IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Rodney J. Ireland, Lester McGillis, Gerald DeCoteau, William Carter, Ryan Corman, Matthew Graham, Terry Greak, Glenn Halton, Robert Hoff, Monte Hojian, Jeremy Johnson, Michael Kruk, Garrett Loy, Kevette Moore, Cruz Muscha, Darin Napier, Paul Oie, Timothy Olpin, Larry Rubey, Christopher Simon, Kelly Tanner, John Westlie, Robert Lilley, Darl Hehn, Oliver Wardlow, Joshua Keeping, Matthew Dyer, Travis Wedmore, Kyle Aune, Marcus Bartole, Jason Gores, Estel Naser, Andrew Olafson, Stanton Quilt, Raymond Voisine, Eugene Wegley, David Anderson, Eugene Fluge, Robert Beauchamp, Sandy Mangelsen, and Jeffrey Wright, Plaintiffs, vs. State of North Dakota, North Dakota Department of Human Services, North Dakota Department of Corrections and Rehabilitation, North Dakota State Hospital, Dr. Rosalie Etherington, Superintendent of the North Dakota State Hospital, Christopher Jones, Executive Director of the North Dakota Department of Human Services, and Leann Bertsch, Director of the North Dakota Department of Corrections and Rehabilitation, Defendants.	Case No. 3:13-cv-3 **REPORT AND RECOMMENDATION ON MOTION FOR PARTIAL SUMMARY JUDGMENT**

In this certified class action, plaintiffs challenge various aspects of North Dakota's system for civil commitment of persons who have been found to be sexually dangerous individuals (SDIs). They brought claims for injunctive relief against the State of North Dakota, three state entities—the Department of Human Services (DHS), the North

Dakota State Hospital (NDSH), and the Department of Corrections and Rehabilitation (DOCR)—and the directors of each of those entities. The court was recently advised that plaintiffs have reached an agreement to settle all claims against DOCR and its director.

Summary

In the current motion, NDSH and DHS (hereinafter defendants)[1] contend that a recent Eighth Circuit decision concerning Minnesota's sex offender treatment program mandates dismissal of "all claims for which Plaintiffs seek to assert a constitutional right to treatment or that the treatment and assessment received is somehow inadequate, inappropriate, ineffective, or unreasonable." (Doc. #603-1, p. 2). Defendants argue that the recent Eighth Circuit decision—Karsjens v. Piper, 845 F.3d 394 (8th Cir. 2017), cert. denied, 138 S. Ct. 106 (2017)—precludes plaintiffs from establishing any substantive due process violation because they cannot show infringement of any fundamental liberty interest.

Plaintiffs respond that Karsjens does not foreclose their claims, contending the decision is inconsistent with prior Eighth Circuit panel decisions in two respects and that the nature of their claims and the material facts of their case are distinguishable from those of Karsjens. (Doc. #617, p. 1).[2]

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[1] For sake of clarity, this opinion refers to the moving parties collectively as "defendants." The motion, however, does not concern claims against DOCR and its director, Leann Bertsch, who took no position on this motion.

[2] Defendants point out that plaintiffs' response to the motion was due March 30, 2018, but not served until the following day. (Doc. #634, p. 1 n.1). Plaintiffs explained that they began filing their response late on March 30th but that a need to reformat a document delayed completion of filing and service until 12:13 a.m. on March 31, 2018. (Doc. #619, p. 1). That slight delay is inconsequential. The court considers filing and service to have been timely.

This court interprets the current motion to exclude plaintiffs' statutory claims under the Americans with Disabilities Act (ADA) and under the Religious Land Use and Institutionalized Persons Act (RLUIPA). Nor does the motion address plaintiffs' claims of punitive conditions of confinement.[3] Further, this court interprets the motion to address only the "as-applied" substantive due process claims and not the claims of facial unconstitutionality, which were addressed in prior motions.

Procedural History

The case originated with three plaintiffs acting pro se. After initial review of the complaint pursuant to 28 U.S.C. § 1915, the court appointed counsel to represent plaintiffs. (Doc. #27). The complaint has since been amended six times. Additional named plaintiffs have been added at various points, and several named plaintiffs have been dismissed. A March 21, 2017 order granted certification of three classes—with one of those classes having three subclasses.[4] (See Doc. #518) (adopting the Report and

[3] Plaintiffs assert that their claims of punitive conditions of confinement does not rest on existence of a constitutional right to sex offender treatment. (Doc. #617, p. 2). And Karsjens did not address claims of punitive conditions of confinement.

[4] The classes and subclasses include:

(1) Sex Offender Treatment and Evaluation Program (SOTEP) Class, consisting of all persons civilly committed to the DHS pursuant to North Dakota Century Code chapter 25-03.3 during the pendency of this litigation, with subclasses consisting of:

(a) SOTEP Class members with disabilities as defined under the ADA (ADA Subclass),

(b) SOTEP Class members whose civil commitment was based on "sexually predatory conduct" (as defined by North Dakota Century Code section 25-03.3-01(9)) committed while they were minors (Juvenile Subclass), and

Recommendation at Doc. #394).

Prior cross-motions for partial summary judgment addressed various aspects of plaintiffs' claims and resulted in the following rulings:[5]

(1) Summary judgment was granted in plaintiffs' favor as to their claim that North Dakota Century Code chapter 25-03.3 (the statute governing sex offender commitment and treatment) is unconstitutional on its face because it does not require that defendants initiate court proceedings for release of individuals who no longer meet SDI criteria. A subsequent order denied reconsideration of that decision and denied a request for a stay of that decision.[6]

(2) Summary judgment was granted in defendants' favor as to several claims:

(a) Equal protection claims based on plaintiffs being similarly situated to persons incarcerated because of criminal convictions;

(b) Equal protection claims based on plaintiffs being similarly situated

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(c) SOTEP Class members whose religious exercise has been substantially burdened while civilly committed (RLUIPA Class);

(2) Evaluation Class, consisting of all persons in custody at NDSH for evaluation as to whether they are SDIs pursuant to North Dakota Century Code section 25-03.3-11 during the pendency of this litigation; and

(3) Debt Class, consisting of all persons from whom DHS or NDSH has demanded payment from January 1, 2004, through the pendency of this litigation, for their civil commitment as SDIs pursuant to North Dakota Century Code chapter 25-03.3.17.

[5] (See Doc. #519) (adopting the Report and Recommendation at Doc. #403 and the Supplemental Report and Recommendation at Doc. #449).

[6] (See Doc. #535).

to "persons requiring treatment" under North Dakota Century Code chapter 25-03.1;

(c) Claims that chapter 25-03.3 is unconstitutional on its face because it does not include a right to a jury trial in SDI commitment proceedings;

(d) Claims that chapter 25-03.3 is unconstitutional on its face based on allegations that it allows for indefinite commitment, that it allows for commitment without a criminal conviction, or that it allows for commitment based on a standard of clear and convincing evidence; and

(e) Claims based on allegations that six of the named plaintiffs were minors during their SDI commitment proceedings.

(3) Summary judgment was denied as to:

(a) Plaintiffs' motion on their claim that chapter 25-03.3 is unconstitutional on its face because it allows SDI commitment both without a prior criminal conviction and without proof beyond a reasonable doubt of sexually predatory conduct;

(b) Defendants' motion on claims that application of chapter 25-03.3 to those whose only sexually predatory conduct occurred while they were juveniles constitutes cruel and unusual punishment;

(c) Defendants' motion on claims of named plaintiff Larry Rubey;

(d) Defendants' motion "on any matter other than the plaintiffs' claim that chapter 25-03.3's annual examination requirement does not

meet substantive due process standards."

Earlier, plaintiffs moved for a preliminary injunction concerning certain policies and practices alleged to interfere with their right of access to the courts. After an evidentiary hearing, the parties came to an agreement on some aspects of the policies and procedures at issue. The motion for a preliminary injunction was denied because of lack of evidence of actual harm resulting from the questioned policies and procedures. (Doc. #324) (adopting the Report and Recommendation at Doc. #284).

A motion to dismiss was granted as to certain other claims:

(1) Personal capacity claims against the DHS and DOCR directors and against the NDSH superintendent; and

(2) Claims of two named plaintiffs under the Americans with Disabilities Act.

(Doc. #244) (adopting, in part, the Report and Recommendation at Doc. #191 and the Supplemental Report and Recommendation at Doc. #222). The same order denied a motion to dismiss all claims against DOCR[7] and a motion to dismiss claims of certain

[7] The order granting certification of three classes denied certification as to a proposed DOCR class, reasoning that none of the named plaintiffs had standing to assert claims of that class. (See Doc. #518) (adopting the Report and Recommendation at Doc. #394). Thereafter, plaintiffs moved to add a plaintiff—Jeffrey Wright—and to have him designated as class representative for the proposed DOCR class. (Doc. #417). Finding that plaintiffs had not established good cause to add Wright as a plaintiff, this court denied plaintiffs' motion to do so, (Doc. #450), and the district judge affirmed that order on appeal, (Doc. #516). The parties then stipulated to dismissal of the DOCR, and the court adopted that stipulation. (Doc. #543). However, plaintiffs later discovered new evidence, which established sufficient reason to set aside the order of dismissal of the DOCR. On reconsideration, the court granted plaintiffs' motion to add Wright as a plaintiff. (Doc. #591) (adopting the Report and Recommendation at Doc. #578). In that order, the court stated that DOCR "may file a new motion challenging Wright's standing or other issues arising from the addition of Wright as a plaintiff." Id. at 3. No other motions concerning Wright's addition as a plaintiff or for certification of a proposed DOCR class have been filed. And, as noted previously, the parties recently reached an

named plaintiffs who are no longer committed.

The parties have engaged in extensive discovery, and the court has made multiple rulings on the scope of discovery. The parties have agreed to an evidentiary "cut-off date" of March 31, 2017. With narrow exceptions, that agreement limits trial testimony to events occurring through that date and limits documentary evidence to documents created on or before that date. (Doc. #587).

Background

An earlier Report and Recommendation regarding the motion for class certification summarized North Dakota's statutory scheme for evaluation and treatment of SDIs:

> North Dakota, like at least twenty other states, has adopted a statutory process for civil commitment of SDIs. See N.D. Cent. Code ch. 25-03.3. Under that statutory framework, a state's attorney can initiate a civil commitment proceeding by filing a petition with a district court. Id. § 25-03.3-03(1). If a petition is filed, the person alleged to be an SDI has a statutory right to notice, a right to counsel, a right to a hearing, and a right to services of an expert witness at state expense. Id. §§ 25-03.3-09 to -13.
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> The SDI civil commitment process usually begins while a person is serving a prison term in custody of the DOCR. If a person who has been convicted of "an offense that includes sexually predatory conduct" is in DOCR's custody, DOCR is required to assess the person and to decide whether to recommend civil commitment as an SDI. Id. § 25-03.3-03.1(1). DOCR's assessment is to occur approximately six months prior to the person's projected date of release from custody. If DOCR determines that a person may meet the statutory definition of an SDI, DOCR is required to refer that person to one or more state's attorneys for possible civil commitment proceedings. Id. § 25-03.3-03(2). If a state's attorney files a petition after getting DOCR's recommendation, the person is transferred from DOCR custody to custody of the county where the petition was filed, pending a preliminary hearing. Id. § 25-03.3-11.

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agreement to settle all claims against DOCR and its director.

At a preliminary hearing, the state court determines whether there is probable cause to believe the individual is an SDI. If the court does not find probable cause, the petition is dismissed. Id. If the state court finds probable cause, the person is transferred to the North Dakota State Hospital (NDSH) for evaluation. Following evaluation, the state district court conducts a commitment hearing. The governing statute provides that a commitment hearing is to be held within 60 days of a finding of probable cause, unless the court finds good cause to extend that time. Id. § 25-03.3-13. But, declarations in the record describe plaintiffs being in the evaluation process at NDSH for as long as 197 days, 234 days, and 1 year. (Doc. #345-2, p. 2; Doc. #345-4, p. 2; Doc. #345-5, p. 2).

At a commitment hearing, the state has the burden to prove, by clear and convincing evidence, that the person meets the statutory definition of an SDI. To meet that burden, the state must prove (1) that the person has engaged in sexually predatory conduct, (2) that the person has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or another mental disorder or dysfunction, and (3) that the disorder makes that person likely to engage in further acts of sexually predatory conduct which constitute a danger to the physical or mental health or safety of others. N.D. Cent. Code § 25-03.3-01(8).

Under North Dakota's system, individuals who are found to be SDIs are committed to the custody of the Department of Human Services (DHS) for placement in "an appropriate facility or program at which treatment is available." Id. § 25-03.3-13. The placement is to be in the "least restrictive available treatment facility or program necessary to achieve the purposes of [the SDI statutes]," though DHS is not required to "create a less restrictive treatment facility or treatment program specifically for [a] respondent or committed individual." Id.

Upon their commitment, DHS places SDIs in a facility on the NDSH campus—the Gronewald/Middleton Building. (Doc. #246, p. 27). DHS may initiate a petition seeking a court's approval for a community placement—rather than placement at NDSH—but an SDI may not petition for community placement, and the state courts have determined that a court cannot order community placement in the absence of a DHS request. N.D. Cent. Code § 25-03.3-24(1); In re Whitetail, 868 N.W.2d 833, 840 (N.D. 2015). SDI treatment stages are described in a resident handbook, and it appears that handbook contemplates a minimum of two to three years to complete the treatment program. (Doc. #344-3, pp. 15-23).

The governing statutes require that an individual who is committed as an SDI have an annual examination, with an exam report to be provided to the court that ordered the commitment. If an SDI is indigent, the statutes also give the SDI a right to an annual examination by a court-appointed

> expert at state expense. N.D. Cent. Code § 25-03.3-17(2). After receiving an annual report, the court may order further examination and may hold a hearing to determine whether the commitment should continue. Id. § 25-03.3-17(4).
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> Once committed, an SDI remains committed indefinitely, unless a court orders discharge. Discharge petitions can be initiated by an SDI or by DHS. Id. § 25-03.3-17(5). There is a statutory requirement that an SDI receive annual notice of the right to petition for discharge, id. § 25-03.3-18(1), and an SDI is entitled to a discharge hearing every twelve months, id. § 25-03.3-18(2). At a hearing on a discharge petition, the SDI again has a right to a court-appointed expert at state expense. Id. § 25-03.3-18(3). In a discharge hearing, as in an initial commitment hearing, the state must prove, by clear and convincing evidence, that the person meets the statutory definition of an SDI. Id. § 25-03.3-18(4). Both initial orders for commitment as an SDI and orders denying petitions for discharge are appealable to the state supreme court. Id. § 25-03.3-19.

(Doc. #394, pp. 2-5).

1. Implementation of Chapter 25-03.3

North Dakota began implementation of chapter 25-03.3 in 1997 through its Sex Offender Treatment and Evaluation Program (SOTEP). As of June 2016, approximately 170 individuals had been evaluated by SOTEP, and approximately 100 of those individuals had been committed as SDIs. (Doc. #361, pp. 6-7). Plaintiffs' compilation of discovery data, which defendants did not question, showed that, of the approximately 50 individuals confined at NDSH as SDIs as of April 2016, over half had been there for 8 or more years and at least 25% had been there more than 10 years. (Doc. #344, p. 1). As of February 2017, there were approximately 45 individuals committed as SDIs. (Doc. #622-4, p. 77).

In opposing the current motion, plaintiffs assert a withholding of treatment from those committed as SDIs. In support of that contention, plaintiffs submitted data concerning SOTEP housing units and treatment progression. Until late 2016, SOTEP

utilized four separate housing units within the Groenwald/Middleton Building on the NDSH campus—Secure 1, Secure 2, Secure 3, and Secure 4. (The Secure 2 housing unit was closed in November 2016.) Within Secure 1 were three separate areas—Secure 1 North, Secure 1 South, and an ICU (also referred to as the observation unit). SDIs were all assigned to Secure 1 when initially committed. Plaintiffs contend that SDIs housed in Secure 1 were not provided any treatment, (Doc. #617-29, pp. 3-4; Doc. #620-1, pp. 2-3; Doc. #623-31, p. 3), though defendants dispute that.

Until May 2017,[8] SOTEP programming consisted of a four-level "Stage" system, and a "skills track" for SDIs who had cognitive impairments or treatment interfering behaviors. The "skills track" included seven different designations (I, II, III-1, III-2, III-3, III-4, and III-5). (Doc. #617-6). Plaintiffs assert that SDIs demoted to Skills I were not in any "treatment track" and had to "earn their way back to start treatment again," (Doc. #620-1, p. 3; see also Doc. #617-29, p. 4; Doc. #623-1, pp. 2-3), though defendants disagree with those assertions. As SDIs progressed through the treatment stages or tracks, they were moved to housing units that allowed more privileges. After completing Stage Two or Skills III-3, SDIs were eligible to move to the Community Transition Center (CTC)—a house on the NDSH campus. (Doc. #617-6, pp. 7-9, 14-15). On reaching Stage Four or Skills III-5, an SDI in the CTC could become eligible for a recommendation for discharge from SOTEP. Id. at 9, 15-16.

Violations of SOTEP behavioral standards resulted in Resident Behavioral Write-ups (RBWs), with the RBWs graded on a point system. Accumulation of a set number of

[8] In May 2017, SOTEP programming changed from a "stages" system to a "levels" system. (Doc. #617-7).

points resulted in transfer from Secure 2, 3, or 4 back to Secure 1.[9] (See Doc. #617-8, p. 2; Doc. #617-31, p. 15; Doc. #620, pp. 2-3, 13, 16). An SDI could accumulate one point for behaviors such as (1) "[n]ot signing in and out on board," (2) not signing in and out for phone use, (3) arguing with peers, (4) being loud, (5) being demanding of staff, (6) being late for "community" or "group," (7) hanging "around desk," (8) "[e]motional [d]ysregulation," or (9) excessive intercom use. (Doc. #617-8, p. 2; Doc. #617-9, p. 2). An SDI could be assessed three points for more serious conduct such as predatory behavior or physical, sexual, or verbal aggression. (Doc. #617-9, p. 2). After points were assessed, one point was removed "for each week behavioral expectations [were] being met." Id.

In support of their position regarding withholding of treatment, plaintiffs presented statistics summarizing transfer of SDIs among the various treatment stages and tracks. That data—accuracy of which defendants did not challenge in their

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[9] Plaintiffs submitted affidavits detailing the course of several SDIs in the SOTEP program. (Doc. #617-29; Doc. #620-1; Doc. #623-1). One of those affidavits is summarized below.

Plaintiff Kyle Aune was transferred from Secure 3 to Secure 1 and was demoted from Skills III to Skills I after he received RBWs for having "engaged in a phone conversation that incited disruptive behavior of another resident" and having been accused of lying to staff. (Doc. #620-1, pp. 3, 12-16). Aune states that though the RBW concerning lying to staff was later overturned, he was still demoted to Skills I. Id. at 3. Aune further states that he "was unable to return to treatment for five months because [he] could not go 30 days without RBWs." Id. Aune's RBWs included various phone violations, food violations (possessing string cheese on two occasions), having an unapproved resident letter, being near the Secure 1 door while in the ICU in an effort to talk with another resident, sliding notes under the Secure 1 door, lying to staff about what time he turned on the television, making too many "team requests" in a day, swearing, wearing another resident's shirt and not telling staff where he got the shirt, looking through an outside fence in what staff viewed as an effort to communicate with other residents, and asking various staff about a "property request" and about stamps (staff shopping). Id. at 18-36.

reply—shows 101 promotions in treatment level and 59 demotions in treatment level during the 10 years from December 2005 through December 2015. (Doc. #617-2, p. 6). From January 2016 through May 2017, the data shows 35 promotions and 5 demotions. Id. According to plaintiffs' calculations, the percentage of SDIs who spent time "outside of the treatment track," i.e., in Secure 1 because of demotions resulting from behavioral issues, each year from 2013 to 2017 ranged between 11% and 31%.

2. Karsjens v. Piper

The impact of the Eighth Circuit's Karsjens decision is central to the issues raised in this motion. In Karsjens—also a class action—the court reversed a post-trial decision in the plaintiffs' favor on grounds that the trial court erred in applying a strict scrutiny standard to conclude that the Minnesota sex offender program violated the plaintiffs' substantive due process rights. The trial court had found the Minnesota program unconstitutional both on its face and as applied. In discussing the standard to be applied to the facial substantive due process claims, the Eighth Circuit stated:

> The United States Constitution guarantees that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." "The Supreme Court has not expressly identified the proper level of scrutiny to apply when reviewing constitutional challenges to civil commitment statutes." 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." 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."
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> Although the Supreme Court has characterized civil commitment as a "significant deprivation of liberty," 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. 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." 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." 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."
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> Accordingly, the proper standard of scrutiny to be applied to plaintiffs' facial due process challenge is whether [the Minnesota Civil Commitment and Treatment Act] bears a rational relationship to a legitimate government purpose.

Karsjens, 845 F.3d at 407-08 (citations omitted). The Eighth Circuit concluded that none of the district court's findings concerning facial unconstitutionality survived under either a strict scrutiny review or a rational relationship review.

As to the as-applied substantive due process claims, the Eighth Circuit described the standard to be applied as follows:

> Following the Supreme Court's decision in County of Sacramento v. Lewis, 523 U.S. 833 (1988), 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.'" 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.
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> 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." 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." Accordingly, the district court applied an incorrect standard in considering the class plaintiffs' as-applied substantive due process claims.

Id. at 408 (emphasis added and citations omitted and altered). The Eighth Circuit concluded that none of the class plaintiffs' as-applied substantive due process claims met the conscience-shocking standard.

The Karsjens' district court had separated the plaintiffs claims into two phases for trial. The appeal followed the phase one trial, and the Eighth Circuit remanded for further proceedings on the remaining claims. Following remand, the defendants moved for summary judgment on all remaining claims, contending the Eighth Circuit's decision forecloses relief on the remaining claims. That motion is pending. Karsjens v. Piper, No. 0:11-cv-3659, Doc. #1095 (D. Minn. motion filed on Dec. 8. 2017).

Immediately after the Eighth Circuit decided Karsjens, defendants in this case asserted it supported their position on an earlier partial summary judgment motion that was then pending.[10] (Doc. #472). The district judge's ruling on that motion concluded that North Dakota's chapter 25-03.3 is unconstitutional on its face because it does not

[10] Defendants filed a motion for partial summary judgment on September 10, 2015. (Doc. #223). This court issued a Report and Recommendation on that motion on September 22, 2016, (Doc. #403), and a Supplemental Report and Recommendation on November 21, 2016, (Doc. #449). After defendants filed their objections to the Report and Recommendation and Supplemental Report and Recommendation, the Eighth Circuit decided Karsjens. On January 6, 2017, defendants filed a citation of supplemental authority—the Eighth Circuits' decision in Karsjens.

require that defendants initiate court proceedings for release of individuals who no longer meet SDI criteria. Defendants asked for reconsideration of that decision, arguing it could not be reconciled with Karsjens. (Doc. #523-1, p. 3). In denying the motion for reconsideration, the district judge stated:

> Although the defendants now contend this court's order cannot be reconciled with the Karsjens decision, they took a very different stance [in their initial summary judgment motion]. They asserted the differences between Minnesota and North Dakota's civil commitment statutes are so significant that Karsjens is distinguishable. Thus, the defendants discounted the applicability of Karsjens when the district court's decision did not favor them and then turn around and fully embrace Karsjens when they interpret the Eighth Circuit's decision as resolving the constitutional issues with regard to North Dakota's civil commitment process, despite their noted differences in North Dakota's and Minnesota's process.

(Doc. #535, p. 2) (footnotes omitted).

3. Strutton v. Meade

In a pre-Karsjens case, Strutton v. Meade, 668 F.3d 549 (8th Cir. 2012), a civilly committed sex offender challenged, inter alia, the adequacy of the treatment he received from Missouri's treatment program. Because of budget limitations and staffing shortages, the Missouri treatment facility discontinued psychoeducational classes and modified process groups for a period of several months. Id. at 552-53. To progress in treatment, participation in process groups was required. Id. at 552.

The Eighth Circuit stated that Strutton's due process claim stemmed from state law but cautioned "not to turn every alleged state law violation into a constitutional claim. Only in the rare situation when the state action is 'truly egregious and extraordinary' will a substantive due process claim arise." Id. at 557. The Eighth Circuit further stated:

> This is why the district court properly analyzed Strutton's claims to determine whether the state action of eliminating the psychoeducational classes and modifying the process groups was so arbitrary or egregious as to shock the conscience. See United States v. Salerno, 481 U.S. 739, 746 (1987) ("So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' . . . or interferes with rights 'implicit in the concept of ordered liberty.'" (quoting Rochin v. California, 342 U.S. 165, 172 (1952) and Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)).

Id. at 557-58 (citations altered).

The Eighth Circuit held that though "the treatment Strutton received may have been less than ideal, and perhaps even inadequate by professional standards, it was not so lacking as to shock the conscience." Id. at 558. In reaching that conclusion, the Eighth Circuit noted that the elimination of the classes and the modification of the process groups was temporary and that the facility "sought to maintain essential treatment services in light of the challenges it faced." Id.

4. Pending Challenges to Missouri and Iowa Sex Offender Treatment Programs

In addition to Karsjens, pending cases challenge state sex offender treatment programs of two other states in this circuit. A class action challenging Missouri's sex offender treatment program is currently before the Eighth Circuit, Van Orden v. Stringer, No. 17-3093 (8th Cir. appeal docketed Sept. 27, 2017), and a case challenging Iowa's system is pending in the Northern District of Iowa, Willis v. Palmer, No. 5:12-cv-4086 (N.D. Iowa case filed Sept. 26, 2012). Interpretation and application of the Eighth Circuit's Karsjens decision are central issues in both the Missouri and Iowa cases, with the parties in those cases raising arguments similar to those now raised in this case.

After trial, the Van Orden district court found "overwhelming evidence" that Missouri's sex offender commitment system "suffers from systemic failures regarding

risk assessment and release that have resulted in the continued confinement of individuals who no longer meet the criteria for commitment, in violation of the Due Process Clause." Van Orden v. Schafer, 129 F. Supp. 3d 839, 844 (E.D. Mo. 2015), amended by No. 4:09-cv-971, 2015 WL 9269251 (E.D. Mo. Dec. 21, 2015), vacated in part sub nom Van Orden v. Stringer, 262 F. Supp. 3d 887 (E.D. Mo. 2017). At trial, the Van Orden court applied a conscience-shocking standard and concluded that the plaintiffs proved that the "nature and duration of the commitment of [sex offenders] bears no reasonable relation to the non-punitive purpose for which they were committed." Id. at 867.

But, after the Eighth Circuit issued the Karsjens decision, the Van Orden court reconsidered its decision. In so doing, the court stated:

> The Court believes that reconsideration is required here in light of *Karsjens*. The Eighth Circuit clearly held that "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." The Eighth Circuit further held that claims substantially similar to the ones alleged here do not implicate a fundamental liberty interest. Although these holdings raise troubling questions as to whether civil commitment statutes can ever be challenged on as-applied substantive due process grounds, they are binding on this Court. And they end the Court's inquiry because, according to *Karsjens*, without a fundamental liberty interest, Plaintiffs' as-applied claim fails no matter how shocking the state defendants' conduct.

Id. at 893-94 (citation omitted). The trial court vacated its earlier decision and dismissed the case, and the plaintiffs' appeal from that dismissal is pending before the Eighth Circuit, with oral argument yet to be scheduled. See Van Orden, No. 17-3093 (8th Cir. appeal docketed Sept. 27, 2017).

The Iowa case, Willis, involves claims of nine individuals who were civilly

committed to that state's sex offender treatment program. In a pre-Karsjens ruling on the plaintiffs' claims that Iowa's program violated the Fourteenth Amendment, the court applied a conscience-shocking standard and denied summary judgment as to claims that the treatment was inadequate, that the system was punitive as applied, and that the program was the least restrictive means available to achieve the state's goals. Willis v. Palmer, No. C12-4086, 2016 WL 1267766, at *22-*25 (N.D. Iowa Mar. 30, 2016). Subsequent to the Eighth Circuit Karsjens ruling, the defendants again moved for summary judgment. That motion is pending. Willis, No. 5:12-cv-4086, Doc. #127 (N.D. Iowa motion filed Apr. 25, 2018).

Standard of Review

Summary judgment should be granted if, drawing all inferences in the light most favorable to the nonmoving party, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c)(2); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). When the record as a whole at the time of the motion "could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

A party opposing summary judgment "may not rest upon mere denials or allegations, but must instead set forth specific facts sufficient to raise a genuine issue for trial." Wood v. SatCom Mktg., LLC, 705 F.3d 823, 828 (8th Cir. 2013) (quoting Wingate v. Gage Cty. Sch. Dist. No. 34, 528 F.3d 1074, 1078-79 (8th Cir. 2008)). As such, there must be evidence in the record on which the jury could find for the nonmoving party. Id. (citing Anderson, 477 U.S. at 252 (1986)).

Law and Discussion

Defendants contend that, under Karsjens, plaintiffs have no fundamental liberty interest that supports a right to "appropriate, effective or reasonable sex offender treatment and assessment," and that plaintiffs therefore cannot prevail on their as-applied substantive due process claims. Defendants rely on a portion of Karsjens that states:

> 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." Further, as the Supreme Court recognized, the Constitution does not prevent "a State from civilly detaining those for whom no treatment is available." 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.
>
> 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.

Karsjens, 845 F.3d at 410-11 (citations omitted).

Ireland, on behalf of the certified classes, now argues the Karsjens panel decision is inconsistent with prior Eighth Circuit decisions in two respects: (1) in applying elements of a substantive due process claim conjunctively rather than disjunctively and (2) in its definition of conscience-shocking conduct. As to the first point, plaintiffs contend that there are conflicts among Eighth Circuit decisions on whether substantive due process claims require a showing of both a violation of a fundamental right and

conscience-shocking conduct, and that Supreme Court precedent establishes a disjunctive standard. They argue that, "until the Eighth Circuit acknowledges and resolves this conflict in light of [Salerno], the best statement of the correct standard to apply comes from the Supreme Court." (Doc. #638, p. 3). Concerning their second point, plaintiffs contend Terrell v. Larson, 396 F.3d 975, 978 (8th Cir. 2005) defines the conscience-shocking standard for substantive due process claims involving custodial situations. They argue that under Terrell proof of deliberate indifference—rather than intent to harm—satisfies the conscience-shocking conduct element in a substantive due process claim involving policy-making in a custodial situation. Plaintiffs assert that an intent-to-harm standard applies in cases involving individual "split-second" decisions and not to cases involving policies implemented by a state agency. (Doc. #617, p. 13). Plaintiffs' arguments are similar to those made in the pending motions in Willis and Karsjens, and in the pending appeal in Van Orden.

Plaintiffs acknowledge that the Eighth Circuit has not recognized a due process right to "appropriate or effective or reasonable treatment" when an individual is civilly committed as an SDI.[11] Plaintiffs contend their substantive due process claim, however, does not concern the adequacy of their sex offender treatment but instead challenges defendants' intermittent withholding of treatment. Plaintiffs assert a systemic practice of withholding treatment violates their fundamental right to be free of continued

[11] Unlike the Eighth Circuit, both the Seventh Circuit and the Ninth Circuit recognize rights of civilly committed persons to treatment that provides a realistic opportunity for improvement in the condition that led to the commitment. Hughes v. Dinas, 837 F.3d 807, 808 (7th Cir. 2016); Sharp v. Weston, 233 F.3d 1166, 1172 (9th Cir. 2000).

physical restraint since completion of treatment is required for release from SDI commitment. In alleging withholding of treatment, plaintiffs refer to defendants' practices of temporarily removing SDIs from treatment programming because of behaviors unrelated to sexual offending or facility security. As discussed below, defendants deny that treatment is completely withheld as a behavioral sanction.

1. Conjunctive v. Disjunctive Standard for Substantive Due Process Claims

Plaintiffs recognize that the Eighth Circuit applied a conjunctive standard for substantive due process claims in Karsjens, requiring **both** interference with a fundamental liberty interest **and** conscience-shocking conduct. But they argue Supreme Court precedent applies a disjunctive standard, requiring **either** interference with a fundamental liberty interest **or** conscience-shocking conduct.

At the outset of this discussion, the court notes that several other circuits appear to recognize disjunctive standards for substantive due process claims.[12] The court also notes a recent scholarly commentary reviewing the history of substantive due process claims, which supports plaintiffs' assertion of a disjunctive standard. Jane R. Bambauer & Toni M. Mossaro, Outrageous and Irrational, 100 Minn. L. Rev. 281 (2015).[13]

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[12] Robinson v. District of Columbia, 686 F. App'x 1, 2 (D.C. Cir. 2017) (per curiam); United States v. Rich, 708 F.3d 1135, 1139 (10th Cir. 2013); B & G Constr. Co. v. Dir., Office of Workers' Comp. Progs., 662 F.3d 233, 255 (3d Cir. 2011); United States v. Green, 654 F.3d 637, 652 (6th Cir. 2011); Corales v. Bennet, 567 F.3d 554, 568 (9th Cir. 2009);

[13] The authors separate due process claims into three broad groups: (1) those involving rights specifically enumerated in the constitution, (2) those involving "penumbral" rights that have been deemed so fundamental to the American sense of liberty that they are entitled to protection under the Due Process Clause, and (3) "the misfits of constitutional law"—those that challenge government conduct implicating no judicially recognized fundamental right, specifically enumerated right, or judicially

Plaintiffs point to Salerno, a case holding that the Bail Reform Act does not violate substantive due process, in which the Supreme Court stated:

> This Court has held that the Due Process Clause protects individuals against two types of governmental actions. So-called "substantive due process" prevents the government from engaging in conduct that "shocks the conscience," or interferes with rights "implicit in the concept of ordered liberty." When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. This requirement has traditionally been referred to as "procedural" due process.

481 U.S. at 746 (1987) (emphasis added and citations omitted). Following Salerno, the Supreme Court decided County of Sacramento v. Lewis, 523 U.S. 833 (1998), holding that a police officer does not violate substantive due process rights through deliberate or reckless indifference to life when pursuing a suspect in a high-speed vehicle chase. Subsequent to Lewis, the Eighth Circuit decided Moran v. Clarke, 296 F.3d 638 (8th Cir. 2002). Moran cites a footnote from Lewis and interprets that footnote to set a conjunctive standard.

Moran, an en banc decision, is comprised of four separate opinions. A concurring opinion by Judge Bye controls whether the standard governing substantive due process claims is conjunctive or disjunctive. Id. at 651 (Bye, J., concurring). In Karsjens, the

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recognized suspect classification. Bambauer & Mossaro, supra, at 282. The authors suggest that those "misfit" cases are of two types: (1) those challenging executive actions that are alleged to be outrageous, where successful claimants must prove that the government's conduct "shocks the conscience" even of those with the most "hardened sensibilities," and (2) those challenging legislative and regulatory actions that are alleged to be irrational, where claimants must prove that a law or rule fails rational basis scrutiny and is devoid of any possible legitimate purpose. Id. The authors further suggest confusion among those courts that require litigants to prove violation of a fundamental right under the outrageousness or rational basis tests since due process protects both fundamental and non-fundamental rights. Id. at 310-12.

Eighth Circuit cited Moran in holding that a conjunctive standard applies:

> Following the Supreme Court's decision in County of Sacramento v. Lewis, 523 U.S. 833 (1988), 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 (1977)). 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.

845 F.3d at 408 (citations altered).

Plaintiffs argue that Judge Bye's controlling opinion in Moran erroneously relied on the Lewis footnote, which reads, in part:

> [I]n a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience. That judgment may be informed by a history of liberty protection, but it necessarily reflects an understanding of traditional executive behavior, of contemporary practice, and of the standards of blame generally applied to them. Only if the necessary condition of egregious behavior were satisfied would there be a possibility of recognizing a substantive due process right to be free of such executive action, and only then might there be a debate about the sufficiency of historical examples of enforcement of the right claimed, or its recognition in other ways.

523 U.S. at 847 n.8 (emphasis added). Plaintiffs contend that, since the Lewis footnote does not mention Salerno,[14] it should not be interpreted to reject the disjunctive

[14] Although Lewis cites Salerno twice, it is not cited in footnote 8, and neither reference concerns the disjunctive standard. See 523 U.S. at 847, 861 n.2.

standard set out by the Supreme Court in Salerno. (Doc. #617, p. 16).

There is apparent inconsistency among post-Moran Eighth Circuit opinions on standards for substantive due process claims; some discuss the standard as conjunctive, and some discuss it as disjunctive. And Moran is cited in support of both a conjunctive standard and a disjunctive standard. Buckley v. Ray applied a conjunctive standard. 848 F.3d 855, 863 (8th Cir. 2017), cert. denied, 137 S. Ct. 2314 (2017). ("To establish a violation of substantive due process rights by an executive official, a plaintiff must show (1) that the official violated one or more fundamental constitutional rights, and (2) that the conduct of the executive official was shocking to the 'contemporary conscience.'"). Andrews v. Schafer, quoting Karsjens and Judge Bye's concurrence in Moran, also describes the standard as conjunctive. 888 F.3d 981, 984 (8th Cir. 2018) ("For Andrews to prevail he 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.'").

But Williams v. Mannis, citing the majority opinion in Moran, describes the standard as disjunctive. 889 F.3d 926, 932 (8th Cir. 2018) ("The Fourteenth Amendment guarantees substantive due process and prohibits government 'conduct that is so outrageous that it shocks the conscience or otherwise offends judicial notions of fairness, [or is] offensive to human dignity.'"). Mendoza v. United States Immigration and Customs Enforcement—another post-Karsjens decision quoting Moran—also describes the standard as disjunctive. 849 F.3d 408, 421 (8th Cir. 2017) ("The

Fourteenth Amendment guarantees '[s]ubstantive due process[, which] prevents the government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty.'"). Strutton—decided after Moran—cited to Salerno but not to Moran and described the standard as disjunctive. 668 F.3d at 558 ("So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' . . . or interferes with rights 'implicit in the concept of ordered liberty."). And Anderson v. Larson, a post-Moran opinion by Judge Bye citing Salerno and several Eighth Circuit opinions, applied a disjunctive standard. 327 F.3d 762, 769 (2013) (stating that a right to substantive due process is violated "if a defendant's conduct 'shocks the conscience or interferes with rights implicit in the concept of ordered liberty,' or 'offends judicial notions of fairness,' or is 'offensive to human dignity,' or is taken with 'deliberate indifference' to protected rights").

In this court's opinion, the Moran decision, setting out a conjunctive standard, controls. Although Moran does not mention Salerno, and despite conflicting language in subsequent panel decisions, Moran governs as the Eighth Circuit's most recent en banc interpretation of Lewis.

2. Fundamental Liberty Interest

Plaintiffs assert that SDIs retain a fundamental interest in freedom from unwarranted physical restraint and that withholding treatment infringes that right because participation in treatment is required for discharge from SOTEP. In support, plaintiffs rely on a line of Supreme Court and Eighth Circuit cases. Plaintiffs cite In re Gault, where in the context of juvenile adjudication the Supreme Court described commitment as a deprivation of liberty—"incarceration against one's will, whether it is

called 'criminal' or 'civil.'" 387 U.S. 1, 50 (1967). In Addington v. Texas, when considering the standard of proof required for commitment of a person because of mental illness, the Supreme Court stated, "[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." 441 U.S. 418, 425 (1979).

In Foucha v. Louisiana, the Supreme Court held that a state could not continue civil commitment of an insanity acquittee after he was no longer mentally ill although the acquittee could not prove he was not dangerous to others. 504 U.S. 71, 77-78 (1992). Foucha discussed freedom from unwarranted physical restraint as a fundamental liberty interest protected under substantive due process doctrine.

> "[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.'" Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action. "It is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." We have always been careful not to "minimize the importance and fundamental nature" of the individual's right to liberty.
>
> . . . .
>
> The State may also confine a mentally ill person if it shows "by clear and convincing evidence that the individual is mentally ill and dangerous."...
>
> We have also held that in certain narrow circumstances persons who pose a danger to others or to the community may be subject to limited confinement . . . .

Id. at 80 (citations omitted). Foucha further states, "Due process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed." Id. at 72.

Plaintiffs argue that the scope of their liberty interest is defined under North Dakota law. In Montin v. Gibson, a case involving a person involuntarily committed after a jury found him not guilty by reason of insanity, the Eighth Circuit stated, "[I]t is well settled that the liberty interest at the heart of a due process claim may be a right created by state law." 718 F.3d 752, 755 (8th Cir. 2013) (citing Ky. Dept. of Corr. v. Thompson, 490 U.S. 454, 460 (1989)).

In arguing North Dakota law establishes a right to treatment and defines the scope of their right to freedom from unwarranted physical restraint, plaintiffs rely on North Dakota case law, the legislative history of chapter 25-03.3, and defendants' admission in their Answer. (See Answer, Doc. #184, pp. 10-11). The North Dakota Supreme Court has described chapter 25-03.3 as serving a dual purpose, protecting the public from the most dangerous offenders "while simultaneously treating those individuals so they may safely return to the community." In re G.R.H., 793 N.W.2d 460, 466 (2011) (emphasis added) (citing Interest of P.F., 744 N.W.2d 724 (2008)).

Defendants acknowledge that Montin and Thompson support the premise that a liberty interest can be defined under state law. They contend, however, that plaintiffs have never advanced a substantive due process claim based on rights created by state law. (Doc. #603-1, p. 9 n.5).[15] The Sixth Amended Complaint does not include a distinct substantive due process claim alleging violations of rights created by state law but does

[15] Defendants suggest that plaintiffs argue for greater substantive due process protections under the North Dakota State Constitution than recognized by the United States Constitution, (Doc. #634, p. 7), but this court does not find that argument in plaintiffs' briefs. Rather, plaintiffs assert substantive due process rights grounded in state statutes. (Doc. #617, p. 9 n.5) (citing Morgan v. Rabun, 128 F.3d 694, 697) (8th Cir. 1997)) (stating that "state-created liberty interests are entitled to protection under the Fourteenth Amendment's Due Process Clause").

include an allegation that chapter 25-03.3 provides that a committed SDI be placed "in an appropriate facility or program at which treatment is available." (Doc. #246, p. 27). Additionally, it is clear from a comprehensive position statement, which plaintiffs filed nearly one year ago, that they claim violations of rights created under chapter 25-03.3. (Doc. #575-4, pp. 8-11).

In discussing the purposes of chapter 25-03.3, in both G.R.H. and P.F., the North Dakota Supreme Court cited the statute's legislative history. The legislative history includes the Solicitor General's explanation of the proposed section 25-03.3-13:

> "A treatment program must be available to the respondent at the facility or in the program in which the respondent is placed." This sentence was included specifically to provide that the committed person has a right to treatment. We believe treatment is a necessary component of a constitutional civil commitment program.
>
> . . . [T]he purpose of H.B. 1047 is treatment, not punishment. Committed persons must be provided treatment. Therefore, criminal standards (such as presumption of innocence and guilt beyond a reasonable doubt) are not required and do not apply.

(Doc. #617-4, pp. 14-15) (emphasis added); Hearing on H.B. 1047 Before the Senate Judiciary Comm., 55th N.D. Legis. Sess. (1997).

The Karsjens court did not discuss a right to treatment arising under state law. Strutton, however, addressed that question:

> The district court was correct that Strutton does not have a fundamental due process right to sex offender treatment. Accordingly, *Youngberg's* "professional judgment" standard does not apply to this case. Strutton's due process claim originates from the state statutory mandate to provide for Strutton's confinement "for control, care and treatment until such time as [his] mental abnormality has so changed that [he] is safe to be at large." We remain cautious not to turn every alleged state law violation into a constitutional claim. Only in the rare situation when the state action is "truly egregious and extraordinary" will a substantive due process claim arise. This is why the district court properly analyzed Strutton's claims to determine

> whether the state action of eliminating the psychoeducational classes and modifying the process groups was so arbitrary or egregious as to shock the conscience.

668 F.3d at 557-58 (citations omitted). Strutton, as discussed above, dealt with allegations of short-term changes in Missouri's sex offender treatment program, rather than withholding of treatment as alleged here.

Under defendants' interpretation of Karsjens, apart from a claim of unsafe custodial conditions, it would seem that civilly committed persons could never establish any applied due process claim. But Karsjens focused on the standard of scrutiny rather than on the parameters of a fundamental liberty interest in freedom from unwarranted physical restraint. The opinion does not state that civilly committed persons can never establish a fundamental liberty interest. Given its application of a conjunctive test, it would not have been necessary to discuss the conscience-shocking conduct element if the court had determined there was no possible fundamental liberty interest. And the Karsjens opinion quoted long-standing precedent establishing that, at minimum, "due process requires that the nature and duration of [civil] commitment bear some *reasonable relation* to the purpose for which the individual is committed." Karsjens, 845 F.3d at 407 (quoting Jackson v. Indiana, 406 U.S. 715, 738 (1972)). This court does not interpret Karsjens to limit a civilly committed SDI's substantive due process claims to those for unsafe custodial conditions. To the extent it held civilly committed sex offenders can never demonstrate a fundamental liberty interest, this court disagrees with the Van Orden court's order vacating its earlier decision.

Under the reasoning of Montin, it appears that North Dakota law may form a basis for plaintiffs' fundamental liberty interest in freedom from unwarranted physical restraint. The legislative history and state supreme court interpretations of that

legislative history support plaintiffs' position that chapter 25-03.3 gives civilly committed SDIs a right to treatment. And the Supreme Court has stated that the federal courts must accept the state court's view of the purpose of its own law. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 829 (1995).

Regardless of whether a liberty interest arises from state law or from federal law, the Eighth Circuit applies a conscience-shocking standard to substantive due process claims because the court "remain[s] cautious not to turn every alleged state law violation into a constitutional claim." Strutton, 668 F.3d at 557.

Karsjens did not address withholding of treatment, and neither side has identified any cases discussing withholding of treatment as a violation of substantive due process rights of civilly committed persons. Nor has this court's research identified cases discussing that issue. In discussing fundamental liberty interests,[16] the Karsjens court recognized a civil commitment as a "significant deprivation of liberty" but cited Foucha in stating that the Supreme Court "has never declared that persons who pose a significant danger to themselves or others possess a fundamental liberty interest in freedom from physical restraint." 845 F.3d at 407. Karsjens concluded its discussion of the fundamental liberty element by reaffirming that, at minimum, due process requires a reasonable relation between the nature and duration of a civil commitment and the purpose for which the individual was committed. Id. (quoting Jackson, 406 U.S. at 738). See also Foucha, 504 U.S. at 79.

[16] Karsjens' discussion of the fundamental liberty interest element is in the context of facial unconstitutionality claims but the opinion does not suggest that element should be analyzed differently in as-applied substantive due process claims.

Given the North Dakota Supreme Court's recognition that a purpose of commitment under chapter 25-03.3 is treatment, withholding treatment could demonstrate lack of a reasonable relationship between the purpose of SDI commitment and its nature and duration. In this court's opinion, since Foucha and Jackson, as cited in Karsjens, require a reasonable relationship between the nature and duration of a commitment and its purpose, the withholding of treatment might be sufficient to establish violation of a fundamental liberty interest created under chapter 25-03.3.

3. Conscience-Shocking Conduct

Whether conduct is conscience shocking in the constitutional sense of the term is a question of law. Terrell, 396 F.3d at 981.

Plaintiffs do not assert that their evidence would show conscience-shocking conduct that would satisfy a malice or sadism definition. Rather, they argue that Karsjens' use of a "malice or sadism" definition of conscience-shocking conduct is inconsistent with Terrell's en banc definition of conscience-shocking conduct in the context of policy implementation. In Terrell, the court stated:

> Because a wide variety of official conduct may cause injury, a court must first determine the level of culpability the § 1983 plaintiff must prove to establish that the defendant's conduct may be conscience shocking. Mere negligence is never sufficient. Proof of intent to harm is usually required, but in some cases, proof of deliberate indifference, an intermediate level of culpability, will satisfy this substantive due process threshold. Lewis, 523 U.S. at 848-49. The deliberate indifference standard "is sensibly employed only when actual deliberation is practical." Lewis, 523 U.S. at 851; see Wilson v. Lawrence Cty., 260 F.3d 946, 957 (8th Cir. 2001). By contrast, the intent-to-harm standard most clearly applies "in rapidly evolving, fluid, and dangerous situations which preclude the luxury of calm and reflective deliberation." Neal v. St. Louis Cty. Bd. of Police Comm'rs, 217 F.3d 955, 958 (8th Cir. 2000).

396 F.3d at 978 (citations altered). In Davis v. Hall, the Eighth Circuit stated, "[P]rison

is the quintessential setting for the deliberately indifferent standard because 'in the custodial situation of a prison, forethought about an inmate's welfare is not only feasible but obligatory.'" 375 F.3d 703, 718 (8th Cir. 2004) (quoting Lewis, 523 U.S. at 851). Since they challenge matters of policy in a custodial situation, plaintiffs argue they need only show deliberate indifference that rises to the level of conscience-shocking conduct rather than showing malice or sadism. (Doc. #617, pp. 12-15).

Defendants argue that Moran, rather than Terrell, controls the question of whether deliberate indifference can satisfy the conscience-shocking conduct element of a substantive due process claim. In asserting that position, defendants quote a phrase from Moran that states, "[D]eliberate indifference will not sustain a substantive due process claim." (Doc. #634, p. 10) (quoting Moran, 296 F.3d at 647). This court, however, views that phrase as dicta in the context of the Moran opinion. The Moran court reversed the trial court's decision granting judgment as a matter of law, concluding that whether the defendants had acted deliberately in violation of the plaintiff's substantive due process rights was a question to be decided by a jury. Both Moran and Terrell were en banc decisions, and Terrell did not mention the earlier Moran opinion apart from a footnote reference that did not concern deliberate indifference. 396 F.3d at 978 n.1. Thus, in this court's view, Terrell supports plaintiffs' position that "when actual deliberation is possible," deliberate indifference can satisfy the conscience-shocking conduct element of a substantive due process claim.

Plaintiffs point to other Eighth Circuit panel opinions in which the court has discussed the deliberate indifference standard in the context of a substantive due process claim. As defendants assert and plaintiffs acknowledge, none of those cases

involve sex offender treatment programs. (Doc. #634, pp. 8-9). But the cases do support the premise for which plaintiffs cite them—deliberate indifference may be sufficient to establish the conscience-shocking conduct element of a substantive due process claim in circumstances where actual deliberation is practical. Truong v. Hassan involved a claim that a city bus driver violated a rider's substantive due process rights when the driver kicked a non-paying rider off the bus and then allowed other passengers to exit the bus to physically remove the would-be rider from the bus's front bumper. 829 F.3d 627, 629-30 (8th Cir. 2016). Noting that the entire incident spanned less than nine minutes, the court considered it "rapidly evolving" and affirmed the trial court's application of an intent-to-harm standard. Id. at 631. The court stated, "Those cases where the deliberate indifference standard has been found to be appropriate involve situations where the defendant had the luxury of time to consider the decisions made." Id. at 632.

Plaintiffs also cite Buckley v. Ray, a post-Karsjens opinion, where the plaintiff brought a substantive due process claim alleging improper use of sealed trial records in opposition to his claim for compensation for wrongful conviction. 848 F.3d 855, 863 (8th Cir. 2017), cert. denied, 137 S.Ct. 2314 (2017). The Eighth Circuit stated:

> "To establish a violation of substantive due process rights by an executive official, a plaintiff must show (1) that the official violated one or more fundamental constitutional rights, and (2) that the conduct of the executive official was shocking to the 'contemporary conscience.'" The "shocks-the-conscience" test presents a high bar for Buckley to reach. His claim against the [defendants] must involve conduct 'so severe . . . so disproportionate to the need presented and . . . so inspired by malice or sadism . . . that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience." In a case such as this, in which actual deliberation was practical, Buckley must also prove that the [defendants] acted with deliberate indifference to the effect their conduct would have on him. Determining whether state officials acted with deliberate indifference "demands an exact analysis of circumstances before any abuse of power is condemned as

conscience shocking."

Id. (citations omitted). Under that analysis, the court concluded that "[u]sing the trial records of an individual seeking compensation for the time he spent in prison, when that individual has placed his conduct and conviction at issue, does not shock the conscience." Id. Defendants contend that Buckley actually adds a requirement to show deliberate indifference to the requirement of showing malice or sadism. (Doc. #634, p. 9). But, in this court's opinion, a finding of malice or sadism would subsume a finding of deliberate indifference; it is difficult to envision conduct that is malicious or sadistic that would not also be deliberately indifferent to the effect the conduct would have on others.

Davis v. Hall involved a substantive due process claim of a plaintiff who had been held in custody for 57 days after a court ordered his release. 375 F.3d at 712. In affirming denial of qualified immunity, the court held that deliberate indifference could satisfy the conscience-shocking conduct element because the conduct in question occurred in a custodial setting where forethought was both feasible and obligatory. Id. at 718. Plaintiffs also cite Ryan v. Armstrong, a post-Karsjens opinion discussing deliberate indifference in the context of a pretrial detainee's serious medical needs claim and reversing a grant of qualified immunity because of genuine issues of material fact as to deliberate indifference. 850 F.3d 419, 425-26 (8th Cir. 2017). Though Fields v. Abbott reversed a decision denying qualified immunity, in reaching that conclusion, the court discussed deliberate indifference as a type of conscience-shocking conduct. 652 F.3d 886, 891 (8th Cir. 2011) (quoting Lewis, 523 U.S. at 850) ("[D]eliberate indifference that shocks the conscience in one environment 'may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due

process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking.'"). Similarly, Hart v. City of Little Rock discussed deliberate indifference as conscience-shocking conduct but concluded that it did not apply on the facts of the case because the plaintiffs did not prove that the city consciously disregarded risk in releasing police officers' personally sensitive information pursuant to a subpoena from a criminal defendant. 432 F.3d 801, 807 (8th Cir. 2005).

Karsjens did not discuss whether deliberate indifference could satisfy the conscience-shocking conduct element of a substantive due process claim.[17] In that respect, it appears inconsistent with later panel decisions, as well as inconsistent with the en banc decision in Terrell. Terrell, as the Eighth Circuit's most recent en banc decision on the question, supports plaintiffs' position that deliberately indifferent conduct can satisfy the conscience-shocking conduct element of a substantive due process claim in situations where actual deliberation was practical for government actors. Here, plaintiffs' substantive due process claims concern matters of policy spanning many years; there is no assertion that actual deliberation was not practical.

Plaintiffs cite evidence of SOTEP administrators' awareness of the impact of demotion practices and contend the evidence shows the deliberate indifference of the administrators. They cite to minutes of SOTEP Advisory Committee meetings showing the number of SDIs in the various housing units and in the various stages of treatment. They also cite to minutes of a meeting of "secure clinicians," which reflect discussion of a

[17] Review of the appellate briefs confirms that neither party raised that issue on appeal. See Karsjens v. Piper, No. 15-3485, Entry IDs: 4349341, 4358824, 4362879 (8th Cir.)

number of weaknesses in the SOTEP program. The identified weaknesses included a treatment "start over" mechanism and behavioral management relying heavily on behavioral write-ups without a "consistent and thorough behavioral chain analysis." (Doc. #617-10, p. 4). Defendants do not question the accuracy of that evidence but contend that Karsjens allows the practices that plaintiffs characterize as withholding treatment. (Doc. #634, p. 4).

In this court's opinion, if a deliberate indifference standard is employed, plaintiffs have shown genuine issues of material fact on the question of whether defendants were deliberately indifferent to SDIs' fundamental liberty interest by withholding treatment for reasons unrelated to sexual misconduct or facility security.

4. Rational Relationship Review

In Karsjens, after concluding that review under a strict scrutiny standard was erroneous, the Eighth Circuit reviewed the district court's findings of facial unconstitutionality under a rational relationship standard. Under that standard, the Eighth Circuit concluded Minnesota's sex offender treatment program was not unconstitutional on its face. But Karsjens did not involve allegations of withholding treatment.

Following the first phase of the Karsjens trial, the district court determined the Minnesota program violated substantive due process as applied in six different respects: (1) not requiring periodic risk assessments of civilly committed individuals, (2) application of an incorrect legal standard for civil commitment, (3) confinement continuing after completion of treatment, (4) lack of discharge planning, (5) lack of facilities for less restrictive placements, and (6) lack of meaningful relationship between

treatment and discharge. Karsjens v. Jesson, 109 F. Supp. 3d 1139, 1170-1172 (D. Minn. 2015), rev'd, 845 F.3d 394 (8th Cir. 2017). Applying a conscience-shocking standard, the Eighth Circuit concluded the evidence did not support the district court's findings but did not discuss whether the as-applied violations that the district court had found would survive rational relationship review.

Plaintiffs as-applied substantive due process claim of withholding treatment is not similar to any claims Karsjens found not conscience-shocking. As recognized by the Willis court:

> Many types of 42 U.S.C. § 1983 cases are well trod, which is to say there is substantial case law that anticipates most fact situations. If the case is excessive force, there is binding precedent about how many times a state actor can punch an inmate before it violates the constitution. If the case is deliberate indifference to a serious medical need, there is case law discussing just how long a prison doctor can leave a tumor untreated before the care runs afoul of the Fourteenth Amendment. But this case offers the rare situation where there is very little precedent discussing what sort of (lack of) treatment would shock the conscience.

175 F. Supp. 3d at 1109-10. Karsjens—decided after the Willis court made that observation—adds little guidance for determining what would shock the conscience, since it discussed neither deliberate indifference as conscience-shocking conduct nor a rational relationship review of the plaintiffs' as-applied due process claim. Thus, this court would not conclude that defendants have demonstrated, as a matter of law, that the practices that plaintiffs characterize as withholding treatment could not support an as-applied substantive due process claim.

5. Issues of Material Fact

Plaintiffs contend there are genuine issues of material fact regarding systemic withholding of SDI treatment as a consequence of "non pro-social behavior."

Defendants contend that what plaintiffs describe as withholding treatment is actually a disagreement with SOTEP's treatment methodology. In support of their assertion that treatment is not withheld when an SDI is demoted to "Skills I-Secure 1," defendants point to the SOTEP resident handbook, which describes the Skills I programming and facility as "designed to treat sex offender residents" whose behavior is too disruptive, who have pending legal charges, or who "currently lack internal motivation for engagement in active sex offender treatment." (Doc. #617-5, p. 3). They also point to affidavits of two named plaintiffs that refer to "Skills [I] treatment." (Doc. #617-29, p. 3; Doc. #620-1, p. 5). But those same affidavits describe being "removed from treatment tracks" because of behavioral issues. (Doc. #617-29, p. 2; Doc. #620-1, p. 2). If the chief district judge agrees that withholding of treatment could infringe a fundamental liberty interest, issues of material fact preclude summary judgment on that issue.

Plaintiffs also allege genuine issues of material fact regarding treatment required under chapter 25-03.3. They point to evidence that very few SDIs have progressed beyond Stage 1/Skills III of SOTEP programming. (Doc. #617, p. 23). Additionally, they submitted evidence that SOTEP has no treatment manual or evaluation manual, that no individual treatment is provided, and that SOTEP provides no discharge planning but uses lack of discharge planning against SDIs who petition for release. Id. at 23-24. Though this evidence leads the court to question the quality of SOTEP treatment, the evidence is material only if a right to effective treatment is recognized under North Dakota law. Although the legislative history and case law support existence of a right to treatment under chapter 25-03.3, neither the case law nor the legislative history discusses a right to effective treatment.

Next, plaintiffs assert genuine issues of material fact concerning less restrictive facilities or programs. (Doc. #617, p. 25). North Dakota Century Code section 25-03.3-13 states that a civilly committed SDI must be placed in "an appropriate facility or program at which treatment is available" and that the facility or program must be the least restrictive necessary to achieve the purposes of chapter 25-03.3. Plaintiffs submitted evidence that alternatives less restrictive than the Gronewald-Middleton building are lacking and that the defendants were aware of that deficiency. (Doc. #617-10, p. 3; Doc #617-16, p. 2; Doc. #617-17, p. 3; Doc. #617-19, p. 7; Doc. #617-20, pp. 5-6; Doc. #622-7, pp. 2-4; Doc. #622-10, pp. 2-3). The Karsjens trial court had concluded that some civilly committed individuals could be safely placed in the community or in less restrictive facilities but that the state defendants had not contracted for a sufficient number of alternative placements. Under Minnesota's statute, if an individual is determined to be a sexually dangerous person or a person with a sexual psychopathic personality, the person is to be committed 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." Minn. Stat. § 253D.07, subd. 3. Applying a strict scrutiny standard, the Karsjens trial court concluded Minnesota's statute was not being applied in a narrowly tailored fashion. As with the other as-applied violations the trial court had found, the Eighth Circuit reversed as not conscience-shocking conduct and did not discuss whether the conduct met a reasonable basis standard. In reaching its decision, the Eighth Circuit appears to have considered the issue as relating to a right to effective treatment, for which it did not recognize a

fundamental right.

Finally, plaintiffs contend there are genuine issues of material fact regarding assessment, arguing that NDSH evaluators improperly and repeatedly "rely on a resident's failure to progress in treatment as proof of serious difficulty in controlling his behavior." (Doc. #617, p. 27). They submitted portions of several evaluations in which evaluators made statements of that nature. (Doc. #622-11, pp. 2, 4; Doc. #622-12, p. 15; Doc. #622-13, p. 25). Since proof of serious difficulty controlling behavior is required for continued commitment, they argue that using lack of progress in treatment in that manner improperly reverses the burden of proof on a discharge petition from the state to the SDI. Defendants' reply brief does not address use of failure to progress in treatment as shifting the burden of proof from the state to the SDI. Karsjens discussed no similar claim. Because defendants did not specifically address the claim, to the extent their motion might seek to include that claim, the motion should be denied.

Conclusion

For the reasons discussed above, it is **RECOMMENDED** that:

(1) Summary judgment be granted on plaintiffs' substantive due process claims that treatment is inadequate, inappropriate, ineffective, or unreasonable;

(2) Summary judgment be denied as to plaintiffs' substantive due process claims based on withholding of treatment as violating a fundamental liberty interest to be free from unwarranted physical restraint;

(3) Summary judgment be denied as to any procedural due process claim relating to adequacy, appropriateness, effectiveness, or reasonableness of

treatment or assessment; and

(4) Summary judgment be denied in all other respects.

Dated this 3oth day of July, 2018.

/s/ *Alice R. Senechal*
Alice R. Senechal
United States Magistrate Judge

NOTICE OF RIGHT TO OBJECT[18]

Any party may object to this Report and Recommendation by filing with the Clerk of Court no later than **August 13, 2018**, a pleading specifically identifying those portions of the Report and Recommendation to which objection is made and the basis of any objection. Failure to object or to comply with this procedure may forfeit the right to seek review in the Court of Appeals.

[18] See Fed. R. Civ. P. 72(b); D.N.D. Civ. L.R. 72.1.