No. 18-3343

United States Court of Appeals
For The Eighth Circuit

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 H. Hausfeld, and
all others similarly situated,

Plaintiffs – Appellants,

v.

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

Defendants – Appellees.

On Appeal from the United States District Court
for the District of Minnesota

BRIEF OF PLAINTIFFS-APPELLANTS

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This case involves the constitutional rights of Plaintiffs-Appellants ("Plaintiffs"), who are civilly committed in Minnesota. After years of litigation and a lengthy bench trial, the district court applied strict scrutiny and found the Minnesota Commitment and Treatment Act (the "Act") unconstitutional on its face and as-applied by Defendants-Appellees ("Defendants"). On appeal, this Court applied the fundamental rights/shocks the conscience test from *Cty. of Sacramento v. Lewis*, 523 U.S. 833 (1998), *see Karsjens v. Piper*, 845 F.3d 394 (8th Cir. 2017) ("*Karsjens I*"), and reversed the district court's decision and remanded. On remand, the district court rejected Plaintiffs' argument that the *Lewis* test did not apply to Counts III, V, VI and VII, which allege the Act violates Plaintiffs' constitutional right to be free from punishment. Instead, the district court applied the *Lewis* standard, citing *Karsjens I*, and dismissed Plaintiffs' claims.

Because Plaintiffs' claims under Counts III, V, VI and VII allege that the Act is punitive, they are governed by the standard from *Bell v. Wolfish,* 441 U.S. 520 (1979) (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963)). As a result, the district court's dismissal should be reversed and the case should be remanded.

Plaintiffs request 15 minutes for oral argument.

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JURISDICTIONAL STATEMENT

Federal question jurisdiction exists over this case pursuant to 28 U.S.C. § 1331. On September 24, 2018, the district court granted Defendants' motion to dismiss Counts III, V, VI, and VII of Plaintiffs' Third Amended Complaint with prejudice and Defendants' motion for summary judgment on Counts VIII, IX and X of Plaintiffs' Third Amended Complaint. Add. 1 (Doc. 1108)[1]. Judgment was entered in this case on August 25, 2018. Add. 43 (Doc. 1109).

Plaintiffs moved for an extension of time to file a notice of appeal (Doc. 1110), which was granted. PA256 (Doc. 1115). Plaintiffs subsequently filed their Notice of Appeal on October 24, 2018, as to the district court's dismissal of Counts III, V, VI and VII. PA258 (Doc. 1118). Jurisdiction exists over this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Did the district court err in applying the *Lewis* fundamental rights/shocks the conscience test to Plaintiffs' due process claims in Counts III, V, VI, and VII, which allege that the Defendants' implementation of the Act through the MSOP is punitive, rather than determining whether the Act is punitive either in purpose or effect under the standard set forth in Supreme Court precedent.

[1] Throughout this brief, "Add." refers to Plaintiffs' Addendum, "PA" refers to Plaintiffs' Appendix, and "Doc." refers to docket entries in the district court.

Most apposite authority:

Hudson v. United States, 522 U.S. 93 (1997)

Kansas v. Hendricks, 521 U.S. 346 (1997)

Bell v. Wolfish, 441 U.S. 520 (1979)

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)

STATEMENT OF THE CASE[2]

This *pro se* case was filed on December 21, 2011, alleging constitutional and state law violations regarding Minnesota's civil commitment of sex offenders. Shortly thereafter, the district court appointed Gustafson Gluek PLLC to represent the purported class. After the class was certified, years of discovery and significant motion practice, on November 7, 2014, the district court issued a final pretrial order bifurcating the trial and identifying the claims to be tried in the first trial (Phase One). PA087 (Doc. 647).

The Phase One trial, which involved Counts I, II, III, IV, V, VI, VII and XI of Plaintiffs' Third Amended Complaint ("TAC") (PA001 (Doc. 635)),[3] began on

[2] The detailed factual record from the trial proceedings in the district court are set forth in the district court's Findings of Fact, Conclusions of Law, and Order (PA092 (Doc. 966)) and *Karsjens I*, 845 F.3d 394, and are not repeated here because this appeal presents a purely legal question.

[3] Plaintiffs' Third Amended Complaint alleges that the MSOP is punitive in Count III (the MSOP's treatment program, by failing to be designed and implemented in a way that moves Plaintiffs towards reduction in custody, is "tantamount to punishment);

February 9, 2015 and concluded on March 18, 2015.[4] Docs. 839, 847-48, 851-52, 860-62, 865-66, 869-72, 883-85, 887-88, 892-93, 902, 906-08. Counts VIII, IX, and X, were reserved for a Phase Two of trial. PA087 (Doc. 647).

On June 17, 2015, the district court issued an order finding for Plaintiffs on Counts I and II, concluding that the Act is unconstitutional on its face and as applied by the Defendants. *See* PA100, PA102 (Doc. 966 at 9, 11). Based on the Minnesota Supreme Court's previous decisions applying strict scrutiny to the Act, *see e.g., In re Blodgett*, 510 N.W.2d 910, 914 (Minn. 1994), and because the Act implicated the fundamental liberty rights of Plaintiffs, the district court applied strict scrutiny to Plaintiffs' Counts I and II. The Court expressly declined to decide Counts III, V, VI and VII, stating, "because any remedy fashioned [as to Counts I and II] will address the issues raised in the remaining Phase One Counts, the Court need not address Counts III, V, VI and VII." PA156 (Doc. 966 at 65, ¶38). After seeking input from Defendants on the appropriate remedy – which Defendants refused to provide – the

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Count V (the MSOP is operated in a punitive manner); Count VI (failure to provide less restrictive alternatives is "tantamount to punishment") and Count VII (confinement to the MSOP is "tantamount to punishment" because it continues even when statutory commitment criteria are no longer met). PA064-66, PA067-74 (TAC, Doc. 635 at ¶¶254-261, 269-297).

[4] Counts IV, XI, XII and XIII were dismissed with prejudice on August 10, 2015. PA168 (Doc. 1005).

district court entered an injunction requiring the Defendants to take remedial action.[5] PA170 (Doc. 1035).

Defendants appealed Counts I and II to this Court, which rejected the application of strict scrutiny to the Act and reversed the district court's findings on Counts I and II, holding that the Act was not unconstitutional on its face or as-applied under the *Lewis* fundamental rights/shocks the conscience test. *See Karsjens I*, 845 F.3d 394. Although this Court held that the "shocks the conscience standard" applied to Plaintiffs' as-applied substantive due process claims, it did not make any findings as to whether the Act was punitive in purpose or effect under Counts III, V, VI or VII. *See id*. In fact, this Court's order makes no mention of these alternative claims.

On December 8, 2017, Defendants filed a renewed Motion for Summary Judgment on Counts VIII, IX, and X, as well as for apportionment of the Rule 706 expert costs to Plaintiffs. Docs. 1095, 1097. Defendants also argued that the district court should dismiss the remaining Phase One claims (Counts III, V, VI, and VII) under this Court's mandate from *Karsjens I*. Doc. 1097 at 4-9.

Plaintiffs opposed Defendants' motion to dismiss Counts III, V, VI and VII, arguing that these claims raise allegations that the Act is punitive (as opposed to civil) in purpose or effect and therefore unconstitutional. Doc. 1100 at 15 (citing PA064,

[5] Defendants sought and obtained a stay of the injunction from this Court while they pursued their appeal on the merits. *Karsjens v. Jesson*, No. 15-3485, Entry ID 4342120 (8th Cir. Dec. 2, 2015).

PA068, PA071, PA072 (TAC, Doc. 635, at ¶¶ 256, 271, 287, 293) (commitment to the MSOP cannot be "tantamount to punishment.")). Plaintiffs specifically argued that the basis for Counts V and VII is that civil commitment under the Act is punitive. *See* PA067-70 (TAC, Doc. 635, at ¶¶269-283) (Count V, alleging denial of Plaintiffs' right to be free from punishment); PA072-74 (TAC, Doc. 635, at ¶¶292-297) (Count VII, alleging denial of Plaintiffs' right to be free from inhumane treatment). Similarly, Counts III and VI allege that commitment to the MSOP under the Act is punishment because the sham and improper purposes evidenced by the treatment program and lack of less restrictive alternatives illustrate an improper purpose or effect and therefore render Plaintiffs' commitment punitive. *See* PA064-66, PA070-72 (TAC, Doc. 635, at ¶¶254-261, 284-291); *see also* Doc. 1100 at 15-16.

Plaintiffs further argued that this Court's opinion relating to Counts I and II in *Karsjens I* did not address the question of whether the Act was punitive and, as such, the prior ruling in *Karsjens I* does not apply to these claims. Doc. 1100 at 16 (citing *Karsjens I*, 845 F.3d 394). Plaintiffs then argued that the evidence at trial demonstrated that Plaintiffs' commitment to the MSOP under the Act is punitive in purpose or effect, regardless of the expressed civil nature of the Act, because the treatment provided, the living conditions (including lack of less restrictive alternatives), and the discharge process interfere with Plaintiffs' opportunity for a reduction in custody or discharge; the consequence of which is permanent, punitive

detention. Based on those claims and evidence, Plaintiffs contended that the district court should make findings that the Act is punitive, and therefore unconstitutional as alleged in Counts III, V, VI and VII.

The district court heard oral argument on February 5, 2018 (Doc. 1103), and on August 23, 2018, dismissed Plaintiffs' remaining Phase One claims (Counts III, V, VI and VII) with prejudice and dismissed Plaintiffs' remaining Phase Two claims (Counts VIII, IX and X) with prejudice. Add. 1 (Doc. 1108). The district court found that this Court's prior ruling in *Karsjens I* was dispositive of the Plaintiffs' remaining Phase One claims regardless of the theory of liability alleged. Add. 19 (Doc. 1108 at 19). The district court specifically found that these claims must be analyzed under the *Lewis* fundamental rights/shocks the conscience test identified by this Court in *Karsjens I* and that "the Eighth Circuit has explicitly held that Defendants' actions, as revealed in Phase One of trial, do not rise to the conscience-shocking level necessary to support Fourteenth Amendment substantive due process liability." *Id.* Additionally, the district court found that "[e]ven if this Court were free to conclude that the MSOP and Defendants' implementation of the [Act] amount to punishment of individuals who are subject to civil commitment, the Eighth Circuit's decision compels the conclusion that Defendants have not engaged in conscience-shocking conduct to support the imposition of liability under the Fourteenth Amendment." Add. 19-20 (Doc. 1108 at 19-20).

Plaintiffs filed a notice of appeal with respect to the dismissal of Counts III, V, VI, and VII.

SUMMARY OF ARGUMENT

Plaintiffs' remaining Phase I claims (Counts III, V, VI and VII) allege, in the alternative, that the MSOP is punitive in purpose or effect and therefore violates the due process component of the Fourteenth Amendment. *See Bell v. Wolfish,* 441 U.S. 520, 535-36 (1979) (stating that "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.") (citations omitted); *see also Youngberg v. Romeo,* 457 U.S. 307, 316, 321-22 (1982). The proper framework to analyze these claims is set forth in *Bell,* 441 U.S. 520, and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). Because the district court applied the wrong standard when dismissing Plaintiffs' Counts III, V, VI and VII, that decision should be reversed and remanded for application of the proper legal standard under *Bell* and *Kennedy*.

STANDARD OF REVIEW

The issue on this appeal is whether the district court applied the correct legal standard in dismissing Plaintiffs' allegations that, under Counts III, V, VI, and VII of the TAC, the Act should be found to be punitive and thus unconstitutional. This is a question of law and therefore reviewed *de novo. See e.g., Highmark Inc. v. Allcare*

Health Mgmt. Sys., Inc., 572 U.S. 559, 563 (2014) (questions of law are reviewed *de novo*).

ARGUMENT

United States Supreme Court law is clear that Plaintiffs, as civilly committed persons and not prisoners, cannot be subjected to conditions that "amount to punishment." *Bell,* 441 U.S. at 535; *Youngberg,* 457 U.S. at 316 (observing that those confined for civil purposes "may not be punished at all."); *see also Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *Jones v. Blanas,* 393 F.3d 918, 932 (9th Cir. 2004).

As the Supreme Court held in *Kansas v. Hendricks*, 521 U.S. 346 (1997), the legislature's intent that a statute is civil rather than punitive will be rejected where "a party challenging the statute provides the clearest proof that the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention to deem it civil." *Id.* at 361 (internal quotation marks omitted) (citation omitted). Where evidence shows that the effect of a statute is retribution or deterrence, it may be punitive rather than civil. *Id.* at 361-62. This is particularly true where, as here, there are not "proper procedures" in place such that "incapacitation [is a] legitimate end of the civil law." *Id.* at 365-66.

The appropriate test to determine whether a penalty is civil is, first, a "question of statutory construction," *see id.* at 361 (quoting *Allen v. Illinois,* 478 U.S. 364, 368

(1986)), and it proceeds "on two levels." *U.S. v. Ward*, 448 U.S. 242, 248 (1980); *see also Hudson v. U.S.,* 522 U.S. 93, 99-100 (1997) (citing *Kennedy,* 372 U.S. at 168-69). As such, the court must first determine whether the legislative body expressed a preference for a particular label ("civil" or "criminal"), *see Ward*, 448 U.S. at 248, though these labels "are not of paramount importance." *Dep't of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 777 (1994) (internal quotation marks and citations omitted). If there is no "conclusive evidence" that the legislature sought to punish criminally through its enactment, the court must then consider a range of factors to decide whether the penalty really is a criminal punishment. *Kennedy*, 372 U.S. at 169.[6]

The Supreme Court identified some of these factors in *Kennedy*:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in

[6] Although this Court disagrees with the Minnesota Supreme Court's conclusion that strict scrutiny applies to the Act, *see e.g., In re Blodgett*, 510 N.W.2d 910, 914 (Minn. 1994), the Minnesota Supreme Court has also rejected the notion that the Act is criminal at least with respect to the double jeopardy and *ex post facto* context. *See In re Linehan*, 594 N.W.2d 867, 871–72 (Minn. 1999) (reconsidering and again rejecting claims of double jeopardy and *ex post facto* on remand after the United States Supreme Court's decision in *Hendricks*).

> relation to the alternative purpose assigned are all relevant to the inquiry.

Id. at 168–69. The Supreme Court found that these factors, "neither exhaustive nor dispositive," enable the Court to determine whether "the statutory scheme was so punitive either in purpose or effect as to negate" the legislature's intention to create a civil penalty. *See Hendricks,* 521 U.S. at 361 (quoting *Ward*, 448 U.S. at 248–49).

Punitive intent is a bright line invalidating even a scheme narrowly tailored to meet non-punitive purposes, no matter how compelling. In *Hendricks*, the Supreme Court called this the "threshold" matter in determining constitutional validity. 521 U.S. at 361-62. And the *Hendricks* Court made it clear that the "punitive purpose" inquiry begins with the state's "disavow[al of] any punitive intent," but does not end there. *See id*. at 368 (quotation marks omitted). In other words, restricting permissible state purposes cannot simply be based on their importance (i.e. "compelling" or "important" or "legitimate") but also on their substance. *See* Eric S. Janus, *Beyond Strict Scrutiny: Forbidden Purpose and the "Civil Commitment" Power*," NEW CRIM. LAW REV., Vol. 21, No. 3, at 349 (2018) (citing Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L REV. 523, 575-78 (2016)). Because no matter how important the state's purposes are, if the legislation contains a forbidden purpose (punishment), it must be invalidated. *Id.* Again, the Supreme

Court has made it clear that "ferreting out the forbidden 'purpose to punish' – is at the center of its civil commitment cases." *Id.* at 368 (citing *Hendricks*, 521 U.S. 346).[7]

In this case, however, the district court did not determine whether the Act was punitive in purpose or effect as alleged in Counts III, V, VI, and VII. It did not undertake the analysis set out in *Bell* nor did it consider the factors set out in *Kennedy* based on the evidence adduced at trial. Rather, the district court concluded it was obligated to apply the fundamental rights/shocks the conscience test identified by the Eighth Circuit in *Karsjens I*. *See* Add. 19 (Doc. 1108 at 19).

But, under Supreme Court precedent, this is not the correct standard to use in the analysis of Plaintiffs' Counts III, V, VI and VIII, which require a determination of whether the Act is punitive either in purpose or effect.[8]

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[7] The Ninth Circuit has found that "punitive conditions may be shown (1) where the challenged restrictions are expressly intended to punish, or (2) where the challenged restrictions serve an alternative, non-punitive purpose but are nonetheless excessive in relation to the alternative purpose…or are employed to achieve objectives that could be accomplished in so many alternative and less harsh methods." *Jones*, 393 F.3d at 932 (internal quotation marks omitted) (citing *Demery v. Arpaio*, 378 F.3d 1020, 1028 (9th Cir. 2004); *Hallstrom v. City of Garden City*, 991 F.3d 1473, 1484 (9th Cir. 1992).

[8] As the Ninth Circuit held in the *Jones* case, *Seling v. Young,* 531 U.S. 250 (2001) is not to the contrary. There, the Supreme Court held only that a sexually violent predator law was not subject to as-applied *ex post facto* and double jeopardy challenges based on the lack of treatment received by a particular detainee under the law. *Jones,* 393 F.3d at 933 (citing *Seling,* 531 U.S. at 263).

CONCLUSION

The district court applied the wrong legal standard to Plaintiffs' alternative claims in Counts III, V, VI and VII that the Act is punitive in purpose and effect and therefore violates due process. The district court's order dismissing the remaining Phase One claims should be reversed and remanded for an analysis of, and finding on, whether the Act is punitive (and therefore unconstitutional) in purpose or effect.

Dated: December 20, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 2,851 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: December 20, 2018

s/Daniel E. Gustafson
Daniel E. Gustafson

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

Dated: December 20, 2018

s/Daniel E. Gustafson
Daniel E. Gustafson