subsequent annual assessments. The Court orders Defendants to provide a plan to the Special Master describing how Defendants will comply with this remedy as outlined below.

The Court has the authority to order Defendants to complete annual independent risk assessments of all committed individuals at the MSOP. In ordering this remedy, the Court reiterates its analysis above regarding the appropriateness of a remedy imposing immediate risk assessments.[18] This additional measure will not only remedy immediate constitutional violations suffered by individuals at the MSOP, but will ensure that constitutional violations that have plagued the MSOP's operation will not persist into the future. In its Findings of Fact, Conclusions of Law, and Order, the Court found that "[r]isk assessments are only valid

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[18] In response to Plaintiff's proposal to implement annual, independent risk assessments of committed individuals at the MSOP, Defendants reiterate many of the same objections raised with respect to immediate risk assessments. (*See* Doc. No. 1026 at 17 (arguing that annual independent risk assessments "are not aimed at remedying a condition held to violate the Constitution"); Doc. No. 1027 at 8-9 (noting hiring additional risk assessors and funding as key limitations to implementing annual risk assessments of all committed individuals at the MSOP).)

for approximately twelve months." (Doc. No. 966 at 36.) And Defendants own witnesses "credibly testified that if a risk assessment has not been conducted within the past year on civilly committed individuals at the MSOP, the MSOP does not know whether those individuals meet the statutory criteria for commitment or for discharge." (*Id.*) Thus, as suggested by the state's own authorities, annual risk assessments are a necessary remedy to ensure the constitutionality of the MSOP's continued commitment of sex offenders into the future.

Based on the identified constitutional violations at the MSOP, the measures needed to directly remedy these violations, and the Court's deference to MSOP authorities in crafting specific plans for compliance, the Court concludes that the injunctive relief ordered below is proper under *Milliken*.

D. Class-Wide Relief

Defendants challenge Plaintiffs' proposed remedies, including those that the Court orders today, because, according to Defendants, they request individualized relief "which is impermissible in [a] Rule 23(b)(2) class action." (Doc. No. 1026 at 26 (citing *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557 (2011)).) In particular, Defendants argue that ordering assessment of all class members "is exactly the type of non-final injunctive order prohibited in a (b)(2) class." (*Id.* at 27.) Defendants challenge any form of relief that would result in individualized determinations or benefits for only a subset of Class members including the creation of less restrictive facilities or remedies specific to individuals with physical or mental disabilities. (*See id.* at 27-28.)

Contrary to Defendants' assertions, the remedies ordered by the Court below are not improper for class-wide relief under Federal Rule of Civil Procedure 23(b)(2). Class certification under Rule 23(b)(2) is appropriate when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "Class cohesiveness and the possibility of uniform resolution" are hallmark characteristics of a properly certified Rule 23(b)(2) class. *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1036 (8th Cir. 2010). As the Supreme Court has explained, "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *Wal-Mart Stores*, 131 S. Ct. at 2557. "Because one purpose of Rule 23(b)(2) was to enable plaintiffs to bring lawsuits vindicating civil rights, the rule 'must be read liberally in the context of civil rights suits.'" *Coley v. Clinton*, 635 F.2d 1364, 1378 (8th Cir. 1980) (quoting *Ahrens v. Thomas*, 570 F.2d 286, 288 (8th Cir. 1978)); *see also* 7AA Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, Richard L. Marcus, & Adam N. Steinman, *Federal Practice and Procedure* § 1775 (3d ed. 2015) ("[S]ubdivision (b)(2) was added to Rule 23 in 1966 primarily to facilitate the bringing of class actions in the civil-rights area.").

In this case, all Class members have suffered an identical injury through the unconstitutional deprivation of liberty in contravention of the Fourteenth Amendment. (*See* Doc. No. 966 at 50.) As this Court stated in its Findings of Fact, Conclusions of Law, and Order, "all Class Members have suffered an

injury in fact—the loss of liberty in a manner not narrowly tailored to the purpose for commitment." (*Id.*) By failing to periodically assess all Class members and failing to operate a treatment program that provides a meaningful opportunity for potential release into the community, Defendants have directly harmed all Class members and have caused substantial injury. (*See id.*) The first interim relief ordered herein directly and finally addresses harms faced by all Class members, making such relief proper in this Rule 23(b)(2) class action litigation. The Court's remedy will help establish a system through which all class members' rights may be vindicated. The fact that the Court's remedy may result in varied outcomes for committed individuals at the MSOP does not render certification under Rule 23(b)(2) improper. *See Coley*, 635 F.2d at 1378 (finding class certification under Rule 23(b)(2) proper and rejecting the district court's determination that "so many variations of remedy [for inmates committed to a state mental hospital]" would make "any sort of class relief . . . impossible"). Unlike cases in which courts ordered individualized relief tailored to individualized harms, the relief that the Court imposes today will broadly affect the MSOP's risk assessment and discharge processes and will address the constitutional harms inflicted upon all Class members. *Cf. Avritt*, 615 F.3d at 1037 (affirming a district court's denial of class certification under Rule 23(b)(2) when "resolution of the plaintiffs' claims would require numerous individual determinations"); *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 499 (7th Cir. 2012) (finding class certification under Rule 23(b)(2) improper because the district court's remedy "require[d] thousands of individual determinations of class membership, liability, and appropriate remedies"). The relief

imposed below will operate identically for all class members to remedy the unconstitutional deprivations of liberty faced by those committed to the MSOP.

CONCLUSION

Given the MSOP's decades-long history of operating an unconstitutional civil commitment program, the deeply systemic nature of the problems plaguing this state's sex offender civil commitment scheme, and the minimal progress made toward remedying any constitutional infirmities since the start of this litigation four years ago, the Court concludes that it must exercise its broad remedial power. The Constitution requires that substantial changes be made to Minnesota's sex offender civil commitment scheme at the MSOP.

The Court emphasizes that it has invited the participation of the state in shaping the proper remedy for eliminating the constitutional violations at the MSOP. The Supreme Court has indicated that it is proper for federal courts to invite state input in developing appropriate relief in institutional reform cases. *See Lewis v. Casey*, 518 U.S. 343, 362 (1996) (identifying the "proper procedure" for federal courts to follow in imposing institutional reform remedies in the prison context). Particularly, federal courts should "charge[] the [state agency] with the task of devising a Constitutionally sound program." *Id.* (internal citation omitted). And, the state agency should "respond[] with a proposal" that the Court may approve after inviting objections from the opposing party. *Id.* at 362-63. The Court has followed this procedure, both leading up to this Order and through the relief identified herein. Defendants have refused to propose any solutions. This

Order requires Defendants to develop plans to fully implement the remedies ordered below. Offering Defendants the opportunity to submit such plans gives state authorities sufficient input into the proper administration of the MSOP. This Order therefore lies squarely within the scope of the Court's constitutional authority and respects the sensitive federalism concerns inherent in this case.

The Court reminds Defendants of how important prompt and meaningful compliance will be for protecting not only the constitutional rights of the Plaintiffs but also the credibility of the state's civil commitment system and the public safety for all Minnesotans. The State of Minnesota is not obligated to operate a civil commitment program for sex offenders. However, because the state has chosen to operate this system, it must do so in a constitutional manner, and it must provide appropriate funding to support the program's constitutional operation. *See Welsch*, 550 F.2d at 1132. Despite Defendants' claim that "the Minnesota Legislature may consider initiatives" that would supplant the need for judicially-imposed remedies (Doc. No. 1026 at 3), the Court will not allow Defendants to simply wait for such a solution. The political sensitivities surrounding the MSOP have repeatedly hampered past efforts at legislative reform.[19] To properly remedy the constitutional

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[19] *See* HCA Amicus Curiae Memorandum (Doc. No. 1023 at 3-4) (describing prior legislative efforts to improve the state's civil commitment system); Amicus Brief of ACLU-MN and Professor Janus (Doc. No. 1021 at 15-17) ("The Legislature has had ample opportunities to address the glaring problems with MSOP and they have so far failed to do so."); Doc. No. 966 at 15-17 (describing

violations found in Defendants' operation of the MSOP, Defendants must take action to resolve the program's unconstitutionality without waiting for legislative change. The Court also reminds Defendants that the Remedies Phase of this litigation is not a platform for them to relitigate previously-determined issues such as the actual harm faced by the Plaintiffs in this matter or the fundamental constitutional flaws in the MSOP's continued operation. Continued intransigence by Defendants will only further compound the significant harms faced by those subject to unconstitutional confinement at the MSOP. And a prolonged stay of enforcement may also place at risk those individuals at the MSOP who continue to operate the program on a daily basis. The Court will not tolerate delay.

In the interest of federalism, the Court hopes that Defendants' response to this Order does not necessitate deeper and more prolonged involvement of the Court in this state's civil commitment scheme.[20] And in the interest of public safety, the Court hopes to avoid the need to impose a more drastic solution in the future such as demanding the release of individuals

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several reports critical of the state's civil commitment scheme and noting recent bills introduced in the legislature that have failed to implement key changes).

[20] *See, e.g.*, *Turay v. Richards*, No. C91-0664RSM, 2007 WL 983132, at *5 (W.D. Wa. Mar. 23, 2007) (dissolving an injunction over a state's sex offender program that had lasted over a decade and noting that "injunctions against the state are not intended to operate in perpetuity").

committed to the MSOP[21] or shutting down the program's operation.[22] Even so, the Court notes that

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[21] *See*, *e.g.*, *Coleman v. Brown*, No. 2:90-cv-0520 LKK JFM P, 952 F. Supp. 2d 901, 935 (E.D. Cal. 2013) (ordering a state prison system to release prisoners to achieve a specific population threshold in the event that the state's implementation plan failed to reach this threshold by a given date). The Court is particularly troubled by the possible remedy of immediately releasing individuals from the MSOP without proper transitional services in place to ensure that these individuals are prepared to live outside an institutionalized setting. (*See* Doc. No. 966 at 69-70 ("[P]rovisional discharge or discharge from the MSOP does not mean discharge or release without a meaningful support network, including a transition or release plan into the community with intensive supervised release conditions.").) Section 253D contemplates that the MSOP may provisionally discharge committed individuals from the program in accordance with a provisional discharge plan "developed, implemented, and monitored by the executive director in conjunction with the committed person and other appropriate persons." *See* Minn. Stat. § 253D.30. The Court has been unable to fully evaluate how this provisional discharge process is applied by Defendants, however, because Defendants offered few details about this topic at trial. (*See, e.g.*, Doc. No. 966 at 24-25.) This lack of evidence can properly be attributed to Defendants' inexperience in implementing provisional discharge plans because only three individuals have ever been provisionally discharged from the MSOP in the program's history. (*See id.* at 11.)

[22] *See* Amicus Brief of ACLU-MN and Professor Janus (Doc. No. 1021 at 19) ("[T]he only truly effective remedy may be the possibility of shutting down the MSOP system."). *Cf. Welsch v. Likins*, 550 F.2d 1122, 1132 & n.8 (8th Cir. 1977) (noting in the context of remedying unconstitutional infirmities at Minnesota's state hospitals for individuals with disabilities that "[a]lternatives to the operation of the existing state hospital system . . . may

the relief outlined below is interim only. The Special Master and the Court will monitor Defendants' compliance with these initial remedies, and more remedies orders are likely to follow.

Finally, although the Court cannot dictate what statutory solutions the legislature should enact to remedy the constitutional infirmities at the MSOP, the legislature should prioritize and begin with addressing the issues identified in this First Interim Relief Order (immediate risk and phase placement reevaluations, discharge-related remedies including prompt discharge or transfer of individuals who are no longer committed under constitutional standards, ensuring availability of less restrictive alternatives such as new facilities or intensive supervision using GPS monitoring, expedited completion of SRB and SCAP hearings (or revising the discharge process altogether), and implementation of an annual risk reevaluation process). Defendants should urge the legislature to prioritize these remedies and to provide the necessary funding to remedy the pervasive constitutional violations faced by those detained at the MSOP. Justice requires no less.

ORDER

Based upon the Findings of Fact and Conclusions of Law, the presentations and submissions of the parties, and the Court being otherwise duly advised in the premises, **IT IS HEREBY ORDERED** that:

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appear undesirable, but alternatives do exist" and suggesting that "[a]n extreme alternative would, of course, be the closing of the hospitals and the abandonment by the State of [the program]").

1. Defendants are hereby enjoined as follows:

a. Defendants must promptly conduct independent risk and phase placement reevaluation of all current patients at the MSOP. These independent risk assessments shall determine whether each patient (1) continues to meet the constitutional standard for commitment as set forth in *Call v. Gomez*, 535 N.W.2d 312 (Minn. 1995); (2) could be appropriately transferred or provisionally discharged; (3) could be housed in or monitored by a less restrictive alternative; and (4) is in the proper treatment phase. Defendants must complete these assessments according to the following time lines:

i. Within 30 days, Defendants shall complete reevaluations of the six individuals in the Alternative Program who were designated for transfer to Cambridge, Eric Terhaar, and Rhonda Bailey.

ii. Within 30 days, Defendants shall submit a detailed plan for approval by the Special Master for the reevaluations of the elderly, individuals with substantive physical or intellectual disabilities, and juvenile-only offenders. The plan must identify the individuals who will be reevaluated, the independent evaluators who will conduct the evaluations, and a detailed schedule for these reevaluations to be completed by a presumptive deadline of April 1, 2016, subject to modification by the Court based on the recommendations of the Special Master

taking into account any submissions of the parties.

iii. Within 60 days, Defendants shall submit a detailed plan for approval by the Special Master for the reevaluations of all remaining individuals at the MSOP. The presumptive completion deadline for these reevaluations is December 31, 2017, subject to modification by the Court based on the recommendations of the Special Master taking into account any submissions of the parties.

b. If the independent risk assessment for any patient concludes that the patient should be fully discharged, transferred, or receive a reduction in custody, the MSOP must seek the release or reduction in custody of that patient to the appropriate placement by immediately filing a petition with the Special Review Board. *See* Minn. Stat. § 253D.27, subd. 2. Should Defendants wish to challenge the finding that a patient should be fully discharged, transferred, or receive a reduction in custody, the burden shall be on Defendants to prove that such individual's commitment and/or current level of custody is appropriate by clear and convincing evidence. *See* Minn. Stat. § 253D.28, subd. 2(d). Defendants must provide access to experienced independent counsel and professional experts to all petitioners. Defendants must ensure that the Special Review Board and Supreme Court Appeal Panel hearings following the independent risk assessments proceed in a

timely manner and in no case conclude more than 120 days after the petition has been filed on behalf of a patient.

c. Defendants must ensure that less restrictive alternatives are available to accommodate all individuals found eligible for a reduction in custody. For individuals found eligible for discharge, Defendants must provide transitional services and discharge planning needed to facilitate the individual's successful transition into the community.

d. Following each treatment phase placement reevaluation identified in part a., above, Defendants shall immediately move any individual who is determined to be in an improper treatment phase into the proper treatment phase. If Defendants wish to object to the movement of any individual, the matter must be submitted to the Special Master for resolution.

e. Defendants shall establish a plan to conduct annual, independent risk assessments to determine whether each client still satisfies the civil commitment requirements and whether each client's treatment phase placement is proper. Parts b., c., and d. shall apply equally to the results of these subsequent annual assessments.

f. Within 30 days, Defendants must submit a plan to the Special Master for approval by the Court providing for how they will complete the actions identified in parts b., c., and d., and e.,

above. Should Defendants seek an alternate deadline, they must prove to the Court why a later deadline is proper.

2. Special Master former Minnesota Supreme Court Chief Justice Eric J. Magnuson shall have authority to monitor compliance with the remedies identified above. The Special Master shall also have the authority to implement and enforce the injunctive relief imposed by the Court and to mediate any dispute between the parties with regard to the implementation of the remedies. Mediation of disputes by the Special Master shall be binding upon the parties.

3. This First Interim Relief Order contemplates that the Court will order further specific relief against Defendants. Subsequent orders by this Court may require Defendants to make improvements to the MSOP's treatment structure and discharge process, to conduct training for MSOP employees on the constitutional standards for commitment, to require periodic evaluation of the MSOP's treatment program by external experts, or to develop a statewide public education campaign to educate the public about Minnesota's sex offender civil commitment scheme, among other things. The Court may also revisit the relief ordered above in the event that Defendants fail to act on these requirements.

4. The Court shall retain jurisdiction over the Parties for 5 years from the date of final judgment, unless the Court orders otherwise.

5. If Defendants fail to fully comply with this Order, the Court reserves the right to issue an injunction enjoining the enforcement of the Act and

precluding civil commitments under the Act and to issue an order to show cause why Defendants should not be held in contempt.

Dated: October 28, 2015

s/Donovan W. Frank
DONOVAN W. FRANK
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil No. 11-3659 (DWF/JJK)

[Filed June 17, 2015]

Kevin Scott Karsjens, David Leroy Gamble, Jr., Kevin John DeVillion, Peter Gerard Lonergan, James Matthew Noyer, Sr., James John Rud, James Allen Barber, Craig Allen Bolte, Dennis Richard Steiner, Kaine Joseph Braun, Christopher John Thuringer, Kenny S. Daywitt, Bradley Wayne Foster, Brian K. Hausfeld, and all others similarly situated,	)
Plaintiffs,	)
v.	)
Lucinda Jesson, Dennis S. Benson, Kevin Moser, Tom Lundquist, Nancy Johnston, Jannine Hébert, and Ann Zimmerman, in their official capacities,	)
Defendants.	)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Daniel E. Gustafson, Esq., Karla M. Gluek, Esq., David A. Goodwin, Esq., Raina Borrelli, Esq., Lucia G. Massopust, Esq., and Eric S. Taubel, Esq., Gustafson Gluek PLLC, counsel for Plaintiffs.

Nathan A. Brennaman, Deputy Attorney General, Scott H. Ikeda, Adam H. Welle, and Aaron Winter, Assistant Attorneys General, Minnesota Attorney General's Office, counsel for Defendants.

INTRODUCTION

This case challenges the constitutionality of the statutes governing civil commitment and treatment of sex offenders in Minnesota as written and as applied, and in so doing, challenges the boundaries that we the people set on the notions of individual liberty and freedom, the bedrock principles embedded in the United States Constitution. As has been long recognized, the government may involuntarily detain an individual outside of the criminal justice system through the so-called "civil commitment" process, which permits the state to detain individuals who are suffering from acute symptoms of severe mental illness and who are truly dangerous to the public as a result of their psychiatric condition. But our constitutional preservation of liberty requires that we carefully scrutinize any such deprivation of an individual's freedom to ensure that the civil commitment process is narrowly tailored so that detention is absolutely limited to a period of time necessary to achieve these narrow governmental objectives. After all, the individual who is civilly committed is not being

detained in order to be punished for the commission of a crime. If it turns out that the civil commitment is in reality punishment for past crimes or a way to prevent future crimes that might be committed, or, in the words of Justice Anthony M. Kennedy, "[i]f the civil system is used simply to impose punishment after the State makes an improvident plea bargain on the criminal side, then it is not performing its proper function." *Kansas v. Hendricks*, 521 U.S. 346, 373 (1997) (Kennedy, J., concurring); *see also id.* ("We should bear in mind that while incapacitation is a goal common to both the criminal and civil systems of confinement, retribution and general deterrence are reserved for the criminal system alone.").

One reason why we must be so careful about civil commitment is that it can be used by the state to segregate undesirables from society by labeling them with a mental abnormality or personality disorder. For example, civil commitment might improperly be used to indefinitely extend the prison terms of individuals who have been criminally convicted of a crime and who have finished serving their defined terms of imprisonment. As the Court has observed previously, the fact that those committed to and confined at the Minnesota Sex Offender Program (the "MSOP") are sex offenders, who may indeed be subject to society's opprobrium, does not insulate the criminal and civil justice systems from a fair and probing constitutional inquiry. (*See* Doc. No. 427 ("February 20, 2014 Order") at 66.)

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. Although the

public might be safer if the government, using the latest "scientific" methods of predicting human behavior, locked up potential murderers, rapists, robbers, and, of course, sex offenders, our system of justice, enshrined in rights guaranteed by our Constitution, prohibits the imposition of preventive detention except in very limited circumstances. This strikes at the very heart of what it means to be a free society where liberty is a primary value of our heritage. Significantly, when the criminal justice system and the civil commitment system carry out their responsibilities, the constitutional rights of all citizens, including sex offenders, can be upheld without compromising public safety or disrespecting the rights, concerns, and fears of victims.

It is against this backdrop that the Court has closely scrutinized the constitutionality of the civil commitment scheme that the State of Minnesota has adopted, which has resulted in the indefinite detention of over 700 sex offenders at the MSOP.

SUMMARY OF DECISION

As detailed below, the Court conducted a lengthy trial over six weeks to determine whether it should declare that the Minnesota statutes governing civil commitment and treatment of sex offenders are unconstitutional as written and as applied. The Court concludes that Minnesota's civil commitment statutes and sex offender program do not pass constitutional scrutiny. The overwhelming evidence at trial established that Minnesota's civil commitment scheme is a punitive system that segregates and indefinitely detains a class of potentially dangerous individuals without the safeguards of the criminal justice system.

The stark reality is that there is something very wrong with this state's method of dealing with sex offenders in a program that has never fully discharged anyone committed to its detention facilities in Moose Lake and St. Peter since its inception in 1994. The number of committed individuals at these facilities keeps growing, with a current count of approximately 714 committed individuals and a projection of 1,215 committed individuals by 2022. In light of the structure of the MSOP and the history of its operation, no one has any realistic hope of ever getting out of this "civil" detention. Instead, it is undisputed that there are committed individuals who meet the criteria for reduction in custody or who no longer meet the criteria for commitment who continue to be confined at the MSOP.

The Court's determination that the MSOP and its governing civil commitment statutes are unconstitutional concludes Phase One of this case. The next part of this case will involve the difficult question of what the remedy should be to address this complex problem. The public should know that the Moose Lake and St. Peter facilities will not be immediately closed. This case has never been about the immediate release of any single committed individual or committed individuals. Recognizing that the MSOP system is unconstitutional, there may well be changes that could be made immediately, short of ordering the closure of the facilities, to remedy this problem. The Court will hold a hearing to determine what remedy should be imposed, including, but not limited to, the potential remedies set forth in the Conclusion section below. In the meantime, the Court will hold a Remedies Phase pre-hearing conference on August 10, 2015, where all

stakeholders, including state legislative and executive leadership, will be called upon to fashion suitable remedies to be presented to the Court.

Moreover, the parties to this case and all stakeholders know that what is true today, was also true before this lawsuit was filed in 2011. That is, there are some sex offenders who are truly dangerous and who should not be released; however, the criminal and civil justice systems should say so and implement appropriate procedures so as to afford individuals their constitutional protections. So too, there are individuals who should have been released, provisionally or otherwise, some time ago, and those individuals should be released with a significant support system and appropriate conditions of supervision, all of which can be accomplished without compromising public safety or the concerns and fears of victims.

DECISION

Based upon the presentations of counsel, including the extensive testimony of the witnesses and the voluminous exhibits produced at trial, as well as counsel's arguments and post-trial submissions, the entire record before the Court, and the Court being otherwise duly advised in the premises, the Court hereby issues its findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure:

FINDINGS OF FACT

1. This is a civil rights action pursuant to 42 U.S.C. § 1983.

2. The fourteen named Plaintiffs in this case, Kevin Scott Karsjens ("Karsjens"), David Leroy Gable, Jr., Kevin John DeVillion, Peter Gerard Lonergan ("Lonergan"), James Matthew Noyer, Sr., James John Rud, James Allen Barber, Craig Allen Bolte ("Bolte"), Dennis Richard Steiner ("Steiner"), Kaine Joseph Braun, Brian Christopher John Thuringer ("Thuringer"), Kenny S. Daywitt, Bradley Wayne Foster ("Foster"), and Brian K. Hausfeld (collectively, "Named Plaintiffs"), represent a class of over 700 individuals (collectively, "Plaintiffs" or "Class Members") who are all currently civilly committed to the MSOP in the care and custody of the Minnesota Department of Human Services ("DHS").

3. The seven individual Defendants in this case are all senior managers of the MSOP and employees of the State of Minnesota (collectively, "Defendants").

4. Defendant Lucinda Jesson ("Commissioner Jesson") is the Commissioner of DHS. Commissioner Jesson has served in that position since January 2011. Commissioner Jesson is ultimately responsible for all operations of the MSOP.

5. Defendant Dennis Benson ("Benson") is the former Executive Director of the MSOP. Benson served in that position from 2008 to 2012. As Executive Director, Benson was primarily responsible for developing the programming and policies of the MSOP.

6. Defendant Kevin Moser ("Moser") is the Operational Director of the MSOP at Moose Lake. Moser has served in that position since December 2011. Moser is responsible for overseeing all facility and security operations and for setting policies relating to

security, facility maintenance, living unit management, and special services.

7. Defendant Tom Lundquist ("Lundquist") is the Associate Clinical Director of the MSOP at Moose Lake. Lundquist has served in that position since at least September 2010.

8. Defendant Nancy Johnston ("Johnston") is the Executive Director of the MSOP. Johnston has served in that position since 2012. Johnston is responsible for overseeing the programming, policies, and facilities of the MSOP. As part of these responsibilities, Johnston is vested with the authority to change the operations of the MSOP.

9. Defendant Jannine Hébert ("Hébert") is the Executive Clinical Director of the MSOP. Hébert has served in that position since 2008. Hébert is responsible for overall treatment programming at the MSOP.

10. Defendant Ann Zimmerman ("Zimmerman") is the Security Director of the MSOP. Zimmerman has served in that position since 2010. Zimmerman is responsible for overseeing security functions and maintaining a secure environment at the MSOP's Moose Lake facility.

11. Plaintiffs initiated this action against Defendants on December 21, 2011. Plaintiffs filed an Amended Complaint on March 15, 2012, and a Second Amended Complaint on August 8, 2013.

12. Plaintiffs filed the Third Amended Complaint on October 28, 2014. In the Third Amended Complaint, Plaintiffs seek a declaratory judgment that the

Minnesota statutes governing civil commitment and treatment of sex offenders are unconstitutional as written and as applied. Plaintiffs do not request that the Court order any specific individual or individuals released from civil confinement.

History of Civil Commitment in Minnesota

13. In 1939, the Minnesota Legislature adopted its first civil commitment law, now codified at Minn. Stat. § 526.10, which provides for the civil commitment of any individual found to have a "psychopathic personality" to the Minnesota State Security Hospital in St. Peter, Minnesota. Over the course of the next fifty years, the statute was used primarily as an alternative to criminal punishment, and individuals were civilly committed under the law rather than being criminally charged and convicted. By 1970, civil commitment under the "psychopathic personality" law had dramatically decreased; in the 1970s, only thirteen individuals were civilly committed, and in the 1980s, only fourteen individuals were civilly committed.

14. Following a series of horrific rape and murder crimes that were committed between 1987 and 1991 by recently released sex offenders from state prison, a task force on the prevention of sexual violence against women recommended stiffer criminal sentences for dangerous sex offenders and increased use of the "psychopathic personality" law to confine and treat the most dangerous offenders being released from prison.

15. In 1989, the Minnesota Legislature modified the "psychopathic personality" law to include provisions that required the district court sentencing a sex offender to determine whether civil commitment

under the statute would be appropriate and to refer such cases to the county attorney.

16. In 1992, the Minnesota Legislature enacted a screening process to evaluate "high-risk" sex offenders before their release from prison upon completing a criminal sentence. As a result of this enactment, commitments under the "psychopathic personality" law increased from two commitments in 1990 to twenty-two commitments in 1992. In contrast to earlier commitments under the statute, which typically involved first-time offenders who were civilly committed as an alternative to criminal punishment, individuals who were civilly committed during the early 1990s were repeat sex offenders who either had failed or refused to participate in sex offender treatment while in prison.

Civil Commitment under the Minnesota Civil Commitment and Treatment Act

17. In 1994, the Minnesota Legislature enacted the Minnesota Civil Commitment and Treatment Act: Sexually Dangerous Persons and Sexual Psychopathic Personalities ("MCTA"), Minn. Stat. § 253D (formerly Minn. Stat. § 253B), which provides for the involuntary civil commitment of any individual who is found by a court to be a "sexually dangerous person" ("SDP") and/or a "sexual psychopathic personality" ("SPP") to the MSOP.

18. Under the MCTA, civil commitment proceedings are initiated by the county attorney, who determines whether good cause exists to file a petition for commitment after receiving a district court's preliminary determination or a referral from the

Commissioner of Corrections. Minn. Stat. § 253D.07, subd. 1.

19. To be civilly committed to the MSOP, an individual must be found to be a SPP and/or SDP under the MCTA.

20. To be committed to the MSOP as a SPP, an individual must be found by a court to have "such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of personal acts, or a combination of any of these conditions, which render the person irresponsible for personal conduct with respect to sexual matters, if the person has evidenced, by a habitual course of misconduct in sexual matters, an utter lack of power to control the person's sexual impulses and, as a result, is dangerous to other persons." Minn. Stat. § 253D.02, subd. 15; Minn. Stat. § 253D.07.

21. To be committed to the MSOP as a SDP, an individual must be found by a court to be someone who "(1) has engaged in a course of harmful sexual conduct"; "(2) has manifested a sexual, personality, or other mental disorder or dysfunction"; and "(3) as a result, is likely to engage in acts of harmful sexual conduct." Minn. Stat. § 253D.02, subd. 16; Minn. Stat. § 253D.07.

22. If a court finds that an individual is a SPP and/or SDP, "the court shall commit the person to a secure treatment facility unless the person establishes by clear and convincing evidence that a less restrictive treatment program is available, is willing to accept the [person] under commitment, and is consistent with the

person's treatment needs and the requirements of public safety." Minn. Stat. § 253D.07, subd. 3.

23. The Commissioner of DHS is vested with the authority to maintain the program, which "shall provide specialized sex offender assessment, diagnosis, care, treatment, supervision, and other services to civilly committed sex offenders," including "specialized programs at secure facilities," "consultative services, aftercare services, community-based services and programs, transition services, or other services consistent with the mission of the Department of Human Services." Minn. Stat. § 246B.02.

24. Following the enactment of the MCTA in 1994, several civilly committed individuals under the newly-enacted legislation challenged the statute's constitutionality. For example, Dennis Darol Linehan, who was subject to commitment under the new law, appealed the state court's commitment order on constitutional grounds. At the time of these challenges, the state represented to the courts that the MSOP was an approximately thirty-two-month program for "model patients."

25. However, the MSOP has developed into indefinite and lifetime detention. Since the program's inception in 1994, no committed individual has ever been fully discharged from the MSOP, and only three committed individuals have ever been provisionally discharged from the MSOP. By contrast, Wisconsin has fully discharged 118 individuals and placed approximately 135 individuals on supervised release since 1994. New York has fully discharged 30 individuals—without any recidivism incidents, placed 125 individuals on strict and intensive supervision and

treatment ("SIST") upon their initial commitment, and transferred 64 individuals from secure facilities to SIST.

26. Minnesota presently has the lowest rate of release from commitment in the nation.

27. Since the MCTA's enactment in 1994, the number of civilly committed sex offenders in Minnesota has grown significantly. The total number of civilly committed sex offenders in Minnesota has grown from less than 30 in 1990, to 575 in 2010, to a current count of approximately 714. From 2000 to 2010, the civilly committed population in Minnesota grew nearly fourfold. The state projects that the number of civilly committed sex offenders will grow to 1,215 by 2022.

28. Minnesota presently has the highest per-capita population of civilly committed sex offenders in the nation.

29. The rate of commitment in Minnesota is 128.6 per million, the rate of commitment in North Dakota is 77.8 per million, and the rate of commitment in New York is 15 per million. The rate of commitment in Minnesota is significantly higher than the rate of commitment in Wisconsin, which is demographically similar to Minnesota.

30. A significant increase in commitment and referral rates followed the abduction and murder of Dru Sjodin in late 2003. Johnston credibly testified that the MSOP experienced a "tremendous growth" in early 2004 following the Dru Sjodin tragedy, which caused the treatment program to expand "at an enormous rate." Hébert credibly testified that the MSOP 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."

31. After the Dru Sjodin tragedy, state law was amended to increase the duration of conditional release for sex offenders and to increase the conditional release options available to a state court when sentencing sex offenders.

32. Minn. Stat. § 609.3455, subd. 6 requires that, when a district court commits a first-time sex offender to the custody of the Commissioner of the Department of Corrections ("DOC"), the court shall provide that, after the offender has been released from prison, the Commissioner of the DOC shall place the offender on conditional release for ten years.

33. Minn. Stat. § 609.3455, subd. 7 requires that, when a district court commits a sex offender with two or more offenses to the custody of the Commissioner of the DOC, the court shall provide that, after the offender has been released from prison, the Commissioner of the DOC shall place the offender on conditional release for the remainder of the offender's life.

34. Minn. Stat. § 609.3455, subd. 8, and Minn. Stat. § 244.05, subd. 6 provide that conditions of release for sex offenders sentenced to prison may include successful completion of treatment and aftercare programs, random drug testing, house arrest, daily curfews, electronic surveillance, and participation in an appropriate sex offender program.

35. In December 2003, the DOC began to use a formal review process to identify sex offenders in Minnesota's correctional facilities for referral to civil commitment following their incarceration. Prior to December 2003, the DOC focused on identifying sex offenders who were clearly dangerous for possible commitment. Beginning in December 2003, the DOC began referring all sex offenders who the DOC believed satisfied the legal commitment standard or who the DOC believed might qualify for civil commitment to county attorneys.

36. In December 2003, the DOC referred 236 additional sex offenders to county attorneys after an extensive review of incarcerated offenders and offenders on supervised release. This increase constituted more than seventy percent of the referrals that were made in the previous thirteen years.

37. Between 2004 and 2008, the DOC made approximately 157 referrals per year, which was 6 times the referral rate between January 1991, when the DOC began reviewing sex offenders for referral to civil commitment, and November 2003. In 2009, the DOC made 114 referrals to county attorneys. Currently, the DOC refers approximately one-third of those reviewed for commitment. Every sex offender that the DOC has referred for commitment has served their full prison sentence.

38. The majority of commitments result from referrals by the DOC to county attorneys.

39. There are significant geographic variations in petition and commitment rates across the state. On average, county attorneys in the seven most populous

counties in Minnesota filed commitment petitions for forty-four percent of the referrals between 1991 and 2008. Between 1991 and 2008, the commitment rates varied from thirty-four percent to sixty-seven percent among the ten judicial districts, with the lowest commitment rates in counties around northeastern Minnesota and the highest commitment rates in counties in southeastern, southwestern, west central, and northwestern Minnesota.

40. Since 1994, various evaluators have published reports that are critical of the state's civil commitment system, the MCTA, and the MSOP's treatment program structure. The Governor's Commission on Sex Offender Policy ("Governor's Commission")[1] issued a report in January 2005 recommending, among other things, the transfer of the screening process of sex offenders for possible civil commitment to an independent panel and the establishment of a continuum of treatment options. The Office of the Legislative Auditor for the State of Minnesota ("OLA") issued a report in March 2011 ("OLA Report") recommending numerous changes to the civil commitment statutory scheme as well as to the MSOP, including revising statutory commitment standards and creating lower cost, reasonable alternatives to commitment at high-security facilities. The Sex Offender Civil Commitment Advisory Task

[1] The Governor's Commission consisted of twelve individuals appointed by Governor Tim Pawlenty to focus on current and best practices relating to sentencing, supervision, commitment, healthcare services, and registration of sex offenders.

Force ("Task Force")[2] recommended, among other things, that the Commissioner of DHS develop less restrictive programs throughout the state. The MSOP Program Evaluation Team ("MPET")[3] found that the MSOP's requirements for phase progression may be too stringent and recommended modification of the phase progression criteria. The Rule 706 Experts[4] published reports criticizing the commitment and placement of certain committed individuals and a final report identifying problems with various aspects of the program, including the lack of periodic assessments.

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[2] The Task Force was established pursuant to the Court's August 15, 2012 Order requiring the Commissioner of DHS to establish a fifteen-member advisory task force to examine and recommend legislative proposals to the Commissioner of DHS on topics related to the civil commitment process, less restrictive alternative options, and standards and processes for the reduction of custody. (*See* Doc. No. 208 at 2.)

[3] The MPET was established pursuant to the Court's November 9, 2012 Order requiring the Commissioner of DHS to create an evaluation team consisting of five qualified sex offender clinical professionals to evaluate sex offender treatment and to address possible program issues associated with phase progression. (*See* Doc. No. 275 at 2-3.) The MPET Program Evaluation team members include James Haaven ("Haaven"), Christopher Kunkle ("Kunkle"), Robert McGrath ("McGrath"), Dr. William Murphy ("Dr. Murphy"), and Dr. Jill D. Stinson ("Dr. Stinson").

[4] On December 6, 2013, the Court appointed four experts, Dr. Naomi Freeman ("Dr. Freeman"), Deborah McCulloch ("McCulloch"), Dr. Robin Wilson ("Dr. Wilson"), and Dr. Michael Miner ("Dr. Miner"), pursuant to Rule 706 of the Federal Rules of Evidence. (*See* Doc. No. 393.) The parties jointly nominated these four experts (*id.* at 1) and the parties submitted their respective proposals regarding the work of the Rule 706 Experts to the Court (*see* Doc. No. 421).

The MSOP Site Visit Auditors[5] have issued reports every year since 2006 that have identified deficiencies in the program and statutory scheme and have included recommendations to improve the civil commitment system.

41. During the 2013-2014 legislative session, Senator Kathy Sheran introduced a bill, Senate File Number 1014, which included provisions that would have implemented certain recommendations by the Task Force. Although the bill passed the Senate on May 14, 2013, the bill did not become law because the companion bill that was introduced by Representative Tina Liebling in the House of Representatives, House File Number 1139, did not pass the House.

42. During the 2015-2016 legislative session, Senator Kathy Sheran, Senator Tony Lourey, and Senator Ron Latz introduced a bill, Senate File Number 415, which included provisions that would have established and appropriated funding to a civil commitment screening unit to review cases and conduct evaluations; required biennial reviews; implemented a statewide sex offender civil commitment judicial panel; and established a sex offender civil commitment defense office. The bill was referred to the Senate Committee on Health, Human Services and Housing in January 2015, but did not reach the Senate floor.

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[5] The Site Visit Auditors, Haaven, McGrath, and Dr. Murphy, were hired by the MSOP to review and evaluate its treatment program.

The MSOP Facilities

43. The MSOP provides housing for its civilly committed residents in three facilities, which include the secure treatment facility in Moose Lake, Minnesota; the secure treatment facility in St. Peter, Minnesota; and the Community Preparation Services ("CPS"), which is located on the St. Peter site outside of the secure perimeter.

44. The Moose Lake facility is the most restrictive facility and CPS is the least restrictive facility.

45. The St. Peter facility is designated for committed individuals in later stages of treatment and for individuals with special needs, such as individuals with cognitive disabilities, individuals with severe mental illness, or vulnerable adults. Approximately 257 committed individuals currently reside within the secure perimeter of the St. Peter facility.

46. The CPS facility currently has a thirty-eight bed capacity limit. Approximately thirty-two committed individuals currently reside at CPS. This is a significant increase from the six CPS residents in 2010, eight CPS residents in 2011, and nine CPS residents in 2012.

47. As a result of the limited bed capacity at the CPS facility, committed individuals have had to wait for beds to become available before being transferred to CPS from the more restrictive facilities at the MSOP. Dr. Elizabeth Barbo ("Dr. Barbo"), the MSOP Reintegration Director, credibly testified that there have been individuals who have been transferred to

CPS who have had to wait due to a lack of bed space at the CPS facility.

48. Since the commencement of this lawsuit in 2011, the MSOP has started constructing a new facility, akin to CPS, with an additional thirty beds. Construction on the new building is projected to be completed by July 1, 2015. Dr. Barbo credibly testified that once construction on the new building is complete, CPS will have fifty-three licensed beds in total.

49. Committed individuals to the MSOP cannot be initially placed at the CPS facility. Dr. Barbo credibly testified that CPS is not available to a newly-committed individual in Minnesota.

50. Minnesota is one of two states that have reported providing housing for its female civilly committed residents in the same facility as its male civilly committed residents. Currently, one female, Rhonda Bailey ("Bailey"), resides at the MSOP's St. Peter facility in a unit with twenty-two male civilly committed residents. Although Bailey has been committed to the MSOP since 1993 and has been housed at the St. Peter facility with all males since 2008, the Site Visit Auditors did not know that Bailey was housed with all men prior to 2014. Until recently, Bailey was receiving group therapy with all men and was denied recommended eye movement desensitization and reprocessing treatment. Despite the Rule 706 Experts' June 4, 2014 report and recommendation that Bailey be transferred or provisionally discharged from the MSOP to a supervised treatment setting, and Plaintiffs' motion to transfer Bailey to an appropriate treatment facility, the MSOP has not taken any steps to implement these

recommendations. Dr. Haley Fox ("Dr. Fox"), Clinical Director of the MSOP St. Peter facility, credibly testified that it would be optimal if Bailey were placed in a different facility. Dr. Fox further credibly testified that the MSOP has the ability to contract with both in-state and out-of-state facilities to place Bailey in another setting.

51. The evidence clearly establishes that hopelessness pervades the environment at the MSOP, and that there is an emotional climate of despair among the facilities' residents, particularly among residents at the Moose Lake facility. Bolte, Karsjens, Foster, and Eric Terhaar ("Terhaar"),[6] offered compelling testimony regarding the "hopeless environment" at the MSOP. Bolte credibly testified that he is "[e]xtremely hopeless" because he believes that "the only way to get out is to die." Foster credibly testified that he does not want to move from the Moose Lake facility to the St. Peter facility and progress in treatment because he is more likely to see his ten-year-old son, who lives near the Moose Lake facility, while in Phase II at Moose Lake than if he moved to St. Peter and lingered in Phase III for years. Dr. Freeman corroborated that many individuals in CPS expressed severe hopelessness. Terrance Ulrich ("Ulrich"), a Senior Clinician at the MSOP Moose Lake facility,

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[6] Bolte and Terhaar are only two of the sixty-seven committed individuals at the MSOP with no adult convictions ("juvenile-only offenders"). Bolte was civilly committed to the MSOP in June 2006 when he was nineteen years old. Terhaar was civilly committed to the MSOP in January 2009 when he was nineteen years old. On May 18, 2014, the Rule 706 Experts issued a report recommending Terhaar's full discharge from the MSOP.

agreed that there is a perception among committed individuals that they will never be discharged from the MSOP and that "they might die in the facility." Ronda White ("White"), a Treatment Psychologist at the MSOP Moose Lake facility, offered persuasive testimony that working at the facility can be difficult "because of the hopelessness."

52. As of July 1, 2014, the cost of confining committed individuals at the MSOP was approximately $124,465 per resident per year. This cost is at least three times the cost of incarcerating an inmate at a Minnesota correctional facility.

53. There is no alternative placement option to allow individuals to be placed in a less restrictive facility at the time of their initial commitment to the MSOP. Dr. Fox credibly testified that the only facilities in which individuals can be placed at the beginning of their commitment are the secure facilities at Moose Lake and St. Peter. Sue Persons ("Persons"), former Associate Clinical Director of the MSOP, confirmed that the MSOP lacks less restrictive options, such as halfway houses, for committed individuals at the MSOP. This lack of less restrictive facilities and programs undermines the MCTA's provision allowing a committing court to consider placing an individual at a less restrictive alternative.

54. It is undisputed that there are civilly committed individuals at the MSOP who could be safely placed in the community or in less restrictive facilities. McCulloch credibly testified that there are individuals at both the Moose Lake and St. Peter facilities who could be treated in a less restrictive environment. Similarly, Dr. Nicole Elsen ("Dr. Elsen"),

Clinical Supervisor of the MSOP St. Peter facility, James Berg ("Berg"), Associate Clinical Director of the MSOP, Ulrich, Benson, Persons, Peter Puffer ("Puffer"), Clinical Director of the MSOP Moose Lake facility, Hébert, Johnston, Anne Barry ("Deputy Commissioner Barry"), Deputy Commissioner of DHS Direct Care and Treatment, and Dr. Fox, all credibly testified that there are committed individuals at the MSOP, including some of the sixty-seven juvenile-only offenders at the MSOP, who could be treated safely in a less secure facility.

55. The Task Force recommended that the Commissioner of DHS develop less restrictive programs throughout the state. The Task Force recommended that less restrictive facilities be designed to serve both those who are already civilly committed to secure facilities as well as those who are subsequently civilly committed to the MSOP.

56. In recent years, DHS attempted to provide less restrictive placement options for civilly committed individuals at the MSOP. In September 2013, Commissioner Jesson sent a letter to the Minnesota Legislature identifying committed individuals at the MSOP who could be transferred to an existing DHS site in Cambridge, Minnesota. Commissioner Jesson expected the facility to become available to the MSOP in 2014. Commissioner Jesson credibly testified that she planned to transform the Cambridge facility to become a less restrictive alternative for individuals committed as sex offenders. However, those efforts were halted by Governor Dayton's November 2013 letter. In that letter, Governor Dayton directed Commissioner Jesson to suspend DHS' plans to

transfer any sex offenders to a less restrictive facility such as Cambridge until: (1) the Task Force issued its findings and recommendations; (2) the legislature had the opportunity to review existing statutes and make any necessary revisions; and (3) the legislature and the Governor's Administration have agreed to and provided sufficient funding for the additional facilities, programs, and staff necessary for the program's successful implementation.

57. The Task Force issued its final findings and recommendations on December 2, 2013. After the 2013-2014 legislative session, Minnesota renewed efforts to create less restrictive alternatives that could be used to relocate individuals committed to the MSOP. Commissioner Jesson credibly testified that DHS recently entered into third-party contracts to allow committed individuals to be placed outside of the current facilities in Moose Lake and St. Peter. Dr. Barbo credibly testified that the MSOP entered into approximately fifteen contracts for transitioning housing and adult foster care or treatment services. Despite this, there are currently only a very limited number of beds available in the MSOP's contracted alternative placement options. Outside of CPS, the MSOP has less than twenty beds available for less restrictive alternative placements. In addition, these contracts are only for a limited type of population at the MSOP. The MSOP does not have any contracts in place to allow vulnerable adults in the Assisted Living Unit at the MSOP to be placed in other facilities. A Class Member, Harley Morris ("Morris"), passed away while he was on hospice care at the MSOP's Moose Lake facility.

58. The evidence overwhelmingly demonstrates, as Dr. Fox concluded, that providing less restrictive confinement options would be beneficial to the State of Minnesota and the entire civil commitment system without compromising public safety.

The MSOP Treatment Program

59. The MSOP Program Theory Manual, the MSOP Treatment Manual, and the MSOP Clinician's Guide describe the MSOP's program model.

60. The stated goal of the MSOP's treatment program, observed in theory but not in practice, is to treat and safely reintegrate committed individuals at the MSOP back into the community.

61. Currently, the MSOP treatment program is organized into three phases of indeterminate length.

62. The current three-phase program began in 2008 after Hébert became Executive Clinical Director of the MSOP. Prior to 2008, the MSOP used various programming over the years. Steiner credibly testified that there have been four or five clinical directors during his commitment at the MSOP, and that the MSOP's treatment program changed four or five times with each change in clinical leadership.

63. Currently, Phase I of the MSOP treatment program focuses on rule compliance, emotional regulation, and treatment engagement. In Phase I, the MSOP emphasizes learning to comply with facility rules and expectations, as well as providing an introduction to basic treatment concepts. However, in Phase I, individuals do not receive any specific sex offense related therapy.

64. Phase II focuses on identifying and addressing patterns of sexually abusive behavior and cycles. In Phase II, the MSOP emphasizes discussion and exploration of the committed individual's history of sexual offending behavior and maladaptive patterns of behavior, along with the motivations for those behaviors.

65. Phase III focuses on reintegration into the community. In Phase III, the MSOP emphasizes application of skills learned in Phase II to daily life, demonstrating utilization of pro-social coping strategies, and reintegrating back to the community.

66. Reintegration services are not available to individuals committed at the MSOP until they are in Phase III of the treatment program. Puffer, Darci Lewis ("Lewis"), a clinician at the MSOP Moose Lake facility, and Dr. Fox each credibly testified that reintegration training and services do not start until Phase III. Johnston credibly testified that the MSOP's reintegration staff does not assist committed individuals who are in Phase I or Phase II with discharge planning, which Johnston described as merely "finding an address and a place to live and putting together a supervision plan." Although Hébert credibly testified that the provisional discharge plan is "certainly more than an address," Hébert confirmed that the MSOP does not assist committed individuals with finding an address as part of a provisional discharge plan when they are initially committed to the MSOP or are in an earlier treatment phase.

67. Although the MSOP's Treatment Manual states that individuals who are civilly committed at the MSOP may start treatment in other phases, virtually

every offender enters the treatment program in Phase I. For example, Lewis credibly testified that all committed individuals are placed in Phase I of the treatment program at the Moose Lake facility and that she was not aware of any individuals who had started in any other phase.

68. There are no reports or assessments conducted at the time of admission to determine what phase of treatment a committed individual should be placed in at the MSOP.

69. The MSOP does not have a policy of seeking to obtain documents pertaining to a committed individual from the DOC when the DOC fails to provide them to the MSOP when a committed individual is initially placed at the MSOP. Dr. Elizabeth Peterson ("Dr. Peterson"), Treatment Assessment Unit Supervisor of the MSOP Moose Lake facility, credibly testified that whether MSOP will be able to obtain the records varies by file and that the MSOP does not always obtain all of the documents or records.

70. The MSOP does not have a practice of considering past participation in sex offender treatment when placing committed individuals into assigned treatment phases or when attempting to individualize treatment. Bolte credibly testified that he started in Phase I, even though he had participated in sex offender treatment in previous juvenile placements. Thuringer credibly testified that he started in Phase I, despite completing an inpatient treatment program prior to his commitment. Puffer credibly testified that the MSOP should assess committed individuals at the MSOP who have had sex offender treatment prior to

commitment to determine if they are in the correct phase of the treatment program.

71. Some committed individuals at the MSOP are not in the proper phase of treatment. The MPET reported that thirty percent of the Phase I patient files reviewed reflected that the patients were not placed in the proper phase based on the MSOP's own policies. Since receiving the MPET Report, the MSOP has not reassessed all committed individuals to determine if they are in the proper phase of treatment. In addition, the MSOP clinicians credibly testified that there are individuals who are in the wrong treatment phase. For example, Lewis credibly testified that both Steiner and Foster should have been allowed to progress to a different treatment phase and should be moved to Phase III.

72. The requirements for progression from Phase I to Phase II are: (1) two consecutive quarterly reports that indicate the individual has achieved at least satisfactory scores of three plus out of five on the Phase I Matrix factors; (2) a score of at least a two on the Matrix Factors of healthy lifestyle and life enrichment; (3) participation in a maintenance polygraph; (4) two consecutive quarters of no major Behavioral Expectation Reports; and (5) active treatment participation as evidenced by requesting group time at least fifty percent of the time in the previous quarter.

73. The requirements for progression from Phase II to Phase III are: (1) two consecutive quarterly reports that indicate an average of four or better on each Phase II Matrix factor; (2) taking of a PPG or Abel/ABID assessment and addressing the results in treatment; (3) taking a maintenance polygraph to

verify the individual's report regarding adherence to program reports; (4) taking a full disclosure polygraph to verify an agreed-upon sexual history; and (5) successfully addressing in core group, through goal presentation and discussion, the individual's offense cycle/chain, roots of offending, relapse prevention plan, and an understanding of sexual arousal patterns and a plan to manage sexual deviance.

74. The phase progression requirements apply to all committed individuals at the MSOP, including those in the Nova Unit for individuals with severe mental illness, those in the Alternative Program for individuals with cognitive disabilities, and those in the Young Adult Unit for juvenile-only offenders. Puffer and Dr. Fox credibly testified that the MSOP's phase progression policy applies to all committed individuals at the MSOP. Persons credibly testified that the MSOP treatment program is not structured differently for juvenile-only offenders, and that the three-phase progression model applies equally to juvenile-only offenders. Ulrich credibly testified that individuals in the mental health unit must meet the same phase progression criteria as all other committed individuals at the MSOP.

75. Committed individuals at the MSOP must meet the progression policy requirements outlined in the Clinician's Guide in order to progress through the treatment program. Puffer credibly testified that committed individuals generally must satisfy the requirements for each phase in order to progress through treatment. Dr. Elsen credibly testified that she has never progressed an individual through the MSOP treatment program who has not satisfied each of the

phase progression requirements listed in the Clinician's Guide.

76. Committed individuals at the MSOP may not skip phases of the treatment program. Persons credibly testified that it is not possible for committed individuals to skip a phase in the phase progression process.

77. The MSOP uses the Goal Matrix for Phases I, II, and III to identify treatment goals for each phase of the program, to measure treatment progress, and to reference as a benchmark for moving committed individuals between phases of the program. The MSOP began using the Goal Matrix in 2009.

78. Treatment progress is scored using the Matrix factors. Puffer credibly testified that committed individuals are scored on their Matrix factors to assess their treatment progress and to determine whether they should progress in treatment. Dr. Fox credibly testified that the Matrix factors are the primary tool used for measuring treatment progress at the MSOP.

79. The Matrix factors include group behavior, attitude toward change, self-monitoring, thinking errors, emotional regulation, interpersonal skills, sexuality, cooperation with rules/supervision, prosocial problem solving, productive use of time, healthy sexuality, and life enrichment.

80. The Matrix factors are used for all committed individuals at the MSOP, including those in the Nova Unit for individuals with severe mental illness, those in the Alternative Program for individuals with cognitive disabilities, those in the Assisted Living Unit for vulnerable adults, those in the Behavior Therapy

Unit for individuals who have demonstrated problematic behavioral issues, and those in the Young Adult Unit for juvenile-only offenders.

81. The Matrix factors are scored using the same scoring spectrum for all committed individuals at the MSOP, including those in the Nova Unit for individuals with severe mental illness, those in the Alternative Program for individuals with cognitive disabilities, those in the Assisted Living Unit for vulnerable adults, those in the Behavior Therapy Unit for individuals who have demonstrated problematic behavioral issues, and those in the Young Adult Unit for juvenile-only offenders.

82. The Matrix factors are not used by any other civil commitment program in the country.

83. Independent evaluators and internal staff at the MSOP have repeatedly observed confusion regarding how the Matrix factors were to be used and inconsistencies with the application of the Matrix factors. McCulloch and Puffer credibly testified that the MSOP clinicians were not applying and scoring the Matrix factors in a consistent manner on committed individuals at the MSOP. Dr. Mischelle Vietanen ("Dr. Vietanen"), the former MSOP Clinical Supervisor, credibly testified that she frequently saw individuals' scores on the Matrix factors fluctuate, due to changes in staffing, and that she was concerned by the lack of inter-rater reliability of the Matrix factors. Persons credibly testified that newer clinicians are more likely to give lower Matrix scores. The Site Visit Auditors expressed concerns regarding the scoring accuracy and consistency of scoring of the Goal Matrix across the MSOP assessors.

84. Despite the critical reports by external reviewers, the MSOP has not implemented any system to determine how clinicians are scoring the Matrix factors or whether there is any consistency in scoring the Matrix factors.

85. The MSOP did not provide training to all staff on the Matrix factors until 2013 and 2014, and the MSOP did not provide any training on the Matrix scoring until 2014. Dr. Vietanen credibly testified that she did not receive any training on the Matrix factors.

86. Inconsistent scoring on the Matrix factors can slow treatment progression. Puffer and Dr. Fox credibly testified that inconsistency in scoring the Matrix factors could affect a committed individual's ability to progress in treatment phase.

87. To progress in treatment phase, a committed individual must have at least two consecutive quarters with no major Behavioral Expectation Reports ("BERs"), even if the major BERs are not related to sexual offending. Elsen credibly testified that she has never progressed an individual through the MSOP treatment program who has not achieved two consecutive quarters with no major BERs as required by the MSOP's phase progression policy.

88. Minor BERs, including those unrelated to sexual offending, can prevent a committed individual from progressing in treatment phase. Hébert and Berg credibly testified that minor BERs can hinder treatment progression. Bolte credibly testified that receiving multiple minor BERs can prevent phase progression. Lewis credibly testified that minor BERs

can be considered in making phase progression decisions.

89. BERs can also affect scoring on the Matrix factors. Bolte credibly testified that he was told by clinical staff that his Matrix scores were lowered due to BERs.

90. Committed individuals can be regressed in treatment as a result of receiving major BERs. Foster was moved from Phase II back to Phase I after receiving a major BER for possessing adult-themed pornography.

91. As of October 2012, the MSOP phase progression design time line indicated a range of six to nine years for a "model client" to progress from Phase I through Phase III.

92. Currently, the treatment program at the MSOP does not have any delineated end point.

93. The lack of clear guidelines for treatment completion or projected time lines for phase progression impedes a committed individual's motivation to participate in treatment for purposes of reintegration into the community. Bolte credibly testified that when he was initially committed to the MSOP, he was told that he would be "fast-tracked" through the program and would be one of the first individuals to ever complete the program, but that now, after years of being in Phase I without progressing, he has lost motivation to participate in the treatment program. The OLA Report found that lack of client motivation has been a barrier to progression in treatment at the MSOP. The Site Visit Auditors reported that committed individuals "consistently expressed concerns

that slow movement through the program . . . was demoralizing, increased hopelessness, and negatively impacted motivation and engagement." The Governor's Commission reported that "those who have made progress in treatment should have an expectation that their confinement in civil commitment will end one day."

94. Some committed individuals at the MSOP, such as Steiner, have been confined for more than twenty years.

95. Progression through the treatment program at MSOP has historically been very slow. As of June 30, 2010, approximately fifty percent of committed individuals at the MSOP were in Phase I, twenty-one percent were in Phase II, seven percent were in Phase III, and twenty-one percent had declined treatment. As of February 2011, only thirty committed individuals at the MSOP were in Phase III. As of the first quarter of 2012, sixty-five percent of committed individuals at the MSOP were in Phase I, twenty-five percent were in Phase II, four percent were in Phase III, and six percent had declined treatment.

96. Committed individuals only began progressing through the treatment phases at the MSOP in recent years. As of the fourth quarter of 2014, thirty-nine percent of committed individuals at the MSOP were in Phase I, fifty-one percent were in Phase II, nine percent were in Phase III, and one percent had declined treatment.

97. Independent evaluators and outside experts have repeatedly criticized the lack of progression. Every year since 2006, the Site Visit Auditors have

voiced concerns in all of their evaluation reports to the MSOP about the disproportionately high number of committed individuals in Phase I compared to those in Phase III of the treatment program. In 2011 and 2012, the Site Visit Auditors reported that "[s]low movement through the program and the multiple required legislative steps for discharge in Minnesota hampers program effectiveness" and that "[t]he lack of clients 'getting out' can be demoralizing to clients and staff, and in the long run may increase security concerns." These concerns have never been successfully addressed.

98. Some committed individuals in the Alternative Program have been in Phase I for over five years or in Phase II for over five years. Puffer credibly testified that some committed individuals in the Alternative Program may not be able to complete the treatment program due to cognitive capacity limitations.

99. As of March 31, 2013, the MSOP identified 131 individuals who had been in Phase I for 36 months or more, 67 individuals who had been in Phase II for 36 months or more, and 14 individuals who had been in Phase III for 36 months or more.

100. Although CPS was originally designed to last approximately nine months, no committed individual at the MSOP has moved through CPS in nine months or less. The first two individuals who were ever placed at CPS, sometime before 2010, John Rydberg ("Rydberg") and Thomas Duvall ("Duvall"), still remain at CPS.

101. There are committed individuals at the MSOP who have reached the maximum benefit and effect of treatment at the MSOP. Dr. Elsen identified individuals who had reached "maximum treatment effect" at the MSOP who could not receive any further benefit from sex offender treatment. Similarly, the Site Visit Auditors reported that there are individuals at the MSOP who may have reached the maximum benefit within the treatment program and who could receive services in a different setting.

102. The MSOP has no system or policy in place to ensure that committed individuals who are not progressing through the treatment phases in a timely manner are reviewed by clinicians at the MSOP or by external reviewers. Haaven credibly testified that the most important change he would like to see at the MSOP is a mechanism to identify barriers to phase progression.

103. Some committed individuals at the MSOP have regressed as a result of changes to the treatment program phase progression model. For example, Steiner had progressed to the last phase of the treatment program; the MSOP then adopted the current three-phase model, resulting in Steiner starting over and moving back to the MSOP Moose Lake facility.

104. Clinical staffing shortages and turnover at the MSOP have hindered the ability of the MSOP to provide treatment as designed and have impeded treatment progression of committed individuals at the MSOP. White credibly testified that since 2008, shortages in the clinical staffing at the MSOP have impacted the therapeutic alliance between committed

individuals and their clinicians and have slowed down the treatment progression for some individuals. Berg credibly testified that a high vacancy rate of clinicians and a high turnover rate of clinicians at the MSOP could slow treatment progress. McCulloch acknowledged that staffing shortages have been a reoccurring problem at the MSOP due to staffing vacancies. Dr. Fox confirmed that the MSOP has experienced staff shortages and that, as a result of those shortages, clinicians' caseloads have tended to be greater at times, which have affected the quality of treatment. The Site Visit Auditors also confirmed that frequent staff turnover, particularly at Moose Lake, has negatively impacted therapeutic treatment engagement.

105. Committed individuals at the MSOP are uncertain and unaware of how to progress through treatment. For example, Bolte credibly testified that "[n]obody knows how to complete the program." Terhaar credibly testified that he is confused as to what scores he needs to progress from Phase I to Phase II of the treatment program. Lonergan credibly testified that he does not know what he needs to do to progress to Phase II of the treatment program.

106. Some individuals confined at the MSOP have stopped participating in treatment, despite satisfying phase progression requirements, because they knew it was futile and they would never be released. Thuringer credibly testified that some individuals have been confined at the MSOP for over twenty years and have completed the treatment program three times, but are currently only in Phase II due to subsequent treatment program changes; he concluded it would be "futile" to

even attempt to progress through the treatment program. Dr. Peterson credibly testified that some individuals do not participate in treatment because they do not see the purpose of participating if they do not believe they will ever be discharged from the MSOP, or because they previously participated in treatment but were forced to restart the treatment program when the program changed.

Risk Assessments

107. There are individuals who meet the reduction in custody criteria or who no longer meet the commitment criteria, but who continue to be confined at the MSOP.

108. Defendants are not required under the MCTA to conduct periodic risk assessments after the initial commitment to determine if individuals meet the statutory requirements for continued commitment or for discharge.

109. The large majority of states require regular risk assessments of all civilly committed sex offenders. For example, the Wisconsin and New York civil commitment statutes require annual risk assessments, and the Texas civil commitment statute requires biannual reviews and a hearing before a court to determine whether an individual no longer meets the criteria for commitment.

110. As of 2011, Minnesota and Massachusetts were the only two states that did not require annual reports to the courts regarding each sex offender's continuing need to be committed.

111. Significantly, a full risk assessment is the only way to determine whether a committed individual meets the discharge criteria.

112. Risk assessments are only valid for approximately twelve months. Johnston and Puffer credibly testified that if a risk assessment has not been conducted within the past year on civilly committed individuals at the MSOP, the MSOP does not know whether those individuals meet the statutory criteria for commitment or for discharge. Hébert credibly testified that all juvenile-only offenders who have not had a risk assessment within the last year should be reassessed to determine whether they meet the statutory criteria for continued commitment or for discharge.

113. Risk assessments need to be performed regularly to account for new research, aging of the individual, and to track an individual's changes through treatment.

114. The MSOP does not conduct risk assessments on a regular, periodic basis to determine whether an individual continues both to need further inpatient treatment and supervision for a sexual disorder and continues to pose a danger to the public.

115. The MSOP historically has not conducted risk assessments on civilly committed individuals outside of the petitioning process. Dr. Elsen, Puffer, Berg, and Dr. Fox credibly testified that risk assessments are only performed when a petition for a reduction in custody is filed.

116. In 2013, DHS attempted to implement a rolling risk assessment process. Commissioner Jesson,

in a letter to Johnston, stated that the MSOP will implement a new plan so that all Class Members receive a full risk assessment on a rolling schedule. Although Hébert and Johnston testified that the MSOP had begun to undertake one or two risk assessments per month outside the petitioning process, many witnesses were not aware of Commissioner Jesson's letter or the proposed directive. For example, Dr. Elsen was unaware that the MSOP was conducting any rolling risk assessments. Puffer credibly testified that he had never seen Commissioner Jesson's letter regarding rolling risk assessments. Dr. Anne Pascucci ("Dr. Pascucci"), a Forensic Evaluator at the MSOP, credibly testified that she had not heard of Commissioner Jesson directing the MSOP to begin conducting risk assessments on a rolling basis. Dr. Fox credibly testified that the MSOP had not established a new policy regarding rolling risk assessments, but the MSOP had been "having conversations about doing more risk assessments on a more regular basis." At the proposed rolling assessment rate, it would take between thirty and sixty years to finish just one risk assessment for each Class Member currently committed at the MSOP.

117. The MSOP could hire outside assessors to perform these rolling risk assessments. Hébert and Johnston credibly testified that the MSOP could hire outside experts to conduct risk assessments.

118. Only recently has the MSOP begun conducting risk assessments outside of the petitioning context. Recently, Dr. Pascucci was asked by Dr. Lauren Herbert ("Dr. Herbert"), the MSOP Risk Assessment Director, to conduct a risk assessment on

Class Member Chad Plank ("Plank"). This is the first risk assessment the MSOP has ever conducted outside of the petitioning process.

119. There are currently eight risk assessors employed by the MSOP.

120. The MSOP has an internal forensic risk assessment unit. Risk assessments are not conducted by independent examiners outside of the MSOP unless a committed individual has a petition before the Judicial Appeal Panel (the "Supreme Court Appeal Panel" or the "SCAP").

121. Outside evaluators and reports, including the OLA Report, have discussed the benefits of independent reviewers for committed individuals. The OLA Report found that requiring an independent review body would shelter the MSOP from making unpopular decisions and would ensure that decisions on reduction in custody petitions are based on risk, not treatment performance.

122. There are no techniques or actuarial tools currently available for conducting an assessment of long-term risk for committed individuals with juvenile-only offenses. Dr. Pascucci credibly testified that current actuarial assessment tools are not validated for juvenile-only offenders, and, therefore, risk assessment instruments cannot quantitatively assess risk for juvenile-only offenders. Dr. Amanda Powers-Sawyer ("Dr. Powers-Sawyer"), former Interim Clinical Director at the MSOP, credibly testified that long-term risk for juvenile-only offenders is impossible to calculate. The Rule 706 Experts reported that there are no techniques currently available for conducting an

assessment of long-term risk for individuals with juvenile-only sexual offenses.

123. Juvenile-only offenders have low recidivism rates compared to adult offenders. Dr. Powers-Sawyer credibly testified that the majority of juvenile-only offenders do not recidivate. Dr. Freeman credibly testified that the re-offense rate for juvenile sex offenders is approximately five percent. In comparison to the sixty-seven juvenile-only offenders currently committed to the MSOP, McCulloch credibly testified that only two or three juvenile-only offenders have been committed to the Wisconsin sex offender program, and Dr. Freeman credibly testified that no juvenile-only offenders are committed to the New York sex offender program, as juvenile-only offenders cannot be civilly committed in New York.

124. The MSOP does not have a manual or guide regarding how to conduct risk assessments.

125. The MSOP risk assessors consider whether a committed individual has major or minor BERs when conducting a risk assessment.

126. The MSOP risk assessors most commonly use the Static-99R and the Stable-2007 as actuarial risk assessment tools.

127. The Static-99R is a risk assessment tool that measures static factors, which are generally unchangeable in nature, whereas the Stable-2007 measures dynamic risk factors that are changeable in nature. The Static-99R is scored by assessing the offender on a list of objective criteria, including the number of prior sexual offenses, whether they had unrelated victims, and age at release, which provides

predictive recidivism rates based on the corresponding risk category. The Static-99R and the Stable-2007 can be combined to assess an overall risk category.

128. Both the Static-99R and Stable-2007 have limitations to their use as risk assessment tools. The Static-99R does not distinguish age for an individual who is over sixty years old or an individual who is over ninety years old. Dr. Herbert credibly testified that both the Static-99R and the Stable-2007 should be used with caution on individuals with cognitive disabilities. Dr. Pascucci credibly testified that the Stable-2007 is not generally used on individuals with cognitive limitations or severe mental illness and that when it is used, it is used with caution.

129. The MSOP risk assessors did not consider the statutory criteria in risk assessment reports until late 2010 or early 2011.

130. The MSOP risk assessors do not receive any formal legal training. Dr. Pascucci and Dr. Jennifer Jones ("Dr. Jones"), a Risk Assessor at the MSOP, credibly testified that they did not receive any training regarding the constitutional standards for commitment or discharge.

131. The standard set forth in the Minnesota Supreme Court's *Call v. Gomez* decision in 1995 was not incorporated into the language of the MSOP risk assessments until the risk assessment for Terhaar in June 2014.

Petitioning Process for Reduction in Custody

132. The MCTA provides that the process for a "reduction in custody," or a "transfer out of a secure

treatment facility, a provisional discharge, or a discharge from commitment," begins with filing a petition with the Special Review Board ("SRB"). Minn. Stat. § 253D.27, subds. 1 & 2.

133. At least six months after initial commitment or a final decision on a prior petition, a committed individual or the Executive Director of the MSOP may file a petition for a reduction in custody with the SRB. Minn. Stat. § 253D.27, subd. 2.

134. Other state commitment statutes, including the Wisconsin and New York statutes, allow committed individuals to petition the committing court at any time to be discharged or for a reduction in custody.

135. Upon the filing of a petition, the SRB holds a hearing on the petition, and within thirty days of the hearing, the SRB issues a report with written findings of fact and recommendations of denial or approval of the petition to the SCAP. Minn. Stat. § 253D.27, subds. 3 & 4.

136. Petitions are generally heard in the order in which they are received.

137. The SCAP has the sole authority to grant a reduction in custody. No reduction in custody recommended by the SRB is effective until it has been both reviewed by the SCAP and until fifteen days after the SCAP issues an order affirming, modifying, or denying the SRB's recommendation. Minn. Stat. § 253D.27, subd. 4.

138. Upon receipt of the SRB's recommendation, the committed individual, the county attorney of the county from which the person was committed or the

county of financial responsibility, or the commissioner may petition the SCAP for a rehearing and reconsideration of the SRB's recommendation. Minn. Stat. § 253D.28, subd. 1(a). The SCAP hearing must be held "within 180 days of the filing of the petition [with the SCAP] unless an extension is granted for good cause." *Id.* If no party petitions the SCAP for a rehearing or reconsideration within thirty days, the SCAP shall either "issue an order adopting the recommendations of the [SRB] or set the matter on for a hearing." Minn. Stat. § 253D.28, subd. 1(c).

139. At the SCAP rehearing, "[t]he petitioning party seeking discharge or provisional discharge bears the burden of going forward with the evidence, which means 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).

140. At the SCAP rehearing, the petitioning party seeking a transfer "must establish by a preponderance of the evidence that the transfer is appropriate." Minn. Stat. § 253D.28, subd. 2(e).

141. A party "aggrieved by an order of the [SCAP]" may appeal the SCAP decision to the Minnesota Court of Appeals. Minn. Stat. § 253D.28, subd. 4; *see also* Minn. Stat. § 253B.19, subd. 5.

142. To be transferred out from a secure treatment facility, the SCAP must be satisfied that transfer is appropriate based on five factors: "(1) the person's clinical progress and present treatment needs; (2) the need for security to accomplish continuing treatment; (3) the need for continued institutionalization; (4) which facility can best meet the person's needs; and

(5) whether transfer can be accomplished with a reasonable degree of safety for the public." Minn. Stat. § 253D.29, subd. 1.

143. For a provisional discharge, the SCAP must be satisfied that "the committed person is capable of making an acceptable adjustment to open society" based on two factors: "(1) whether the committed person's course of treatment and present mental status indicate there is no longer a need for treatment and supervision in the committed person's current treatment setting; and (2) whether the conditions of the provisional discharge plan will provide a reasonable degree of protection to the public and will enable the committed person to adjust successfully to the community." Minn. Stat. § 253D.30, subd. 1.

144. For a full discharge, the SCAP must be satisfied that, after a hearing and recommendation by a majority of the SRB, "the committed person is capable of making an acceptable adjustment to open society, is no longer dangerous to the public, and is no longer in need of inpatient treatment and supervision." Minn. Stat. § 253D.31. In determining whether a discharge shall be recommended, the SRB and the SCAP "shall consider whether specific conditions exist to provide a reasonable degree of protection to the public and to assist the committed person in adjusting to the community." *Id.*

145. The discharge criteria is more stringent and harder to prove than the commitment criteria.

146. The SRB and the SCAP, with limited exception, will not grant provisional discharge or discharge without the support of the MSOP. The SRB

nearly always follows the MSOP's recommendation. Dr. Fox credibly testified that the SRB and the SCAP have agreed with and granted petitions that the MSOP has supported and that she could not recall the SCAP not agreeing with the MSOP's recommendation in support of an individual's petition. Deputy Commissioner Barry credibly testified that the SRB generally follows the MSOP's recommendations for provisional discharge or discharge.

147. Since January 1, 2010, the SRB has recommended granting twenty-six petitions for transfer, eight petitions for provisional discharge, and no petitions for discharge.

148. The MSOP supported all of the provisional discharge petitions that were recommended to be granted by the SRB.

149. As of July 2014, the SCAP has granted transfer to CPS twenty-eight times, provisional discharge once, and full discharge zero times.

150. 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.

151. There is no time limit on the SCAP decisions.

152. The SRB and the SCAP petitioning process, from the filing of the initial petition to receiving a final SCAP decision, can take years. Karsjens credibly testified that he filed a petition for a reduction in custody on October 11, 2011, and he did not receive a final order until June 10, 2013. The petitioning process

for Duvall took approximately five years. Deputy Commissioner Barry credibly testified that some petitions can take longer than five years to complete the petitioning process. Johnston credibly testified that these time lines for the SRB hearings are too long.

153. As of June 2014, approximately 105 SRB petitions were pending decision and 48 petitions were pending a SCAP decision.

154. The shortest number of days between the time a petition is filed and the time of the hearing on the petition is twenty-nine days. This time period referred to Terhaar's petitioning process, which occurred after the Rule 706 Experts issued a report on May 18, 2014, 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.

155. The MSOP has previously attempted to address delays in the petitioning process, but has not attempted to address the problem recently. In 2013, Commissioner Jesson set a goal of having petitions supported by the MSOP heard more quickly.

156. The SRB and the SCAP process is unduly lengthy and is bogged down with difficult procedures; the process denies individuals the services necessary to navigate the process.

157. These delays, in substantial part, are a result of insufficient funding and staffing. Berg and Puffer credibly testified that the MSOP lacks sufficient staff

to complete the reports needed by the SRB and the SCAP.

158. 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.

159. A committed individual retains the right to the writ of habeas corpus during the petitioning process. Minn. Stat. § 253B.23, subd. 5. However, the 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.

160. There is no bypass mechanism available for individuals to challenge their commitment.

161. Defendants are not required under the MCTA to petition for transfer or reduction in custody of committed individuals who meet the statutory requirements for such a reduction in custody.

162. There is no policy or practice at the MSOP, nor a requirement in the statute, that requires the MSOP to file a petition on an individual's behalf, even if the MSOP knows or reasonably believes that the individual no longer satisfies the statutory or constitutional criteria for commitment or for discharge.

163. Defendants could choose and have the discretion to file a petition for a reduction in custody on behalf of committed individuals at the MSOP.

164. The MSOP knows that there are Class Members who meet the reduction in custody criteria or who no longer meet the commitment criteria but who continue to be confined at the MSOP.

165. 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.

166. The MSOP had never filed a petition for a reduction in custody on behalf of a committed individual before 2013.

167. The 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. The seven petitions were for six individuals in the Alternative Program who were designated for transfer to Cambridge, but who ultimately were never transferred to Cambridge, and for Terhaar for transfer to CPS.

168. The MSOP has only filed a petition for transfer to CPS on behalf of one individual in the history of the program. In October 2014, Johnston filed a petition for transfer to CPS on behalf of Terhaar. Terhaar credibly testified that no one from the MSOP told him about the filing of the petition on his behalf for transfer to CPS, and that he wanted the petition to be for his discharge from the MSOP rather than for his transfer to CPS.

169. The MSOP has not filed a petition on behalf of any juvenile-only offender except Terhaar.

170. The MSOP does not have an established process or practice to determine whether to petition on behalf of a committed individual.

171. The MSOP's SRB policy states that when a petition for provisional discharge is supported by the treatment team, the MSOP staff are authorized to assist the individual petitioner with a provisional discharge plan.

172. The MSOP only assists committed individuals who are in Phase III of treatment with provisional discharge plans.

173. Although a committed individual must have a fully completed provisional discharge plan to support a provisional discharge petition, the MSOP does not assist committed individuals who are in Phase I or Phase II in creating a provisional discharge plan.

174. The MSOP does not provide legal advice to committed individuals regarding filing a petition.

175. Individuals confined at the MSOP have expressed confusion and uncertainty regarding the petitioning process, and some have been deterred from petitioning due to the daunting petitioning process. For example, Terhaar credibly testified that he has not filed a petition for a reduction in custody because the petitioning process is very long and complicated, and he does not know how to navigate the petitioning process. Foster credibly testified that he did not know about the petitioning form or process until another committed individual explained the form and process to him, after he had been committed for approximately six years.

176. Between January 2010 and June 2014, 441 committed individuals at the MSOP who were potentially eligible for discharge had not filed a petition for a reduction in custody.

177. The MSOP has never supported a full discharge petition.

178. The MSOP has supported fewer than ten petitions for provisional discharge.

179. The MSOP will only support a petition for a reduction in custody if the petitioning individual fully completes the treatment program. Commissioner Jesson credibly testified that the MSOP will only support individuals for discharge if they had been successful in finishing treatment and defined "successful" to mean "finished." Johnston credibly testified that the MSOP's practice is that committed individuals must be in Phase III for the MSOP to support their petition.

180. The MSOP has only supported one petition for transfer to CPS from a committed individual in Phase I. Dr. Fox credibly testified that the MSOP has only supported a petition for transfer to CPS for an individual in Phase I in one case, and that was for Terhaar. Dr. Pascucci credibly testified that she has never recommended that a committed individual in Phase I be transferred to CPS.

181. Within the last year, the MSOP has supported one petition for transfer to CPS from a committed individual in Phase II. Johnston credibly testified that "[i]t wasn't until more recently in the last year that treatment team support for transfer to CPS while a client is in Phase II has occurred."

182. Any conclusion of law which may be deemed a finding of fact is incorporated herein as such.

Based upon the above findings of fact, the Court hereby makes the following:

CONCLUSIONS OF LAW

Jurisdiction

1. The Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331.

2. The United States Supreme Court has held that to have standing to invoke the federal court's jurisdiction, a plaintiff must show the following:

> (1) "injury in fact," by which we mean an invasion of a legally protected interest that is "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; . . . (2) a causal relationship between the injury and the challenged conduct, by which we mean the injury "fairly can be traced to the challenged action of the defendant," and has not resulted "from the independent action of some third party not before the court"; . . . and (3) a likelihood that the injury will be redressed by a favorable decision, by which we mean that the "prospect of obtaining relief from the injury as a result of a favorable ruling" is not "too speculative."

See Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 663-64 (1993) (internal citations omitted).

3. Plaintiffs have standing in this case. Contrary to Defendants' assertion that Plaintiffs allege

merely a generalized concern, Plaintiffs have shown that all Class Members have suffered an injury in fact—the loss of liberty in a manner not narrowly tailored to the purpose for commitment. Each Class Member has been harmed by not knowing whether they continue to meet the criteria for commitment to the MSOP through regular risk assessments. Each Class Member has been harmed by the treatment program's structural problems, resulting in delays in progression.

4. Plaintiffs have shown that each Class Member has been harmed and their liberty has been implicated as a result of Defendants' actions. For example, Defendants created the MSOP's treatment program structure, developed the phase progression policies, and had the discretion to conduct periodic risk assessments of each Class Member and to petition on behalf of the Class Members, but have chosen not to do so. By failing to provide the necessary process, Defendants have failed to maintain the program in such a way as to ensure that all Class Members are not unconstitutionally deprived of their right to liberty.

5. Plaintiffs have shown that each Class Member's injury with respect to their liberty interests will likely be redressed by a favorable decision, as is exemplified through the possible remedies proposed below.

Plaintiffs' Facial Challenge

6. A "plaintiff can only succeed in a facial challenge by establishing that no set of circumstances exists under which the Act would be valid, i.e., that the law is unconstitutional in all of its applications." *Wash.*

State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 (2008) (internal quotation omitted).

7. The Due Process Clause of the Fourteenth Amendment of the United States Constitution provides that "[n]o state shall . . . deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV § 1.

8. "[T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (internal quotation omitted); *see also Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (noting that the Supreme Court has "emphasized time and again that the touchstone of due process is protection of the individual against arbitrary action of government") (internal quotation omitted).

9. Substantive due process protects individuals against two types of government action: action that "shocks the conscience" or "interferes with rights implicit in the concept of ordered liberty." *United States v. Salerno*, 481 U.S. 739, 746 (1987); *see also Seegmiller v. LaVerkin City*, 528 F.3d 762 (10th Cir. 2008).

10. State and federal caselaw has long recognized that civil confinement is a "massive" curtailment of liberty. *Vitek v. Jones*, 445 U.S. 480, 491-92 (1980); *Addington v. Texas*, 441 U.S. 418, 425 (1979) ("[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."); *In re Blodgett*, 510 N.W.2d 910, 914 (Minn. 1994) ("To live one's life free of physical

restraint by the state is a fundamental right; curtailment of a person's liberty is entitled to substantive due process protection.").

11. Substantive due process requires that civil committees may be confined only if they are both mentally ill and pose a substantial danger to the public as a result of that mental illness. *See Call v. Gomez*, 535 N.W.2d 312, 319 (Minn. 1995); *see also Foucha v. Louisiana*, 504 U.S. 71, 77 (1992) ("Even if the initial commitment was permissible," a civil commitment may not "constitutionally continue after that basis no longer exist[s].") (internal citations omitted); *see also id.* (explaining that a "committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous").

12. When a fundamental right is involved, courts must subject the law to strict scrutiny, placing the burden on the state to show that the law is narrowly tailored to serve a compelling state interest. *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) ("[T]he Fourteenth Amendment forbids the government to infringe . . . fundamental liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.") (internal citations and quotations omitted) (emphasis in original); *Gallagher v. City of Clayton*, 699 F.3d 1013, 1017 (8th Cir. 2012) (noting that, where legislation infringes upon a fundamental right, such legislation "must survive strict scrutiny—the law must be 'narrowly tailored to serve a compelling state interest'") (internal citations omitted).

13. The Court concludes that the strict scrutiny standard applies because Plaintiffs' fundamental right to live free of physical restraint is constrained by the curtailment of their liberty. *See, e.g.*, *Foucha*, 504 U.S. at 80 ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.") (internal citation omitted); *Jones v. United States*, 463 U.S. 354, 361 (1983) ("[C]ommitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.") (internal citation omitted); *see also Cooper v. Oklahoma*, 517 U.S. 348, 368-69 (1996) ("The requirement that the grounds for civil commitment be shown by clear and convincing evidence protects the individual's fundamental interest in liberty."); *Reno v. Flores*, 507 U.S. 292, 316 (1993) (O'Connor, J., concurring) ("The institutionalization of an adult by the government triggers heightened, substantive due process scrutiny."); *Vitek*, 445 U.S. at 492 ("The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement."); *Blodgett*, 510 N.W.2d at 914 ("The state must show a legitimate and compelling interest to justify any deprivation of a person's physical freedom.").

14. This case is distinguishable from other challenges to the involuntary confinement of sex offenders where it was represented to the court that the program's anticipated duration of completion was a few years or only *potentially* indefinite; here, not one offender has been released from the MSOP program after over twenty years. *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 364 (1997) (stating that "commitment under the Act is only *potentially* indefinite" because "[t]he maximum amount of time an individual can be

incapacitated pursuant to a single judicial proceeding is one year" and "[i]f Kansas seeks to continue the detention beyond that year, a court must once again determine beyond a reasonable doubt that the detainee satisfies the same standards as required for the initial confinement"); *In re Linehan*, 557 N.W.2d 171, 188 (Minn. 1996) (finding that "model patients" were expected to complete the program in approximately thirty-two months and finding that, in light of this finding, the program was remedial and not punitive in nature); *Call*, 535 N.W.2d at 318 n.5 (noting the state's representation that "[a]n average patient is expected to complete the program in a minimum of 24 months").

In addition, no other case has raised a systemic challenge to section 253D or specifically addressed section 253D's failure to require regular risk assessments to determine if class members continued to meet the criteria for continued commitment or section 253D's failure to require the MSOP to initiate the petitioning process when it is aware that a committed individual likely meets the statutory discharge criteria.

15. The United States Supreme Court has held that a civil commitment statutory scheme is permitted provided that an individual is not detained past the time they are no longer dangerous or no longer have a mental illness without rendering the statute punitive in purpose or effect as to negate a legitimate nonpunitive civil objective. *See Hendricks*, 521 U.S. at 361-62. Thus, where, notwithstanding a "civil label," a statutory scheme "is so punitive either in purpose or effect as to negate the State's intention to deem it 'civil,'" a court will reject a legislature's "manifest

intent" to create a civil proceeding and "will consider the statute to have established criminal proceedings for constitutional purposes." *Id.* at 361. Moreover, "[i]f the object or purpose" of a civil commitment law is to provide treatment, "but the treatment provisions were adopted as a sham or mere pretext," such a scheme would indicate "the forbidden purpose to punish." *Id.* at 371 (Kennedy, J., concurring).

16. To satisfy the narrowly tailored standard, section 253D must ensure that individuals are committed no longer than necessary to serve the state's compelling interests.

17. The purpose for which an individual is civilly committed to the MSOP is to provide treatment to and protect the public from individuals who are both mentally ill and pose a substantial danger to the public as a result of that mental illness.

18. The Court concludes that the state has failed to demonstrate that section 253D is narrowly tailored to achieve its compelling interests.

19. First, section 253D is not narrowly tailored because the statute indisputably fails to require periodic risk assessments. In the absence of such assessments, Defendants cannot know whether any Class Members satisfy the statutory criteria for continued commitment. The MSOP has no periodic risk assessment for individuals the MSOP knows or should know no longer meet the criteria to remain confined or restricted to early phases of the progression program. The statute, on its face, allows the continued civil commitment of sex offenders, even after they no longer meet the statutory criteria for commitment or meet the

criteria for discharge or reduction in custody. By not providing for periodic risk assessments, the statute, on its face, authorizes prolonged commitment, even after committed individuals no longer pose a danger to the public and need further inpatient treatment and supervision for a sexual disorder. The statute is therefore 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.

20. Second, section 253D is not narrowly tailored because it fails to provide a judicial bypass mechanism to the statutory reduction in custody process. Section 253D provides for a single process to obtain transfer, provisional release, or full discharge. As noted above, the SRB and the SCAP process takes too long, is burdened with difficult and cumbersome procedures, and denies committed individuals services necessary to navigate the process. The SRB and the SCAP process, and its corresponding duration and procedures, are insufficient to meet this standard. Neither the habeas process nor a Rule 60 motion provide sufficient bypass because neither provides the right to counsel or the right to medical professional assistance to individuals seeking those alternative processes. The failure of the statute to provide for an adequate emergency or alternative mechanism by which someone who satisfies the discharge standard can obtain release from commitment in a reasonable time period demonstrates that the statute on its face is not narrowly tailored. The Court is unpersuaded by Defendants' argument that federal habeas law already provides a series of procedures allowing federal review of Minnesota's compliance with federal constitutional standards because the habeas process does not provide the right

to counsel or the right to medical professional assistance to committed individuals seeking alternative processes. As written, section 253D contains no judicial bypass mechanism, and, as such, there is no way for Plaintiffs to timely and reasonably access the judicial process outside of the statutory discharge process to challenge their ongoing commitment. Therefore, section 253D 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.

21. Third, the Court concludes that section 253D is not narrowly tailored because the statutory discharge criteria is more stringent than the statutory commitment criteria. To be discharged from the MSOP, section 253D requires that a committed individual "no longer be dangerous" as opposed to being "highly likely to reoffend," which is the initial commitment standard. Although an individual may be initially committed to the MSOP on proof of being "highly likely to engage in harmful sexual conduct" in the future, an individual is prohibited from being discharged unless he demonstrates, among other things, that he is no longer dangerous. Because the statute renders discharge from the MSOP more onerous than admission to it, section 253D 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.

22. Fourth, the Court concludes that section 253D is not narrowly tailored because the statute impermissibly places the burden on committed individuals to demonstrate that they may be placed in a less restrictive setting upon commitment or by transfer from the MSOP. The Court concludes that the

burden of demonstrating the justification for continued confinement by clear and convincing evidence should remain on the state at all times. Because the burden to petition impermissibly shifts from the state to committed individuals, section 253D 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.

23. Fifth, the Court concludes that section 253D is not narrowly tailored because although the statutory scheme contemplates that less restrictive alternatives are available, *see* Minn. Stat. § 253D.07, subd. 3, and requires that committed individuals show by clear and convincing evidence that a less restrictive alternative is appropriate, *see id.*, the evidence demonstrates, and the Court concludes, that there are no less restrictive alternatives available upon commitment. Moreover, committed individuals can never meet the preponderance of the evidence standard to transfer to a "facility that best meets the person's needs," *see id.*, when those alternative facilities do not exist. Therefore, the Court concludes that section 253D 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.

24. Finally, the Court concludes that section 253D is not narrowly tailored because the statute does not require the state to take any affirmative action, such as petition for reduction of custody, on behalf of individuals who no longer satisfy the criteria for continued commitment. The statute's failure to require the state to petition for individuals who no longer pose a danger to the public and no longer need inpatient

treatment and supervision for a sexual disorder is a fatal flaw that renders the statute 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.

25. For the reasons set forth above, section 253D is unconstitutional on its face because no application of the statute provides sufficient constitutional protections to render the statute 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.

Plaintiffs' As-Applied Challenge

26. The Court concludes that the strict scrutiny standard also applies to Plaintiffs' as-applied challenge because Plaintiffs' substantive due process claim involves the infringement of a fundamental right.

27. Under the strict scrutiny standard, the burden is on Defendants to demonstrate that the statute, as applied, is narrowly tailored to serve a compelling state interest.

28. Confinement under civil commitment at the MSOP is constitutional only if the state determines and confirms that the basis for commitment still exists or that the statutory reduction in custody criteria is not met. It is constitutionally mandated that only individuals who constitute a "real, continuing, and serious danger to society" may continue to be civilly committed to the MSOP. *See Hendricks*, 521 U.S. at 372 (Kennedy, J., concurring). Individuals who are no longer dangerous cannot constitutionally continue to be confined at the MSOP. *See Foucha*, 504 U.S. at 77

(holding that a committed individual "may be held as long as he is *both* mentally ill *and* dangerous, but no longer") (quoting *Jones*, 463 U.S. at 368) (emphasis added). In *Call v. Gomez*, the Minnesota Supreme Court held that continued confinement of a committed individual is constitutional "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). Consistent with these statutory and constitutional requirements, when the standard for commitment is no longer met or when the standard for discharge is satisfied, the state has no authority to continue detaining the confined individual at the MSOP.

29. The Court concludes that section 253D is unconstitutional as applied because Defendants apply the statute in a manner that results in Plaintiffs being confined to the MSOP beyond such a time as they either meet the statutory reduction in custody criteria or no longer satisfy the constitutional threshold for continued commitment.

30. First, the Court finds that section 253D, as applied, is not narrowly tailored because Defendants do not conduct periodic risk assessments of civilly committed individuals at the MSOP. Defendants admit that they do not know whether many individuals confined at the MSOP meet the commitment or discharge criteria, but they do know that certain individuals could be discharged or transferred to a less restrictive facility. Although Defendants claim that the MSOP provides a risk assessment to the SRB upon the filing of a petition, Defendants do not purport to

procure periodic, independent assessments or otherwise evaluate whether an individual continues to meet the initial commitment criteria or the discharge criteria if an individual does not file a petition. This is true even after decades of confinement in the program. In addition, although the statute currently does not require risk assessments, nothing in the statute prohibits the MSOP from conducting periodic risk assessments. The MSOP has yet to fix the periodic risk assessment problem even though Defendants concede they could add periodic risk assessments at their discretion.

Despite Defendants' assertions that they have started to conduct "rolling risk assessments," this plan is insufficient to pass constitutional muster. Defendants have not hired any additional risk assessors beyond the existing department vacancies to implement this plan, and many employees of the MSOP had never heard of this plan. In addition, even if Defendants were in fact implementing such a plan, the planned one or two risk assessments per month outside of the petitioning process would take 30 to 60 years in order to assess all currently committed Class Members at the MSOP, and yet risk assessments are only valid for one year. 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.

31. Second, section 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.

32. Third, section 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.

33. Fourth, section 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.

34. Fifth, section 253D, as applied, is not narrowly tailored because there are no less restrictive alternatives. Although section 253D expressly allows for the referral of committed individuals to less restrictive alternatives, this is not occurring in practice. It is undisputed that there are individuals confined at the Moose Lake and St. Peter secure facilities who could be served in less restrictive alternatives. However, until recently, there were no less restrictive alternatives, aside from CPS, in which

to place individuals. Even now, there are simply not enough less restrictive alternatives available for committed individuals seeking transfer to less restrictive alternatives. In addition, committed individuals cannot be placed at CPS or other less restrictive alternatives upon initial commitment. Insisting on confinement at the secure facilities impinges on the individual's liberty interest, particularly given the statutorily proscribed less restrictive options, and thus the statute is not narrowly tailored, resulting in a punitive effect and application contrary to the purpose of civil commitment. *See Hendricks*, 521 U.S. at 361-62.

35. Finally, section 253D, as applied, is not narrowly tailored because, although treatment is made available, there is no meaningful relationship between the treatment program at the MSOP and discharge from custody. Progression through the phases of treatment at the MSOP has been so slow, for so many years, that treatment has never been a way out of confinement for committed individuals, especially in light of the fact that no periodic risk assessments are conducted. Most of the committed individuals get stuck in Phase I of the program, a part of the program where no specific offender-related therapy is provided, only institutional rule compliance training and preparation for therapy. The treatment program has been plagued by a lack of funding, staff shortages, and periodic alterations in the treatment program, resulting in committed individuals having to go through stoppages and starting over again. Even if the treatment that is provided has led to a reduction in risk of reoffending of some committed individuals, the previously identified risk assessment problems have nullified any such

positive effect. The lack of a meaningful relationship between the treatment program and discharge is borne out by the fact that over the past twenty-one years, very few have been progressed to Phase III, no one has been fully discharged, and only three persons have been provisionally discharged. The overall failure of the treatment program over so many years is evidence of the punitive effect and application of section 253D. *See Hendricks*, 521 U.S. at 361-62.

36. Each of the reasons set forth above are an independent reason for the Court to conclude that section 253D is unconstitutional as applied. Together, these reasons support the Court's conclusion that the statute, as applied, is not narrowly tailored to protect against individuals being confined to the MSOP beyond such time as they either satisfy the statutory reduction in custody criteria or no longer satisfy the constitutional standards for continued commitment. Instead, the statute, as applied, is a three-phased treatment system with "chutes-and-ladders"-type mechanisms for impeding progression, without periodic review of progress, which has the effect of confinement to the MSOP facilities for life. As a result, section 253D, on its face and 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.

37. Any finding of fact which may be deemed a conclusion of law is incorporated herein as such.

38. Because the Court finds the program is unconstitutional on its face and as applied (Counts I and II), and because any remedy fashioned will address the issues raised in the remaining Phase One Counts,

the Court need not address Counts III, V, VI, and VII. Counts IV and XI will be addressed under separate Order.

CONCLUSION

The Court concludes that the evidence presented over the course of the six-week trial in this case demonstrates that Minnesota's civil commitment statutory scheme is unconstitutional both on its face and as applied. Contrary to Defendants' assertions, the Court concludes that the "shocks the conscience" standard does not apply to Plaintiffs' facial and as-applied challenges because Plaintiffs' substantive due process claims involve the infringement of a fundamental right. *See Cooper*, 517 U.S. at 368-69; *Flores*, 507 U.S. at 316 (O'Connor, J., concurring); *Foucha*, 504 U.S. at 80; *Jones*, 463 U.S. at 361; *Vitek*, 445 U.S. at 492; *Blodgett*, 510 N.W.2d at 914. After applying the strict scrutiny standard, the Court concludes that Minnesota's civil commitment statutory scheme is not narrowly tailored and results in a punitive effect and application contrary to the purpose of civil commitment and that the MSOP, in implementing the statute, systematically continues to confine individuals in violation of constitutional principles.

Specifically, the Court concludes that section 253D is facially unconstitutional for the following six reasons: (1) section 253D indisputably fails to require periodic risk assessments and, as a result, authorizes prolonged commitment even after committed individuals no longer pose a danger to the public and need further inpatient treatment and supervision for a sexual disorder; (2) section 253D contains no judicial

bypass mechanism and, as such, there is no way for Plaintiffs to timely and reasonably access the judicial process outside of the statutory discharge process to challenge their ongoing commitment; (3) section 253D renders discharge from the MSOP more onerous than admission to it because the statutory discharge criteria is more stringent than the statutory commitment criteria; (4) section 253D authorizes the burden to petition for a reduction in custody to impermissibly shift from the state to committed individuals; (5) section 253D contemplates that less restrictive alternatives are available and requires that committed individuals show by clear and convincing evidence that a less restrictive alternative is appropriate, when there are no less restrictive alternatives available; and (6) section 253D does not require the state to take any affirmative action, such as petition for a reduction in custody, on behalf of individuals who no longer satisfy the criteria for continued commitment.

In addition, the Court further concludes that section 253D is unconstitutional as applied for the following six reasons: (1) Defendants do not conduct periodic, independent risk assessments or otherwise evaluate whether an individual continues to meet the initial commitment criteria or the discharge criteria if an individual does not file a petition; (2) those risk assessments that have been performed have not all been performed in a constitutional manner; (3) individuals have remained confined at the MSOP even though they have completed treatment or sufficiently reduced their risk; (4) discharge procedures are not working properly at the MSOP; (5) although section 253D expressly allows the referral of committed individuals to less restrictive alternatives, this is not

occurring in practice because there are insufficient less restrictive alternatives available for transfer and no less restrictive alternatives available for initial commitment; and (6) although treatment has been made available, the treatment program's structure has been an institutional failure and there is no meaningful relationship between the treatment program and an end to indefinite detention.

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. The Court must emphasize that politics or political pressures[7] cannot trump the fundamental rights of Class Members who, pursuant to state law, have been civilly committed to receive treatment. The Constitution protects individual rights even when they are unpopular. As Justice Sandra Day O'Connor sagely observed, "[a] nation's success or failure in achieving democracy is judged in part by how well it responds to those at the bottom and the margins of the social order." *Third Annual William French*

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[7] Benson credibly testified that "the politics around the program are really thick" and that "politics guide the thinking of those involved in the [release] process," which Benson described as a "political crapshoot." Benson further credibly testified that "I think this is an area where people have got to rise above the politics and do the right thing or . . . this program is going to, I think, eventually be deemed unconstitutional, and in its current form probably should be." The Task Force Report corroborated these observations, stating that "the Task Force is deeply concerned about the influence of public opinion and political pressure on all levels of the commitment process."

Memorial Lecture: A Conversation with Retired Justice Sandra Day O'Connor, 37 Pepp. L. Rev. 63, 65 (2009).

As a former Assistant County Attorney, the undersigned prosecuted sexual assault and child sexual abuse cases and, as a former Minnesota District Judge who handled many such cases, the undersigned then and now is sensitive to the interests of all individuals affected by this matter, as well as the fears and concerns of the public at large, including, of course, victims of these heinous and tragic crimes.[8] The undersigned accepts and acknowledges that it has an obligation to all citizens to not only honor their constitutional rights, but to do so without compromising public safety and the interests of justice. The balance is a delicate and important one, but it can and will be done. The Court observes that the parties and this Court are in the same position now as when this lawsuit was filed in 2011 in at least two ways. First, there are some individuals who indisputably should be discharged from the MSOP and who are being confined unconstitutionally at the MSOP. As stated by Grant Duwe, Director of Research at the DOC: "[M]any high-risk sex offenders can be managed successfully in the community. The cost of civil commitment in a high-security facility also implies that this type of commitment should be reserved only for those offenders who have an inordinately high risk to sexually reoffend." (Doc. No. 427 (February 20, 2014

[8] The Court has received numerous letters from not only victims and family members of victims of committed individuals, but also from family members of committed individuals at the MSOP as well as individuals who claim to have experienced the MSOP firsthand.

Order") at 67 n.48 (citing Doc. No. 410 ("Nelson Decl.") ¶ 2, Ex. 1, at 9).) The confinement of the elderly, individuals with substantive physical or intellectual disabilities, and juveniles, who might never succeed in the MSOP's treatment program or who are otherwise unlikely to reoffend, is of serious concern for the Court and should be for the parties as well. Importantly, provisional discharge or discharge from the MSOP does not mean discharge or release without a meaningful support network, including a transition or release plan into the community with intensive supervised release conditions. Virtually all of these offenders have been institutionalized, as the reintegration component of Phase III of this program acknowledges. Second, there are others who are truly dangerous and should remain confined at the MSOP, but for whom constitutional procedures must be followed because "[s]ubstantive due process forecloses the substitution of preventative detention schemes for the criminal justice system, and the judiciary has a constitutional duty to intervene before civil commitment becomes the norm and criminal prosecution the exception." *In re Linehan*, 557 N.W.2d at 181.

Further, the Court must emphasize how truly systemic the state's problem has become. The record before this Court shows that a number of Class Members were allowed to plead to a lesser criminal sexual conduct charge and often received concurrent sentences even though there were multiple victims involved,[9] and, as defendants, were never advised of

[9] For example, Steiner was convicted of several counts of criminal sexual conduct of varying degrees involving a number of victims, sentenced to the custody of the DOC Commissioner with his

the "collateral consequence" of what being committed to the MSOP means.[10] In some cases, defendants were allowed to enter a guilty plea, even though they proclaimed their innocence, by accepting the benefits of the plea bargain, more commonly known as an *Alford* plea.[11] It is difficult for this Court to understand why

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sentence stayed, and then stipulated to his civil commitment to the MSOP.

There are a number of cases where the plea agreement called for either a plea to a lesser charge or dismissal of other charges involving multiple victims. For two other such examples where a sex offender was allowed to plead to a lesser criminal sexual conduct charge or other counts of criminal sexual conduct were dismissed, see *Call v. Gomez*, 535 N.W.2d 312 (Minn. 1995) and *In re Ince*, 847 N.W.2d 13 (Minn. 2014).

[10] Terhaar, Bolte, and Steiner, among others, were never advised of what the MSOP entailed. At the time of his commitment to the MSOP, Steiner was told that he would be committed for three to four years, consistent with the representations made by the state to the Minnesota Supreme Court in *In re Linehan*, 557 N.W.2d 171, 188 (Minn. 1996). Steiner has been committed to the MSOP for twenty-three years.

[11] An *Alford* plea is "[a] guilty plea that a defendant enters as part of a plea bargain without admitting guilt." *Black's Law Dictionary* 71 (7th ed. 1999). The term "*Alford* plea" is named after the United States Supreme Court case of *North Carolina v. Alford*, 400 U.S. 25 (1970).

A number of committed individuals at the MSOP, including Karsjens, denied their guilt and entered an *Alford* plea, but are now having difficulty advancing past Phase I of the treatment program because they still proclaim their innocence and deny any wrongdoing.

There are circumstances under which an *Alford* plea may serve

the criminal justice system so heavily relies on plea agreements in criminal sexual conduct cases. It appears to this Court that the civil commitment process—with lower burdens of proof—is being utilized instead. This reliance on the civil commitment process is especially troubling given the provisions of Minn. Stat. § 609, specifically Minn. Stat. § 609.3455, which authorizes a mandatory ten-year period of conditional release for a first-time offender and placing an offender with prior sex offense convictions on conditional release for the remainder of the offender's life. *See* Minn. Stat. § 609.3455, subds. 6, 7. In addition, Minn. Stat. § 609 authorizes mandatory life prison sentences for "egregious first-time offenders" and repeat offenders, as well as significant increases in the presumptive sentence under certain circumstances. *See* Minn. Stat. § 609.3455. Such plea negotiations, with few exceptions, have only proved to be a disservice to the entire system and have rarely served the interests of justice.

Further, in a number of the civil commitment cases, the DOC referred the offender to the county attorney for commitment, even though the sentencing judge had imposed the mandatory ten-year conditional release to follow the prison sentence, which can be intensive supervised release and can include GPS monitoring, daily curfews, alcohol and drug testing, and other conditions of release while on supervision. *See, e.g.*, *In re Ince*, 847 N.W.2d 13 (Minn. 2014). Deferring to the mandatory conditional release imposed by the

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the interests of justice. However, as a former prosecutor and as a state and federal judge, the undersigned has never allowed or accepted an *Alford* plea.

sentencing judge, especially for those individuals convicted of sex crimes who are not evaluated to be "the worst of the worst" (i.e., the most dangerous of sexual offenders), not only addresses public safety, but also considers the constitutionally-protected liberty interests of individuals with convictions. In the words of Justice John E. Simonett:

> At issue is not only the safety of the public on the one hand and, on the other, the liberty interests of the individual who acts destructively for reasons not fully understood by our medical, biological and social sciences. In the final analysis, it is the moral credibility of the criminal justice system that is at stake.

Blodgett, 510 N.W.2d at 918. Consequently, the Court observes that, in light of the current state of Minnesota's sex offender civil commitment scheme, it is not only the "moral credibility of the criminal justice system" that is at stake today, but the credibility of the entire system, including all stakeholders that work within the system, and those affected by the system, not forgetting those who have been convicted of sex crimes, their victims, and the families of both.

The Court concludes that the Constitution requires that substantial changes be made to Minnesota's sex offender civil commitment scheme. Accordingly, the Court will hold a Remedies Phase pre-hearing conference where it will consider all remedies proposals, which could include, but would not be limited to the following:

- Requiring risk and phase placement reevaluation, with all deliberate speed, of all

current patients, starting with the elderly, individuals with substantive physical or intellectual disabilities, and juveniles;

- Requiring periodic, independent risk assessments to determine whether the clients still satisfy the civil commitment requirements and whether the treatment phase placement is proper;
- Requiring and creating a variety of alternate less restrictive facilities;
- Revising the discharge process, including the possibility of using a specialized sex offender court with authority to request information, order transfer, provisional discharge, or discharge, and order appropriate conditions and supports for individuals transitioning to the community;
- Requiring the MSOP to promptly file petitions for any person the MSOP believes does not meet the criteria for civil commitment upon arrival, may no longer meet the criteria for civil commitment, or should be transferred to an alternative facility, including for individuals that cannot be well served at the MSOP (for example, due to an individual's physical or intellectual disability);
- Requiring the MSOP to proactively and continuously develop and adjust specific treatment and discharge plans, no matter which phase a person is in;

- Requiring the MSOP to provide annual notice to all clients of the right to petition and provide assistance with the petitioning process dependent upon the client's needs;
- Requiring the state to have the burden to prove that the committed individuals meet statutory and constitutional standards for continued commitment and placement;
- Requiring the statutory standards for discharge and commitment be the same;
- Requiring a judicial bypass mechanism;
- Requiring changes to the civil commitment process to correct systemic problems and to ensure that only those who need further inpatient treatment and supervision for a sexual disorder and pose a danger to the public are civilly committed, taking into account an individual's age, adult convictions, severity of adult convictions, and physical or intellectual disability;
- Requiring the provision of qualified defense counsel and professional experts to all petitioners;
- Requiring ongoing external review and evaluation by experts to recommend changes to the MSOP treatment program processes, including an overview of the structure of the treatment program and phase progression processes;

- Requiring continued and specific training for all employees of the MSOP and for those people involved with the petitioning, commitment, or discharge process;
- Requiring a plan for educating the public on civil commitment, civil commitment alternative facilities, provisional discharge conditions, and risk of re-offense data, among other things, and requiring funding for such education; and
- Appointing a Special Master to monitor compliance with all of the remedies.[12]

The Court is hopeful that the stakeholders will fashion suitable remedies so that the Court need not consider closing the MSOP facilities or releasing a number of individuals from the MSOP with or without conditions. As the Court has stated in a number of previous orders[13] and will now say one last time, the time is now for all of the stakeholders in the criminal justice system and civil commitment system to come together and develop policies and pass laws that will not only protect the public safety and address the fears and concerns of all citizens, but will preserve the constitutional rights of the Class Members.

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[12] As the Court noted in its February 20, 2014 Order, at least one court has taken strong remedial action against a state's sex offender program and has required court monitoring over a thirteen-year time period. (*See* Doc. No. 427 (citing *Turay v. Richards*, No. C91-0664RSM, 2007 WL 983132, at *5 (W.D. Wa. Mar. 23, 2007)).)

[13] (*See, e.g.*, Doc. No. 427 ("February 20, 2014 Order") at 68; Doc. No. 828 ("February 2, 2015 Order") at 42.)

ORDER

Based upon not only the findings and conclusions of this Court, but also the entire record of this case, the Court hereby enters the following:

1. Plaintiffs' request for declaratory relief with respect to Counts I and II of their Third Amended Complaint (Doc. No. [635]) is **GRANTED**.

2. The parties shall participate in a Remedies Phase pre-hearing conference on **August 10, 2015,** at **9:00 a.m.,** to discuss the relief that they find appropriate with respect to both Counts I and II, in light of the above requirements and recommendations. In addition to counsel for the parties, the Court urges the following individuals to be present and participate in the pre-hearing conference: Governor Mark B. Dayton; Representative Kurt L. Daudt (Speaker of the House); Senator Thomas M. Bakk (Majority Leader of the Senate); Attorney General Lori Swanson; Commissioner Lucinda E. Jesson; Deputy Commissioner Anne M. Barry; Robin Vue Benson (DHS attorney); Jannine Hébert; Nancy Johnston; former Chief Justice Eric J. Magnuson (Chair of the Task Force); former Chief Judge James M. Rosenbaum (Vice Chair of the Task Force); the Honorable Joanne M. Smith (Task Force Member); Minnesota Commissioner of Corrections Tom Roy (Task Force Member); Eric S. Janus (Dean of William Mitchell College of Law and Task Force Member); Kelly Lyn Mitchell (Executive Director of the Sentencing Guidelines Commission and Task Force Member); Mark A. Ostrem (Olmstead County Attorney and Task Force Member); Ryan B. Magnus (defense attorney and Task Force Member); John Kirwin (Assistant Hennepin County Attorney);

and Donna Dunn (Executive Director of the Minnesota Coalition Against Sexual Assault and Task Force Member).[14] The conference will be presided over by the undersigned, along with United States Magistrate Judge Jeffrey J. Keyes. The conference will take place in the 7th Floor Conference Room, Warren E. Burger Federal Building and United States Courthouse, 316 North Robert Street, St. Paul, Minnesota.

3. Counts VIII, IX, and X, will be tried in the second phase of trial ("Phase Two"). Phase Two will be addressed at the Remedies Phase pre-hearing conference on August 10, 2015.

4. Counts IV, XI, XII, and XIII will be addressed under separate Order.

Dated: June15, 2015

s/Donovan W. Frank
DONOVAN W. FRANK
United States District Judge

[14] Although the Court acknowledges that it cannot compel non-parties to attend the conference, the Court invites select non-parties to the conference to fashion suitable remedies to be presented to the Court.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 15-3485

[Filed February 22, 2017]

Kevin Scott Karsjens, et al.

Appellees

v.

Emily Johnson Piper, et al.

Appellants

Minnesota House of Representatives

Amicus on Behalf of Appellant(s)

Eric Steven Janus and American Civil Liberties Union of Minnesota

Amici on Behalf of Appellee(s)

Appeal from U.S. District Court for the District of Minnesota - Minneapolis
(0:11-cv-03659-DWF)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

February 22, 2017

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans

APPENDIX E

CHAPTER 253D

CIVIL COMMITMENT AND TREATMENT OF SEX OFFENDERS

253D.01 CITATION.

This chapter may be cited as the "Minnesota Commitment and Treatment Act: Sexually Dangerous Persons and Sexual Psychopathic Personalities."

History: *2013 c 49 s 9*

253D.02 DEFINITIONS.

Subdivision 1. **Scope.** For the purposes of this chapter, the terms defined in this section have the meanings given them.

Subd. 2. **Administrative restriction.** "Administrative restriction" means any measure utilized by the commissioner to maintain safety and security, protect possible evidence, and prevent the continuation of suspected criminal acts. Administrative restriction does not mean protective isolation as defined by Minnesota Rules, part 9515.3090, subpart 4. Administrative restriction may include increased monitoring, program limitations, loss of privileges, restricted access to and use of possessions, and separation of a committed person from the normal living environment, as determined by the commissioner or the commissioner's designee. Administrative restriction applies only to committed persons in a secure treatment facility as defined in subdivision 13 who:

(1) are suspected of committing a crime or charged with a crime;

(2) are the subject of a criminal investigation;

(3) are awaiting sentencing following a conviction of a crime; or

(4) are awaiting transfer to a correctional facility.

Subd. 3. **Commissioner.** "Commissioner" means the commissioner of human services or the commissioner's designee.

Subd. 4. **Committed person.** "Committed person" means an individual committed under this chapter, or under this chapter and under section 253B.18. It includes individuals described in section 246B.01, subdivision 1a, and any person committed as a sexually dangerous person, a person with a psychopathic personality, or a person with a sexual psychopathic personality under any previous statute including section 526.10 or chapter 253B.

Subd. 5. **Committing court.** "Committing court" means the district court where a petition for commitment was decided.

Subd. 6. **Examiner.** "Examiner" has the meaning given in section 253B.02, subdivision 7.

Subd. 7. **Executive director.** "Executive director" has the meaning given in section 246B.01, subdivision 2c.

Subd. 8. **Harmful sexual conduct.** (a) "Harmful sexual conduct" means sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another.

(b) There is a rebuttable presumption that conduct described in the following provisions creates a substantial likelihood that a victim will suffer serious physical or emotional harm: section 609.342 (criminal sexual conduct in the first degree), 609.343 (criminal

sexual conduct in the second degree), 609.344 (criminal sexual conduct in the third degree), or 609.345 (criminal sexual conduct in the fourth degree). If the conduct was motivated by the person's sexual impulses or was part of a pattern of behavior that had criminal sexual conduct as a goal, the presumption also applies to conduct described in section 609.185 (murder in the first degree), 609.19 (murder in the second degree), 609.195 (murder in the third degree), 609.20 (manslaughter in the first degree), 609.205 (manslaughter in the second degree), 609.221 (assault in the first degree), 609.222 (assault in the second degree), 609.223 (assault in the third degree), 609.24 (simple robbery), 609.245 (aggravated robbery), 609.25 (kidnapping), 609.255 (false imprisonment), 609.365 (incest), 609.498 (tampering with a witness), 609.561 (arson in the first degree), 609.582, subdivision 1 (burglary in the first degree), 609.713 (terroristic threats), or 609.749, subdivision 3 or 5 (stalking).

Subd. 9. **Interested person.** "Interested person" has the meaning given in section 253B.02, subdivision 10.

Subd. 10. **Peace officer.** "Peace officer" has the meaning given in section 253B.02, subdivision 16.

Subd. 11. **Respondent.** "Respondent" means an individual who is the subject of a petition for commitment as a sexually dangerous person or a person with a sexual psychopathic personality.

Subd. 12. **Safety.** "Safety" means protection of persons or property from potential danger, risk, injury, harm, or damage.

Subd. 13. **Secure treatment facility.** "Secure treatment facility" means the Minnesota sex offender program facility in Moose Lake and any portion of the Minnesota sex offender program operated by the Minnesota sex offender program at the Minnesota Security Hospital, but does not include services or programs administered by the Minnesota sex offender program outside a secure environment.

Subd. 14. **Security.** "Security" means the measures necessary to achieve the management and accountability of patients of the facility, staff, and visitors, as well as property of the facility.

Subd. 15. **Sexual psychopathic personality.** "Sexual psychopathic personality" means the existence in any person of such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of personal acts, or a combination of any of these conditions, which render the person irresponsible for personal conduct with respect to sexual matters, if the person has evidenced, by a habitual course of misconduct in sexual matters, an utter lack of power to control the person's sexual impulses and, as a result, is dangerous to other persons.

Subd. 16. **Sexually dangerous person.** (a) A "sexually dangerous person" means a person who:

(1) has engaged in a course of harmful sexual conduct as defined in subdivision 8;

(2) has manifested a sexual, personality, or other mental disorder or dysfunction; and

(3) as a result, is likely to engage in acts of harmful sexual conduct as defined in subdivision 8.

(b) For purposes of this provision, it is not necessary to prove that the person has an inability to control the person's sexual impulses.

History: *1Sp1994 c 1 art 1 s 1-3; 1997 c 217 art 1 s 16,17; 2004 c 288 art 3 s 14-16; 2010 c 299 s 14; 2013 c 49 s 2,10,22*

253D.03 GENERAL PROVISIONS.

The provisions of section 253B.23 apply to commitments under this chapter except where inconsistent with this chapter.

History: *2013 c 49 s 11*

253D.04 REVIEW BOARD.

The commissioner shall establish a review board under section 253B.22 for facilities of the Minnesota sex offender program.

History: *2013 c 49 s 12*

253D.07 PROCEEDINGS.

Subdivision 1. **Commitment generally.** Before commitment proceedings are instituted, the facts shall first be submitted to the county attorney, who, if satisfied that good cause exists, will prepare the petition. The county attorney may request a prepetition screening report. The petition is to be executed by a person having knowledge of the facts and filed with the district court of the county of financial responsibility, as defined in section 253B.02, subdivision 4c, or the county where the respondent is present. If the

respondent is in the custody of the commissioner of corrections, the petition may be filed in the county where the conviction for which the person is incarcerated was entered.

Subd. 2. **Petition.** Upon the filing of a petition alleging that a proposed respondent is a sexually dangerous person or a person with a sexual psychopathic personality, the court shall hear the petition as provided in sections 253B.07 and 253B.08.

Subd. 3. **Secure treatment facility.** If the court finds by clear and convincing evidence that the respondent is a sexually dangerous person or a person with a sexual psychopathic personality, the court shall commit the person to a secure treatment facility unless the person establishes by clear and convincing evidence that a less restrictive treatment program is available, is willing to accept the respondent under commitment, and is consistent with the person's treatment needs and the requirements of public safety.

Subd. 4. **Period of commitment.** After a determination that a respondent is a sexually dangerous person or a person with a sexual psychopathic personality, the court shall order commitment for an indeterminate period of time and the committed person shall be transferred, provisionally discharged, or discharged, only as provided in this chapter.

Subd. 5. **Not to constitute defense.** The existence in any person of a condition of a sexual psychopathic personality or the fact that a person is a sexually dangerous person shall not in any case constitute a

defense to a charge of crime, nor relieve such person from liability to be tried upon a criminal charge.

History: *1Sp1994 c 1 art 1 s 4; 1999 c 118 s 6; 2002 c 221 s 37; 2010 c 300 s 26; 2010 c 357 s 9; 2010 c 385 s 7; 2011 c 102 art 1 s 1; 2013 c 49 s 7,22*

253D.08 COUNTY ATTORNEY ACCESS TO DATA.

Notwithstanding sections 144.291 to 144.298; 245.467, subdivision 6; 245.4876, subdivision 7; 260B.171; 260B.235, subdivision 8; 260C.171; and 609.749, subdivision 6, or any provision of chapter 13 or other state law, prior to filing a petition for commitment of a sexually dangerous person or a person with a sexual psychopathic personality, and upon notice to the proposed committed person, the county attorney or the county attorney's designee may move the court for an order granting access to any records or data, to the extent it relates to the proposed committed person, for the purpose of determining whether good cause exists to file a petition and, if a petition is filed, to support the allegations set forth in the petition.

The court may grant the motion if: (1) the Department of Corrections refers the case for commitment of a sexually dangerous person or a person with a sexual psychopathic personality; or (2) upon a showing that the requested category of data or records may be relevant to the determination by the county attorney or designee. The court shall decide a motion under this section within 48 hours after a hearing on the motion. Notice to the proposed committed person need not be given upon a showing that such notice may result in harm or harassment of interested persons or potential witnesses.

Notwithstanding any provision of chapter 13 or other state law, a county attorney considering the civil commitment of a person under this chapter may obtain records and data from the Department of Corrections or any probation or parole agency in this state upon request, without a court order, for the purpose of determining whether good cause exists to file a petition and, if a petition is filed, to support the allegations set forth in the petition. At the time of the request for the records, the county attorney shall provide notice of the request to the person who is the subject of the records.

Data collected pursuant to this section shall retain their original status and, if not public, are inadmissible in any court proceeding unrelated to civil commitment, unless otherwise permitted.

History: *2000 c 480 s 1; 2008 c 299 s 13; 2008 c 326 s 10; 2010 c 300 s 26; 2013 c 49 s 7,22*

253D.09 PETITION REQUIRED.

(a) Within 120 days of receipt of a preliminary determination from a court under section 609.1351, or a referral from the commissioner of corrections pursuant to section 244.05, subdivision 7, a county attorney shall determine whether good cause under section 253D.07 exists to file a petition, and if good cause exists, the county attorney or designee shall file the petition with the court.

(b) Failure to meet the requirements of paragraph (a) does not bar filing a petition under section 253D.07, subdivision 2, any time the county attorney determines pursuant to section 253D.07 that good cause for such a petition exists.

History: *2007 c 147 art 8 s 14; 2010 c 300 s 26; 2013 c 49 s 7,22*

253D.10 TEMPORARY CONFINEMENT.

Subdivision 1. **Jails.** During any hearing held under this chapter, or pending revocation of a provisional discharge, the court may order the committed person or proposed committed person temporarily confined in a jail or lockup but only if:

(1) there is no other feasible place of confinement for the person within a reasonable distance;

(2) the confinement is for less than 24 hours or, if during a hearing, less than 24 hours prior to commencement and after conclusion of the hearing; and

(3) there are protections in place, including segregation of the person, to ensure the safety of the person.

Subd. 2. **Correctional facilities.** (a) A person who is being petitioned for commitment under this chapter and who is placed under a judicial hold order under section 253B.07, subdivision 2b or 7, may be confined at a Department of Corrections or a county correctional or detention facility, rather than a secure treatment facility, until a determination of the commitment petition as specified in this subdivision.

(b) A court may order that a person who is being petitioned for commitment under this chapter be confined in a Department of Corrections facility pursuant to the judicial hold order under the following circumstances and conditions:

(1) The person is currently serving a sentence in a Department of Corrections facility and the court determines that the person has made a knowing and voluntary (i) waiver of the right to be held in a secure treatment facility and (ii) election to be held in a Department of Corrections facility. The order confining the person in the Department of Corrections facility shall remain in effect until the court vacates the order or the person's criminal sentence and conditional release term expire.

In no case may the person be held in a Department of Corrections facility pursuant only to this subdivision, and not pursuant to any separate correctional authority, for more than 210 days.

(2) A person who has elected to be confined in a Department of Corrections facility under this subdivision may revoke the election by filing a written notice of intent to revoke the election with the court and serving the notice upon the Department of Corrections and the county attorney. The court shall order the person transferred to a secure treatment facility within 15 days of the date that the notice of revocation was filed with the court, except that, if the person has additional time to serve in prison at the end of the 15-day period, the person shall not be transferred to a secure treatment facility until the person's prison term expires. After a person has revoked an election to remain in a Department of Corrections facility under this subdivision, the court may not adopt another election to remain in a Department of Corrections facility without the agreement of both parties and the Department of Corrections.

(3) Upon petition by the commissioner of corrections, after notice to the parties and opportunity for hearing and for good cause shown, the court may order that the person's place of confinement be changed from the Department of Corrections to a secure treatment facility.

(4) While at a Department of Corrections facility pursuant to this subdivision, the person shall remain subject to all rules and practices applicable to correctional inmates in the facility in which the person is placed including, but not limited to, the powers and duties of the commissioner of corrections under section 241.01, powers relating to use of force under section 243.52, and the right of the commissioner of corrections to determine the place of confinement in a prison, reformatory, or other facility.

(5) A person may not be confined in a Department of Corrections facility under this provision beyond the end of the person's executed sentence or the end of any applicable conditional release period, whichever is later. If a person confined in a Department of Corrections facility pursuant to this provision reaches the person's supervised release date and is subject to a period of conditional release, the period of conditional release shall commence on the supervised release date even though the person remains in the Department of Corrections facility pursuant to this provision. At the end of the later of the executed sentence or any applicable conditional release period, the person shall be transferred to a secure treatment facility.

(6) Nothing in this section may be construed to establish a right of an inmate in a state correctional facility to participate in sex offender treatment. This

section must be construed in a manner consistent with the provisions of section 244.03.

(c) The committing county may offer a person who is being petitioned for commitment under this chapter and who is placed under a judicial hold order under section 253B.07, subdivision 2b or 7, the option to be held in a county correctional or detention facility rather than a secure treatment facility, under such terms as may be agreed to by the county, the commitment petitioner, and the commitment respondent. If a person makes such an election under this paragraph, the court hold order shall specify the terms of the agreement, including the conditions for revoking the election.

History: *1998 c 313 s 22; 2008 c 299 s 10; 2008 c 326 art 2 s 5; 2010 c 300 s 26; 2013 c 49 s 4,7,22*

253D.11 STATEWIDE JUDICIAL PANEL.

Subdivision 1. **Establishment.** The Supreme Court may establish a panel of district judges with statewide authority to preside over commitment proceedings of sexually dangerous persons or persons with sexual psychopathic personalities. Only one judge of the panel is required to preside over a particular commitment proceeding. Panel members shall serve for one-year terms. One of the judges shall be designated as the chief judge of the panel, and is vested with the power to designate the presiding judge in a particular case, to set the proper venue for the proceedings, and to otherwise supervise and direct the operation of the panel. The chief judge shall designate one of the other judges to act as chief judge whenever the chief judge is unable to act.

Subd. 2. **Petitions.** If the Supreme Court creates the judicial panel authorized by this section, all petitions for civil commitment brought under section 253D.07 shall be filed with the supreme court instead of with the district court in the county where the proposed patient is present, notwithstanding any provision of section 253D.07 to the contrary. Otherwise, all of the other applicable procedures contained in this chapter and sections 253B.07 and 253B.08 apply to commitment proceedings conducted by a judge on the panel.

History: *1Sp1994 c 1 art 1 s 4; 1997 c 217 art 1 s 100; 2010 c 300 s 26; 2013 c 49 s 7,22*

253D.12 FINANCIAL RESPONSIBILITY.

Subdivision 1. **State facility.** For purposes of this section, "state facility" has the meaning given in section 246.50 and also includes a Department of Corrections facility when the respondent is confined in such a facility pursuant to section 253D.10, subdivision 2.

Subd. 2. **Share of cost of confinement.** Notwithstanding sections 246.54, 253D.10, and any other law to the contrary, when a petition is filed for commitment under this chapter pursuant to the notice required in section 244.05, subdivision 7, the state and county are each responsible for 50 percent of the cost of the person's confinement at a state facility or county jail, prior to commitment.

Subd. 3. **Reimbursement.** The county shall submit an invoice to the state court administrator for reimbursement of the state's share of the cost of confinement.

Subd. 4. **Reimbursement limit.** Notwithstanding subdivision 2, the state's responsibility for reimbursement is limited to the amount appropriated for this purpose.

History: *1999 c 216 art 6 s 6; 2008 c 299 s 14; 2008 c 326 art 2 s 11; 2010 c 300 s 26; 2013 c 49 s 7,22*

253D.13 PROCEDURES UPON COMMITMENT.

Upon commitment under this chapter, admission procedures shall be carried out under section 253B.10.

History: *2013 c 49 s 13*

253D.14 VICTIM NOTIFICATION OF PETITION AND RELEASE; RIGHT TO SUBMIT STATEMENT.

Subdivision 1. **Definitions.** As used in this section:

(1) "crime" has the meaning given to "violent crime" in section 609.1095, and includes criminal sexual conduct in the fifth degree and offenses within the definition of "crime against the person" in section 253B.02, subdivision 4a, and also includes offenses listed in section 253D.02, subdivision 8, paragraph (b), regardless of whether they are sexually motivated;

(2) "victim" means a person who has incurred loss or harm as a result of a crime, the behavior for which

forms the basis for a commitment under this chapter; and

(3) "convicted" and "conviction" have the meanings given in section 609.02, subdivision 5, and also include juvenile court adjudications, findings under Minnesota Rules of Criminal Procedure, rule 20.02, that the elements of a crime have been proved, and findings in commitment cases under this section or section 253B.18, that an act or acts constituting a crime occurred.

Subd. 2. **Notice of filing petition.** A county attorney who files a petition to commit a person under this chapter shall make a reasonable effort to provide prompt notice of filing the petition to any victim of a crime for which the person was convicted. In addition, the county attorney shall make a reasonable effort to promptly notify the victim of the resolution of the petition.

Subd. 3. **Notice of discharge or release.** Before provisionally discharging, discharging, granting pass-eligible status, approving a pass plan, or otherwise permanently or temporarily releasing a person committed under this chapter from a treatment facility, the executive director shall make a reasonable effort to notify any victim of a crime for which the person was convicted that the person may be discharged or released and that the victim has a right to submit a written statement regarding decisions of the executive director, or special review board, with respect to the person. To the extent possible, the notice must be provided at least 14 days before any special review board hearing or before a determination on a pass plan. Notwithstanding section 611A.06, subdivision 4, the

commissioner shall provide the judicial appeal panel with victim information in order to comply with the provisions of this chapter. The judicial appeal panel shall ensure that the data on victims remains private as provided for in section 611A.06, subdivision 4.

Subd. 4. **Electronic notice.** This section applies only to victims who have requested notification through the Department of Corrections electronic victim notification system, or by contacting, in writing, the county attorney in the county where the conviction for the crime occurred or where the civil commitment was filed or, following commitment, the executive director. A request for notice under this section received by the commissioner of corrections through the Department of Corrections electronic victim notification system shall be promptly forwarded to the prosecutorial authority with jurisdiction over the offense to which the notice relates or, following commitment, the executive director. A county attorney who receives a request for notification under this section following commitment shall promptly forward the request to the commissioner of human services.

Subd. 5. **Additional victim rights.** Rights under this section are in addition to rights available to a victim under chapter 611A. This provision does not give a victim all the rights of a "notified person" or a person "entitled to statutory notice" under section 253B.18, subdivision 4a, 4b, or 5; 253D.23; or 253D.27.

History: *2010 c 300 s 26; 2012 c 155 s 7; 2013 c 49 s 7,22*

253D.17 RIGHTS OF COMMITTED PERSONS; GENERALLY.

Persons committed under this chapter have the rights described in section 253B.03, except as limited under section 253D.19.

History: *2013 c 49 s 14*

253D.18 ADMINISTRATIVE RESTRICTION.

(a) A committed person has the right to be free from unnecessary or excessive administrative restriction. Administrative restriction shall not be used for the convenience of staff, for retaliation for filing complaints, or as a substitute for program treatment. Administrative restriction may not involve any further deprivation of privileges than is necessary.

(b) Administrative restriction may include separate and secure housing.

(c) Committed persons under administrative restriction shall not be limited in access to their attorney.

(d) If a committed person is placed on administrative restriction because the committed person is suspected of committing a crime, the secure treatment facility must report the crime to the appropriate police agency within 24 hours of the beginning of administrative restriction. The committed person must be released from administrative restriction if a police agency does not begin an investigation within 72 hours of the report.

(e) A committed person placed on administrative restriction because the committed person is a subject of

a criminal investigation must be released from administrative restriction when the investigation is completed. If the committed person is charged with a crime following the investigation, administrative restriction may continue until the charge is disposed of.

(f) The secure treatment facility must notify the committed person's attorney of the committed person being placed on administrative restriction within 24 hours after the beginning of administrative restriction.

(g) The commissioner shall establish policies and procedures according to section 246.014, paragraph (d), regarding the use of administrative restriction. The policies and procedures shall identify the implementation and termination of administrative restrictions. Use of administration restriction and the reason associated with the use shall be documented in the committed person's medical record.

History: *2004 c 288 art 3 s 17; 2013 c 49 s 3,22*

253D.19 RIGHTS OF PERSONS COMMITTED UNDER THIS CHAPTER.

Subdivision 1. **Limited rights.** The commissioner may limit the statutory rights described in subdivision 2 for persons committed to the Minnesota sex offender program under this chapter or with the commissioner's consent under section 246B.02. The statutory rights described in subdivision 2 may be limited only as necessary to maintain a therapeutic environment or the security of the facility or to protect the safety and well-being of committed persons, staff, and the public.

Subd. 2. **Statutory rights.** The statutory rights that may be limited in accordance with subdivision 1

are those set forth in section 144.651, subdivision 19, personal privacy; section 144.651, subdivision 21, private communications; section 144.651, subdivision 22, retain and use of personal property; section 144.651, subdivision 25, manage personal financial affairs; section 144.651, subdivision 26, meet with visitors and participate in groups; section 253B.03, subdivision 2, correspond with others; and section 253B.03, subdivision 3, receive visitors and make telephone calls. Other statutory rights enumerated by sections 144.651 and 253B.03, or any other law, may be limited as provided in those sections.

History: *2004 c 288 art 3 s 18; 2010 c 300 s 26; 2013 c 49 s 7,22*

253D.20 RIGHT TO COUNSEL.

A committed person has the right to be represented by counsel at any proceeding under this chapter. The court shall appoint a qualified attorney to represent the committed person if neither the committed person nor others provide counsel. The attorney shall be appointed at the time a petition for commitment is filed. In all proceedings under this chapter, the attorney shall:

(1) consult with the person prior to any hearing;

(2) be given adequate time and access to records to prepare for all hearings;

(3) continue to represent the person throughout any proceedings under this chapter unless released as counsel by the court; and

(4) be a vigorous advocate on behalf of the person.

History: *2013 c 49 s 15*

253D.21 NEUROLEPTIC MEDICATION.

Neuroleptic medications may be administered to a person committed under this chapter only as provided in section 253B.092.

History: *2013 c 49 s 16*

253D.22 TRANSFER TO CORRECTIONAL FACILITY.

(a) If a person has been committed under this chapter and later is committed to the custody of the commissioner of corrections for any reason, including but not limited to, being sentenced for a crime or revocation of the person's supervised release or conditional release under section 244.05; 609.3455, subdivision 6, 7, or 8; Minnesota Statutes 2004, section 609.108, subdivision 6; or Minnesota Statutes 2004, section 609.109, subdivision 7, the person shall be transferred to a facility designated by the commissioner of corrections without regard to the procedures provided in section 253D.29, subdivision 1.

(b) If a person is committed under this chapter after a commitment to the commissioner of corrections, the person shall first serve the sentence in a facility designated by the commissioner of corrections. After the person has served the sentence, the person shall be transferred to a treatment program designated by the commissioner of human services.

History: *1Sp1994 c 1 art 1 s 4; 2000 c 359 s 1; 2007 c 13 art 3 s 37; 2007 c 147 art 11 s 9; 2010 c 300 s 26; 2013 c 49 s 7,22*

253D.23 PASSES.

A committed person may be released on a pass only as provided by section 253B.18, subdivisions 4a and 4b.

History: *2013 c 49 s 17*

253D.24 RETURN OF ABSENT PERSON.

Subdivision 1. **Absent person report.** If a committed person is absent without authorization, including failure to return to the custody of the Minnesota sex offender program upon the revocation of a provisional discharge, the executive director shall report the absence to the local law enforcement agency. The executive director shall inform the committing court of the revocation or absence, and the committing court or other district court shall issue an order for the apprehension and holding of the committed person by a peace officer in any jurisdiction and transportation of the committed person to a facility operated by the Minnesota sex offender program or otherwise returned to the custody of the Minnesota sex offender program.

Subd. 2. **Department of Human Services.** An employee of the Department of Human Services may apprehend, detain, or transport an absent committed person at any time. The immunity provided under section 253B.23, subdivision 4, applies to the apprehension, detention, and transport of an absent committed person.

Subd. 3. **Crime database; missing persons entry.** Upon receiving either the report or the apprehend and hold order in subdivision 1, a law enforcement agency shall enter information on the committed person into the missing persons file of the

National Crime Information Center database according to the missing persons practices. Where probable cause exists of a violation of section 609.485, a law enforcement agency shall also seek a felony arrest warrant and enter the warrant in the National Crime Information Center database.

Subd. 4. **Disclosure of information.** For the purposes of ensuring public safety and the apprehension of an absent committed person, and notwithstanding state and federal data privacy laws, the Minnesota sex offender program shall disclose information about the absent committed person relevant to the person's apprehension and return to law enforcement agencies where the absent committed person is likely to be located or likely to travel through and to agencies with statewide jurisdiction.

Subd. 5. **Peace officers.** Upon receiving either the report or the apprehend and hold order in subdivision 1, a committed person shall be apprehended and held by a peace officer in any jurisdiction pending return to a facility operated by the Minnesota sex offender program or otherwise returned to the custody of the Minnesota sex offender program.

Subd. 6. **Jail or lockup.** A committed person detained solely under this section may be held in a jail or lockup only if:

(1) there is no other feasible place of detention for the person;

(2) the detention is for less than 24 hours; and

(3) there are protections in place, including segregation of the person, to ensure the safety of the person.

These limitations do not apply to a committed person being held for criminal prosecution, including for violation of section 609.485.

Subd. 7. **Detention and transportation.** If a committed person is detained under this section, the Minnesota sex offender program shall arrange to pick up the person within 24 hours of the time detention was begun and shall be responsible for securing transportation for the person to a facility operated by the Minnesota sex offender program, as determined by the executive director. The expense of detaining and transporting a committed person shall be the responsibility of the Minnesota sex offender program.

Subd. 8. **Apprehension; notice.** Immediately after an absent committed person is apprehended, the Minnesota sex offender program or the law enforcement agency that apprehended or returned the absent committed person shall notify the law enforcement agency that first received the absent committed person report under this section, and that agency shall cancel the missing persons entry from the National Crime Information Center computer.

History: *2010 c 300 s 26; 2011 c 102 art 2 s 2; 2013 c 49 s 7,22*

253D.27 PETITION FOR REDUCTION IN CUSTODY.

Subdivision 1. **Victim notification.** (a) This section applies only to committed persons as defined in section 253D.02, subdivision 4. The procedures in section 253D.14 for victim notification and right to submit a statement apply to petitions filed and reductions in custody recommended under this subdivision.

(b) For the purposes of this section, "reduction in custody" means transfer out of a secure treatment facility, a provisional discharge, or a discharge from commitment. A reduction in custody is considered to be a commitment proceeding under section 8.01.

Subd. 2. **Filing.** A petition for a reduction in custody or an appeal of a revocation of provisional discharge may be filed by either the committed person or by the executive director and must be filed with and considered by a panel of the special review board authorized under section 253B.18, subdivision 4c. A committed person may not petition the special review board any sooner than six months following either:

(1) the entry of judgment in the district court of the order for commitment issued under section 253D.07, subdivision 5, or upon the exhaustion of all related appeal rights in state court relating to that order, whichever is later; or

(2) any recommendation of the special review board or order of the judicial appeal panel, or upon the exhaustion of all appeal rights in state court, whichever is later. The executive director may petition at any time. The special review board proceedings are not contested cases as defined in chapter 14.

Subd. 3. **Hearing.** (a) The special review board shall hold a hearing on each petition before issuing a recommendation and report under section 253D.30, subdivision 4. Fourteen days before the hearing, the committing court, the county attorney of the county of commitment, the county attorney of the county of financial responsibility, an interested person, the petitioner and the petitioner's counsel, and the committed person and the committed person's counsel must be given written notice by the commissioner of the time and place of the hearing before the special review board. Only those entitled to statutory notice of the hearing or those administratively required to attend may be present at the hearing. The committed person may designate interested persons to receive notice by providing the names and addresses to the commissioner at least 21 days before the hearing.

(b) A person or agency receiving notice that submits documentary evidence to the special review board before the hearing must also provide copies to the committed person, the committed person's counsel, the county attorney of the county of commitment, and the county attorney of the county of financial responsibility. The special review board must consider any statements received from victims under section 253D.14.

Subd. 4. **Report.** Within 30 days of the hearing, the special review board shall issue a report with written findings of fact and shall recommend denial or approval of the petition to the judicial appeal panel established under section 253B.19. The commissioner shall forward the report of the special review board to the judicial appeal panel and to every person entitled to statutory

notice. No reduction in custody or reversal of a revocation of provisional discharge recommended by the special review board is effective until it has been reviewed by the judicial appeal panel and until 15 days after an order from the judicial appeal panel affirming, modifying, or denying the recommendation.

History: *2008 c 326 art 2 s 12; 2010 c 300 s 26; 2013 c 49 s 7,22*

253D.28 JUDICIAL APPEAL PANEL.

Subdivision 1. **Rehearing and reconsideration.** (a) A person committed as a sexually dangerous person or a person with a sexual psychopathic personality under this chapter, or committed as both mentally ill and dangerous to the public under section 253B.18 and as a sexually dangerous person or a person with a sexual psychopathic personality under this chapter; the county attorney of the county from which the person was committed or the county of financial responsibility; or the commissioner may petition the judicial appeal panel established under section 253B.19, subdivision 1, for a rehearing and reconsideration of a recommendation of the special review board under section 253D.27.

(b) The petition must be filed with the Supreme Court within 30 days after the recommendation is mailed by the commissioner as required in section 253D.27, subdivision 4. The hearing must be held within 180 days of the filing of the petition unless an extension is granted for good cause.

(c) If no party petitions the judicial appeal panel for a rehearing or reconsideration within 30 days, the judicial appeal panel shall either issue an order

adopting the recommendations of the special review board or set the matter on for a hearing pursuant to this section.

Subd. 2. **Procedure.** (a) The Supreme Court shall refer a petition for rehearing and reconsideration to the chief judge of the judicial appeal panel. The chief judge shall notify the committed person, the county attorneys of the county of commitment and county of financial responsibility, the commissioner, the executive director, any interested person, and other persons the chief judge designates, of the time and place of the hearing on the petition. The notice shall be given at least 14 days prior to the date of the hearing. The hearing may be conducted by interactive video conference under General Rules of Practice, rule 131, and Minnesota Rules of Civil Commitment, rule 14.

(b) Any person may oppose the petition. The committed person, the committed person's counsel, the county attorneys of the committing county and county of financial responsibility, and the commissioner shall participate as parties to the proceeding pending before the judicial appeal panel and shall, no later than 20 days before the hearing on the petition, inform the judicial appeal panel and the opposing party in writing whether they support or oppose the petition and provide a summary of facts in support of their position.

(c) The judicial appeal panel may appoint examiners and may adjourn the hearing from time to time. It shall hear and receive all relevant testimony and evidence and make a record of all proceedings. The committed person, the committed person's counsel, and the county attorney of the committing county or the county of financial responsibility have the right to be present and

may present and cross-examine all witnesses and offer a factual and legal basis in support of their positions.

(d) The petitioning party seeking discharge or provisional discharge bears the burden of going forward with the evidence, which means presenting a prima facie case with competent evidence to show that the person is entitled to the requested relief. If the petitioning party has met this burden, the party opposing discharge or provisional discharge bears the burden of proof by clear and convincing evidence that the discharge or provisional discharge should be denied.

(e) A party seeking transfer under section 253D.29 must establish by a preponderance of the evidence that the transfer is appropriate.

Subd. 3. **Decision.** A majority of the judicial appeal panel shall rule upon the petition. The panel shall consider the petition de novo. No order of the judicial appeal panel granting a transfer, discharge, or provisional discharge shall be made effective sooner than 15 days after it is issued. The panel may not consider petitions for relief other than those considered by the special review board from which the appeal is taken. The judicial appeal panel may not grant a transfer or provisional discharge on terms or conditions that were not presented to the special review board.

Subd. 4. **Appeal.** A party aggrieved by an order of the appeal panel may appeal that order as provided under section 253B.19, subdivision 5.

History: *2013 c 49 s 18,22; 2015 c 65 art 2 s 3*

253D.29 TRANSFER.

Subdivision 1. **Factors.** (a) A person who is committed as a sexually dangerous person or a person with a sexual psychopathic personality shall not be transferred out of a secure treatment facility unless the transfer is appropriate. Transfer may be to other treatment programs under the commissioner's control.

(b) The following factors must be considered in determining whether a transfer is appropriate:

(1) the person's clinical progress and present treatment needs;

(2) the need for security to accomplish continuing treatment;

(3) the need for continued institutionalization;

(4) which facility can best meet the person's needs; and

(5) whether transfer can be accomplished with a reasonable degree of safety for the public.

Subd. 2. **Voluntary readmission to a secure facility.** (a) After a committed person has been transferred out of a secure facility pursuant to subdivision 1 and with the consent of the executive director, a committed person may voluntarily return to a secure facility for a period of up to 60 days.

(b) If the committed person is not returned to the facility to which the person was originally transferred pursuant to subdivision 1 within 60 days of being readmitted to a secure facility, the transfer is revoked and the committed person shall remain in a secure

facility. The committed person shall immediately be notified in writing of the revocation.

(c) Within 15 days of receiving notice of the revocation, the committed person may petition the special review board for a review of the revocation. The special review board shall review the circumstances of the revocation and shall recommend to the judicial appeal panel whether or not the revocation shall be upheld. The special review board may also recommend a new transfer at the time of the revocation hearing.

(d) If the transfer has not been revoked and the committed person is to be returned to the facility to which the committed person was originally transferred pursuant to subdivision 1 with no substantive change to the conditions of the transfer ordered pursuant to subdivision 1, no action by the special review board or judicial appeal panel is required.

Subd. 3. **Revocation.** (a) The executive director may revoke a transfer made pursuant to subdivision 1 and require a committed person to return to a secure treatment facility if:

(1) remaining in a nonsecure setting will not provide a reasonable degree of safety to the committed person or others; or

(2) the committed person has regressed in clinical progress so that the facility to which the committed person was transferred is no longer sufficient to meet the committed person's needs.

(b) Upon the revocation of the transfer, the committed person shall be immediately returned to a secure treatment facility. A report documenting

reasons for revocation shall be issued by the executive director within seven days after the committed person is returned to the secure treatment facility. Advance notice to the committed person of the revocation is not required.

(c) The committed person must be provided a copy of the revocation report and informed, orally and in writing, of the rights of a committed person under this section. The revocation report shall be served upon the committed person and the committed person's counsel. The report shall outline the specific reasons for the revocation including, but not limited to, the specific facts upon which the revocation is based.

(d) If a committed person's transfer is revoked, the committed person may re-petition for transfer according to section 253D.27.

(e) Any committed person aggrieved by a transfer revocation decision may petition the special review board within seven days, exclusive of Saturdays, Sundays, and legal holidays, after receipt of the revocation report for a review of the revocation. The matter shall be scheduled within 30 days. The special review board shall review the circumstances leading to the revocation and, after considering the factors in subdivision 1, paragraph (b), shall recommend to the judicial appeal panel whether or not the revocation shall be upheld. The special review board may also recommend a new transfer out of a secure facility at the time of the revocation hearing.

History: *2010 c 300 s 26; 2011 c 102 art 1 s 1,2; 2013 c 49 s 7,22*

253D.30 PROVISIONAL DISCHARGE.

Subdivision 1. **Factors.** (a) A person who is committed as a sexually dangerous person or a person with a sexual psychopathic personality shall not be provisionally discharged unless the committed person is capable of making an acceptable adjustment to open society.

(b) The following factors are to be considered in determining whether a provisional discharge shall be granted:

(1) whether the committed person's course of treatment and present mental status indicate there is no longer a need for treatment and supervision in the committed person's current treatment setting; and

(2) whether the conditions of the provisional discharge plan will provide a reasonable degree of protection to the public and will enable the committed person to adjust successfully to the community.

Subd. 2. **Plan.** A provisional discharge plan shall be developed, implemented, and monitored by the executive director in conjunction with the committed person and other appropriate persons. The executive director shall, at least quarterly, review the plan with the committed person and submit a written report to the county attorneys of the county of commitment and the county of financial responsibility concerning the committed person's status and compliance with each term of the plan.

Subd. 3. **Review.** A provisional discharge pursuant to this chapter shall not automatically terminate. A full discharge shall occur only as provided in section

253D.31. The terms of a provisional discharge continue unless the committed person requests and is granted a change in the conditions of provisional discharge or unless the committed person petitions the special review board for a full discharge and the discharge is granted by the judicial appeal panel.

Subd. 4. **Voluntary readmission.** (a) With the consent of the executive director, a committed person may voluntarily return to the Minnesota sex offender program from provisional discharge for a period of up to 60 days.

(b) If the committed person is not returned to provisional discharge status within 60 days of being readmitted to the Minnesota sex offender program, the provisional discharge is revoked. The committed person shall immediately be notified of the revocation in writing. Within 15 days of receiving notice of the revocation, the committed person may request a review of the matter before the special review board. The special review board shall review the circumstances of the revocation and, after applying the standards in subdivision 5, paragraph (a), shall recommend to the judicial appeal panel whether or not the revocation shall be upheld. The board may recommend a return to provisional discharge status.

(c) If the provisional discharge has not been revoked and the committed person is to be returned to provisional discharge, the Minnesota sex offender program is not required to petition for a further review by the special review board unless the committed person's return to the community results in substantive change to the existing provisional discharge plan.

Subd. 5. **Revocation.** (a) The executive director may revoke a provisional discharge if either of the following grounds exist:

(1) the committed person has departed from the conditions of the provisional discharge plan; or

(2) the committed person is exhibiting behavior which may be dangerous to self or others.

(b) The executive director may revoke the provisional discharge and, either orally or in writing, order that the committed person be immediately returned to a Minnesota sex offender program treatment facility. A report documenting reasons for revocation shall be issued by the executive director within seven days after the committed person is returned to the treatment facility. Advance notice to the committed person of the revocation is not required.

(c) The committed person must be provided a copy of the revocation report and informed, orally and in writing, of the rights of a committed person under this section. The revocation report shall be served upon the committed person, the committed person's counsel, and the county attorneys of the county of commitment and the county of financial responsibility. The report shall outline the specific reasons for the revocation, including but not limited to the specific facts upon which the revocation is based.

(d) An individual who is revoked from provisional discharge must successfully re-petition the special review board and judicial appeal panel prior to being placed back on provisional discharge.

Subd. 6. **Appeal.** Any committed person aggrieved by a revocation decision or any interested person may petition the special review board within seven days, exclusive of Saturdays, Sundays, and legal holidays, after receipt of the revocation report for a review of the revocation. The matter shall be scheduled within 30 days. The special review board shall review the circumstances leading to the revocation and shall recommend to the judicial appeal panel whether or not the revocation shall be upheld. The special review board may also recommend a new provisional discharge at the time of the revocation hearing.

History: *2010 c 300 s 26; 2011 c 102 art 1 s 3; 2013 c 49 s 7,22*

253D.31 DISCHARGE.

A person who is committed as a sexually dangerous person or a person with a sexual psychopathic personality shall not be discharged unless it appears to the satisfaction of the judicial appeal panel, after a hearing and recommendation by a majority of the special review board, that the committed person is capable of making an acceptable adjustment to open society, is no longer dangerous to the public, and is no longer in need of inpatient treatment and supervision.

In determining whether a discharge shall be recommended, the special review board and judicial appeal panel shall consider whether specific conditions exist to provide a reasonable degree of protection to the public and to assist the committed person in adjusting to the community. If the desired conditions do not exist, the discharge shall not be granted.

History: *2010 c 300 s 26; 2013 c 49 s 7,22*

253D.32 SCOPE OF COMMUNITY NOTIFICATION.

Subdivision 1. **Notice and disclosure.** Notification of the public and disclosure of information under section 244.052, subdivision 4, regarding an individual who was committed under this chapter or Minnesota Statutes 1992, section 526.10, is as provided under section 244.052, subdivision 4, paragraphs (b), clause (3), and (g), and subdivision 4b, regardless of the individual's assigned risk level. The restrictions under section 244.052, subdivision 4, paragraph (b), clause (3), placed on disclosing information on individuals living in residential facilities do not apply to persons committed under this section or Minnesota Statutes 1992, section 526.10. The local law enforcement agency may proceed with the broadest disclosure authorized under section 244.052, subdivision 4.

Subd. 2. **Petition by committed individual.** (a) After four years from the date of an order for provisional discharge or discharge of civil commitment, the individual may petition the executive director to have the scope of notification and disclosure based solely upon the individual's assigned risk level under section 244.052.

(b) If an individual's provisional discharge is revoked for any reason, the four-year time period under paragraph (a) starts over from the date of a subsequent order for provisional discharge or discharge except that the executive director may, in that person's sole discretion, determine that the individual may petition before four years have elapsed from the date of the order of the subsequent provisional discharge or

discharge and notify the individual of that determination.

(c) The executive director shall appoint a multidisciplinary committee to review and make a recommendation on a petition made under paragraph (a). The executive director may grant or deny the petition. There is no review or appeal of the decision. If a petition is denied, the individual may petition again after two years from the date of denial.

(d) Nothing in this chapter shall be construed to give an individual an affirmative right to petition the executive director earlier than four years after the date of an order for provisional discharge or discharge.

Subd. 3. **Executive director.** The executive director shall act in place of the individual's corrections agent for the purpose of section 244.052, subdivision 3, paragraph (h), when the individual is not assigned to a corrections agent.

History: *2011 c 102 art 4 s 1; 2012 c 123 s 1; 2013 c 49 s 7,22*

253D.35 AFTERCARE SERVICES.

Subdivision 1. **Provision.** The Minnesota sex offender program shall provide the supervision, aftercare, and case management services for a person under commitment as a sexually dangerous person or a person with a sexual psychopathic personality. The designated agency, as defined in section 253B.02, subdivision 5, shall assist with eligibility for public welfare benefits and will provide those services that are available exclusively through county government.

Subd. 2. **Plan.** Prior to the date of discharge or provisional discharge of any person committed as a sexually dangerous person or a person with a sexual psychopathic personality, the executive director shall establish a continuing plan of aftercare services for the committed person, including a plan for medical and behavioral health services, financial sustainability, housing, social supports, or other assistance the committed person needs. The Minnesota sex offender program shall provide case management services and shall assist the committed person in finding employment, suitable shelter, and adequate medical and behavioral health services and otherwise assist in the committed person's readjustment to the community.

History: *2010 c 300 s 26; 2013 c 49 s 7,22*

253D.36 DISCHARGE; ADMINISTRATIVE PROCEDURES.

Upon discharge from commitment under this chapter, administrative procedures shall be carried out, to the extent applicable, under section 253B.20.

History: *2013 c 49 s 19*