Appellate Court File 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 K. Hausfeld, and all others similarly situated,

Plaintiffs-Appellants,

v.

Tony Lourey; Kevin Moser; Peter Puffer; Nancy Johnston; Jannine Hébert; Ann Zimmerman; in their official capacities,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

BRIEF OF DEFENDANTS-APPELLEES TONY LOUREY[1], ET AL.

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[1] Tony Lourey, the current Commissioner of DHS, is automatically substituted for former DHS Commissioner Emily Johnson Piper. Fed. R. App. P. 43(c)(2).

SUMMARY OF CASE AND REQUEST FOR ORAL ARGUMENT

In 2015, following a six-week trial, the district court concluded that Minnesota's civil commitment statute applicable to sexual offenders, the Minnesota Commitment and Treatment Act ("MCTA"), was unconstitutional. It specifically held in Plaintiffs' favor on two of Plaintiffs' six Fourteenth Amendment substantive due process claims (Counts I and II). It reserved ruling on Plaintiffs' other four substantive due process claims (Counts III, V, VI, and VII).

Defendants appealed and this Court reversed, holding that the district court applied the wrong standards to Plaintiffs' substantive due process claims, and that the record demonstrated no substantive due process violation under the correct standards. *Karsjens v. Piper*, 845 F.3d 394 (2017) ("*Karsjens I*"). The Court remanded for consideration of the remaining four substantive due process counts. After the parties filed supplemental briefs, the district court decided Plaintiffs' remaining substantive due process claims under the "shocks the conscience" standard applied by this Court in *Karsjens I*, and dismissed Counts III, V, VI, and VII. Plaintiffs appealed dismissal of those counts. This dismissal was clearly mandated by this Court's prior decision, and should be affirmed.

Defendants do not believe oral argument is necessary, but if the Court grants Plaintiffs' request, Defendants respectfully suggest each party receive 15 minutes for oral argument.

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STATEMENT OF JURISDICTION

The district court had federal question jurisdiction in this case pursuant to 28 U.S.C. § 1331. Having been granted an extension of time to file a notice of appeal by October 24, 2018, *see* Doc. 1115, p. 2, Plaintiffs timely appealed the district court's August 23, 2018 order dismissing their remaining claims by filing a notice of appeal on October 24, 2018. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Consistent with this Court's earlier holding in this case, are substantive due process challenges to executive action governed by the "shocks the conscience" standard, and did the district court correctly dismiss Plaintiffs' remaining Fourteenth Amendment claims under that standard?

   Most Apposite Authorities:

   Karsjens v. Piper, 845 F.3d 394 (2017)

   Morris v. Am. Nat. Can Corp., 988 F.2d 50, 52 (8th Cir. 1993)

   Macheca Transp. Co. v. Philadelphia Indem. Ins. Co., 737 F.3d 1188, 1194 (8th Cir. 2013)

STATEMENT OF THE CASE AND FACTS

I. SEX OFFENDER CIVIL COMMITMENT IN MINNESOTA.

Minnesota Statutes Chapter 253D provides that an individual may be civilly committed if a Minnesota state court finds by "clear and convincing evidence" that he is a "sexually dangerous person" or "sexual psychopathic personality," under Minnesota law. Minn. Stat. §§ 253D.07, subd. 3; 253D.02, subds. 15, 16. A person found to meet this demanding standard is committed to the care of the Commissioner of the Minnesota Department of Human Services ("DHS"). *Id.* Defendants are not involved in the initial commitment of sex offenders.

The Department's Minnesota Sex Offender Program ("MSOP") provides treatment and housing to civilly committed sex offenders at an annual cost of about $125,000 per client, which is at least three times the cost of incarcerating an inmate in a Minnesota correctional facility. Doc.966, p. 20, PA111.[2] MSOP has three main facilities. Tr. 3306, App.963. The largest facility is a secure location in Moose Lake, Minnesota that houses clients who are in the early stages of treatment. Tr. 3304-06, App.961-63. MSOP also has two facilities in St. Peter, Minnesota: a secure facility for clients who are generally in the later stages of

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[2] "Doc." refers to docket entries in the district court. "Tr." refers to the transcript of the trial that took place from February 9 to March 18, 2015. "PA" refers to Plaintiffs-Appellants' Appendix. "App." refers to Defendants-Appellees' Appendix. "Add." refers to Plaintiffs-Appellants' Addendum. "Pl. Br." refers to Plaintiffs-Appellants' brief.

treatment, Tr. 3299-300, 3307, App.957-58, 964, and Community Preparation Services ("CPS"), which is housing outside of the secure perimeter designed for clients in the last stages of treatment, focusing on reintegration into the community. Tr. 3301-02, 3308, 4010, App.959-60, 965, 1037.

MSOP Executive Director Nancy Johnston has nearly thirty years of experience in treatment and program administration. Tr. 3201-08, App.942-49. MSOP's Clinical Director, Associate Clinical Directors, and Clinical Supervisors all have master's degrees or higher and significant experience in sex-offender treatment. Tr. 1359-61, 4208, 4211-12, 4223-30, 4574-85, App.908-10, 1049-51, 1053-60, 1071-82. MSOP hires only primary therapists who have a master's degree or higher. Tr. 4601-07, App.1083-89. MSOP employees testified at length about the structure of the treatment program, the training clinicians receive, and the ratio of clinicians to clients. Tr. 1412-22, 4017-19, 4215-16, 4253-56, 4341-42, App.911-21, 1038-40, 1052, 1061-66.

II. THE MSOP CLIENT POPULATION.

MSOP clients are the most dangerous sex offenders in Minnesota and represent only 4% of all registered sex offenders in the State. Tr. 3210, App.950. Sixty-seven percent of the 635 MSOP clients who have been tested have high psychopathy, approximately fifty percent of clients have an antisocial personality diagnosis, and ten percent are diagnosed as sadistic. Tr. 3219-22, App.952-55.

Fourteen percent of MSOP clients either killed or tried to kill one of their victims, Tr. 3222-23, App.955-56, and forty-one percent used a weapon to perpetrate at least one of their sexual assaults. *Id.* On average, each MSOP client has 12 *known* victims, totaling at least 8,800 victims. Tr. 3217, 4794-95, App.951, 1100-01.

For example, lead Plaintiff and Class representative Kevin Karsjens was committed after a 30-year history of forcibly raping and threatening to kill his sister, wives, partners, and other females; yet Mr. Karsjens denies being a sex offender, having committed any sexual offenses, or needing any sex offender treatment. Tr. 3433-34, App.975-76. According to Mr. Karsjens, all of his victims are liars and he is only committed because of a vast conspiracy. *See* Tr. 3469-70, 3435, App.985-86, 977 (testifying that when sister says she was sexually and physically abused by him, sister is not telling the truth); Tr. 3437, App.978 (denying sexual abuse of ex-wife when she still had stitches from childbirth and stating she lied); Tr. 3438, 3433, 3449, App.979, 975, 980 (denying victim's testimony that he drove her to "the country," choked, shook, and hit her, and attempted to run her over with his vehicle); Tr. 3452-53, 3462, 3463, App.981-84 (discussing other victims). Mr. Karsjens has petitioned for a reduction in custody which was denied by a panel of three state district court judges. The panel's decision was affirmed by the Minnesota Court of Appeals. *Karsjens v. Jesson*, A13-1746, 2014 WL 902860 (Minn. Ct. App., March 10, 2014) (unpublished).

Other MSOP clients who testified at trial include the following individuals:

Plaintiff and Class representative Peter Lonergan was committed for raping his sister-in-law's eight-year-old daughter, Tr. 3641-42, App.987-88, repeatedly raping and threatening with weapons his cousin's eight-year-old stepson, Tr. 3647-49, App.990-92, raping that child's two sisters, Tr. 3650-52, App.993-95, and raping his girlfriend's three-year-old daughter and his own brother. Tr. 3654-56, App.997-99. Mr. Lonergan denies all of these offenses except the first one. Tr. 3642, 3647, App.988, 990. Mr. Lonergan says all his other victims are either liars or confused, Tr. 3649, 3651, 3653, 3656, App.992, 994, 996, 999, and claims he has "never really been sexually attracted to children," despite his numerous crimes. Tr. 3643, 3711, App.989, 1004. At the time of trial in this case, Mr. Lonergan had a petition pending before the three-judge panel that makes reduction in custody decisions, Tr. 3754-69, App.1005-20, and the eventual denial of that petition was affirmed by the Minnesota Court of Appeals. *Lonergan v. Piper*, No. A15-1625, 2016 WL 687515, at *1 (Minn. Ct. App. Feb. 22, 2016) (unpublished).

Plaintiff and Class representative James Rud's commitment order identified more than 50 different victims, both male and female, between the ages of 2 and 17. Tr. 3804-06, App.1021-23. Mr. Rud used chemicals to obtain victims' compliance to effectuate his assaults and admits to victimizing sixteen children

between the ages of 6 and 15. *Id*. He had a pattern of gaining access to child victims "through extensive grooming of the children and their parents, such as providing gifts, taking the children places such as the movies or theme parks and providing uncharged child care." Tr. 3807, App.1024. Mr. Rud continues to deny multiple findings that he threatened his victims or their families, or used chemicals to obtain his victims' compliance. Tr. 3808-10, App.1025-27.

When he was age 17 to 24, Plaintiff and Class representative Christopher Thuringer sexually abused more than 20 minor males and females age 2 to 15. Tr. 1879, App.930; Def. Ex. 239, pp. 4-6. Mr. Thuringer was paroled from jail without civil commitment in 2006, but violated parole when he was found to be in possession of child pornography. Tr. 1856, App.929. Despite the fact that he had been involuntarily terminated in 2004 from his previous sex offender treatment program, Tr. 1855, App.928, and despite his continued possession of child pornography thereafter, Mr. Thuringer believes he had already been effectively treated for his sex offenses at the time of commitment. Tr. 1916, App.936.

Class member Wayne Nicolaison was committed after two brutal rapes, one of which he perpetrated after he absconded from a halfway house. Tr. 4939, 5014, App.1108, 1117. During that rape, Mr. Nicolaison repeatedly sexually assaulted his victim, threatening her with a knife. Tr. 5015-18, App.1118-21. Mr. Nicolaison feels no remorse or empathy for his brutal assaults, boasting that

being raped by him did not "hurt [his victim's] reputation any," because he was such a ladies' man. Tr. 5007-10, App.1113-16. Nicolaison does not believe he should be committed, does not participate in sex offender treatment at MSOP, and denies that he needs sex offender treatment. Tr. 4933, 4938, App.1106-07. Mr. Nicolaison has petitioned for a reduction in custody numerous times and has been denied each time. Tr. 4978-81, App.1109-12; *e.g.*, Def. Ex. 478.

Class member Jason Hayzlett admitted that he sexually assaulted his three-year-old cousin. Tr. 5049, App.1123. He denies other sex offenses detailed in his commitment order, including repeated sexual assaults of his sister-in-law and other women. Tr. 5050-51, App.1124-25. At trial, Mr. Hayzlett admitted to stalking and grabbing a woman "from behind her around the neck with one arm, cutting off her airway, cover[ing] her mouth with the other hand and dragg[ing] her across the parking lot" before being stopped by intervening bystanders. Tr. 5051-52, App.1125-26. Mr. Hayzlett refuses to participate in treatment at MSOP, Tr. 5048-49, App.1122-23, and has unsuccessfully petitioned for a reduction in custody twice. Def. Exs. 489, 496.

III. MSOP TREATMENT.

MSOP provides sex offender treatment that is consistent with current research in the field and best practices and employs qualified clinicians. Doc. 658 (also Pl. Ex. 225), p. 28, App.220; Tr. 4601-07, App.1083-89. Treatment occurs in

a progression of three "phases," and MSOP clients are reviewed on a quarterly basis to determine their progress in treatment and whether they are assigned to the correct treatment phase. Tr. 3896, 3915-16, App.1028-30. MSOP organizes its clients into subgroups in an effort to best meet their individual treatment needs. Tr. 3941, 4042-44, App.1031, 1041-43. MSOP's 86% treatment participation rate compares favorably with other states' programs. Def. Ex. 17; Tr. 682, App.903. MSOP has policies and practices that attempt to balance security with the promotion of a therapeutic environment. Tr. 3309-11, App.966-68. These policies and practices are consistent with the policies and practices of other states. Tr. 306-15, 321-31, App.878-98; Doc. 658, p. 57, App.249 ("For the most part, MSOP administration and staff at Moose Lake and St. Peter maintains reasonable policies and practices that balance security with promotion of a therapeutic environment.").

IV. THE REDUCTION IN CUSTODY PETITION PROCESS.

MSOP clients can petition for a "reduction in custody" from their commitment. Minn. Stat. §§ 253D.27-.31. An MSOP client can request: (1) transfer to a less secure location; (2) provisional discharge to the community; or (3) full discharge. *Id.* A client may ask for any or all of these types of relief. Def. Ex. 34. Filing a petition is easy, and only requires a client to indicate that he wants a reduction in custody and to sign his name. *Id.*

The process includes the appointment of an attorney (paid for by the State) and at least two risk assessments, one by MSOP and one by an examiner appointed by a panel of three Minnesota district court judges. Minn. Stat. §§ 253D.20, .27. MSOP risk assessments must be completed by a doctoral level psychologist and takes 40-55 hours to complete. Tr. 4725, App.1095.

A petition is first reviewed by a three-member Special Review Board (SRB), which is provided treatment and risk assessment reports from MSOP and any information submitted by the petitioner. Tr. 1501, App.922; Minn. Stat. § 253D.27, subd. 3. The SRB holds an administrative-type hearing at which the petitioner is represented by an attorney. *Id.* The SRB issues a written recommendation as to whether the petition should be denied or granted. *See* Minn. Stat. § 253D.27, subd. 4.

If the DHS Commissioner, the county attorney from the county of commitment or financial responsibility, or the petitioner disagrees with the SRB recommendation, they may request rehearing by the state court three-judge panel, which presides over a *de novo* evidentiary hearing. Minn. Stat. § 253D.28, subds. 1, 2, & 3. The burden is on the party opposing discharge or provisional discharge to prove by clear and convincing evidence that the client is still in need of commitment. Minn. Stat. § 253D.28, subd. 2(d). The three-judge panel issues a

written decision, which can be appealed to the Minnesota Court of Appeals and then to the Minnesota Supreme Court. Minn. Stat. § 253D.28, subds. 3, 4.

V. PLAINTIFFS' CLAIMS.

Plaintiffs' original Complaint, filed *pro se* on December 21, 2011, did not allege that the MCTA at Minnesota Statutes Chapter 253D (then largely codified at Minnesota Statutes section 253B.185) or any other statute was unlawful, either facially or "as applied." Instead, they only alleged that policies, conditions, and treatment at MSOP violated the First, Fourth, and Fourteenth Amendments. Doc. 1, pp. 1-47, App.1-47. The Complaint contained no double jeopardy or *ex post facto* claim.

Plaintiffs' First and Second Amended Complaints, filed after they obtained counsel, retained the same focus on MSOP policies, conditions, and treatment. The only statutory challenge contained in those versions was a vague allegation that the MCTA violated substantive due process "as applied" because MSOP does not provide "acceptable mental health treatment," and that "Defendants' implementation" of the statute leads to a "punitive, not therapeutic" environment at MSOP. Doc. 151, pp. 57-59, App.104-06; Doc. 301, pp. 72-73, App.182-83. Neither the First nor Second Amended Complaints contained a double jeopardy or *ex post facto* claim.

Plaintiffs' Third Amended Complaint ("TAC") was the operative complaint at the time of trial and contains the counts currently on appeal (Counts III, V, VI, and VII). No count in this final version of the complaint, other than Counts I and II, purported to challenge the MCTA or any other statute. Doc. 635, PA001-086. Plaintiffs did not bring a double jeopardy or *ex post facto* claim.

From February 9 to March 18, 2015, the parties tried "Phase One" of this case, which among other claims included each of the substantive due process claims contained in the TAC: Counts I, II, IV, V, VI, and VII. *See id*. at 59-74, PA059-74; Tr. 5310-12, App.1133-35.

The parties submitted closing arguments after trial, which addressed each of the claims tried. Docs. 914, 930, 933, App.301-562, 563-709, 710-95. Plaintiffs exclusively argued that the district court had to use a "strict scrutiny" standard when deciding all of Plaintiffs' substantive due process claims. Doc. 914, pp. 2-23, App.302-23; Doc. 933, pp. 3-12, 41, 55, 64, App.712-21, 750, 764, 773. Defendants responded that Plaintiffs' facial substantive due process challenge to the MCTA (Count I) was governed by the "some reasonable relation" test, *see, e.g., Foucha v. Louisiana*, 504 U.S. 71, 79 (1990), and that Plaintiffs' substantive due process challenges to Defendants' executive administration of MSOP (Counts II, III, V, VI, and VII) were governed by the "shocks the conscience"

standard, *see Cty. of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998). Doc. 930, pp. 31-43, App.593-605.

At no time before the district court's decision did Plaintiffs address – even in the alternative – that some other standard might apply to any of their substantive due process claims should their insistence on "strict scrutiny" turn out to be mistaken. They also never argued that Defendants' statement of the "shocks the conscience" standard was incorrect or incomplete.

On June 17, 2015, the district court issued a liability order agreeing with Plaintiffs that "strict scrutiny" applied to their substantive due process claims. It ruled in Plaintiffs' favor and held that civil commitment in Minnesota violated substantive due process both facially and "as applied," in part concluding that "[t]he statute is therefore not narrowly tailored and results in a punitive effect and application contrary to the purpose of civil commitment." Doc. 966, p. 56, PA147. The district court ruled only on Counts I and II "because any remedy fashioned will address the issues raised in the remaining Phase One counts." *Id*. at 65, PA156.

Defendants appealed, arguing in part that the district court applied the wrong legal standards. *Karsjens I*, 8th Cir. Case No. 15-3485, Entry ID: 4349341, pp. 76-87. In response, Plaintiffs argued that the district court properly applied "strict scrutiny," and did not argue any alternative substantive due process theory

or that Defendants had misstated the "shocks the conscience" standard. *Id*. at Entry ID: 4358824, pp. 47-75.

This Court reversed, holding that the district court should have applied the "some reasonable relation" standard to Count I and the "shocks the conscience" standard to Count II. *Karsjens I*, 845 F.3d 394, 407-11 (8th Cir. 2017). As to Count I's facial challenge, the Court also held that the MCTA did not violate the "some reasonable relation" standard. *Id*. at 408-10. As to Count II's "as applied" challenge, the Court recognized that Plaintiffs really challenged Defendants' administration of MSOP, and that those actions did not violate the "shocks the conscience" standard. As the Court reasoned, "[h]aving reviewed these grounds and the record on appeal . . . the class plaintiffs have failed to demonstrate that any of the identified actions of the state defendants or arguable shortcomings in the MSOP were egregious, malicious, or sadistic as is necessary to meet the conscience-shocking standard." *Id.* at 407-11. This Court remanded the case "for further proceedings on the remaining claims in the Third Amended Complaint." *Id*. at 411.

On remand, Plaintiffs stated that Counts III, V, VI, and VII, the substantive due process claims the district court did not decide, "can be decided by the Court without any further briefing, argument, or presentation of evidence," in part because Plaintiffs' position on these substantive due process claims was "fully

submitted" in their closing argument. Doc. 1074, p. 7, App.802. Each of these remaining counts explicitly challenges Defendants' administration of MSOP (and does not challenge the MCTA). *See* Doc. 635, pp. 64-65, 68-71, 73, PA64-65, 68-71, 73 (repeatedly basing these claims on "the policy and procedures created and implemented by Defendants" and "the acts and omissions of Defendants"); *see also* Doc. 1108, PA213-54, Add. 1-42 (district court recognizing that "Counts III, V, VI, and VII all arise under the due process clause of the Fourteenth Amendment[] and challenge Defendants' acts and omissions relating to the creation and implementation of various policies at the MSOP.").

Defendants later filed supplemental briefing asserting that this Court's decision in *Karsjens I* mandated dismissal of these remaining substantive due process counts. Doc. 1097, App.804-39. In response, Plaintiffs advanced two substantive due process theories never before argued to the district court, contending: (1) that Counts III, V, VI, and VII challenged Defendants' executive actions in administering MSOP, and that Defendants' actions "shocked the conscience" because Defendants had time to deliberate before taking such actions,[3] *see* Doc. 1100, pp. 5-15, App.844-54; and (2) that Counts III, V, VI, and VII

[3] Plaintiffs first mentioned this theory in their petition for en banc rehearing to this Court following *Karsjens I*, *see* Entry ID: 4496169, pp. 19-22, which the Court denied. *Id*. at Entry ID: 4503853. Plaintiffs did not pursue this theory in their petition for writ of certiorari, and do not pursue this theory in this appeal.

somehow "alternatively" challenged the MCTA as being "punitive rather than civil" under *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), *Bell v. Wolfish*, 441 U.S. 520, 535 (1979), and the *ex post facto*/double jeopardy standard discussed in *Kansas v. Hendricks*, 521 U.S. 346 (1997).[4] Doc. 1100, pp. 15-22, App.854-61.

As to this second theory, Plaintiffs argued before the district court that the MCTA is punitive because the treatment program "operates in such a way" as to continue Plaintiffs' confinement too long, that there should be less restrictive alternative settings, and that "the discharge process does not actually result in releases." *Id*. at 18-22, App.857-61. Applying the "shocks the conscience" substantive due process standard utilized by this Court in *Karsjens I*, the district court dismissed Counts III, V, VI, and VII. Doc. 1108, p. 42, PA254, Add. 42. This appeal followed.[5]

STANDARD OF REVIEW

"[D]ecisions on questions of law are reviewable *de novo*." *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748 (2014) (internal quotation marks and citation omitted).

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[4] This latter theory is similar to the one now advanced on appeal.

[5] The district court also dismissed Plaintiffs' other remaining claims (brought under the First and Fourth Amendments), *see* Doc. 1108, p. 42, PA254, Add. 42, but Plaintiffs only appealed the judgment on Counts III, V, VI, and VII, the remaining substantive due process claims. Doc. 1118, p. 2, PA259.

SUMMARY OF ARGUMENT

In *Karsjens I*, this Court announced the legal standard applicable to substantive due process challenges to both legislation and executive action. 845 F.3d at 406-08. As Plaintiffs' remaining substantive due process claims challenge Defendants' administration of MSOP, the district court correctly recognized that under the law of the case doctrine – not to mention the binding nature of circuit precedent – it was required to apply the "shocks the conscience" standard. It also correctly recognized that this very high standard requires Plaintiffs to show "*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." *Id*. at 408 (citing *Moran v. Clarke*, 296 F.3d 638, 651 (8th Cir. 2002) (internal quotations omitted); Doc. 1108, pp. 12-20, PA224-232, Add. 12-20. Applying this standard to the same record already reviewed by this Court in *Karsjens I*, as required, the district court properly dismissed Counts III, V, VI, and VII.

Even if the district court were not bound by the law of the case doctrine and circuit precedent, application of the "shocks the conscience" standard to Counts III, V, VI, and VII is legally correct. Plaintiffs erroneously rely on case law governing

whether a statute violates *ex post facto* and double jeopardy protections, or on procedural due process cases governing institutional restrictions. The Court should affirm dismissal of Counts III, V, VI, and VII.

ARGUMENT

I. CONSISTENT WITH THE LAW OF THE CASE DOCTRINE, THE DISTRICT COURT CORRECTLY DISMISSED COUNTS III, V, VI, AND VII.

"The law of the case is a doctrine that provides that 'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" *Morris v. Am. Nat. Can Corp.*, 988 F.2d 50, 52 (8th Cir. 1993) (citing *Arizona v. California*, 460 U.S. 605, 618 (1983)). "The doctrine prevents the relitigation of settled issues in a case, thus protecting the settled expectations of parties, ensuring uniformity of decisions, and promoting judicial efficiency." *Little Earth of the United Tribes, Inc. v. United States Dep't of Housing & Urban Dev.*, 807 F.2d 1433, 1441 (8th Cir.1986); *see also Macheca Transp. Co. v. Philadelphia Indem. Ins. Co.*, 737 F.3d 1188, 1194 (8th Cir. 2013) ("For over one hundred years, our court has repeatedly barred parties from litigating issues in a second appeal following remand that could have been presented in the first appeal.").[6]

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[6] As the district court noted in its dismissal order, "[u]nder the law of the case doctrine, 'the district court is not free on remand to reconsider any question finally disposed of by the court of appeals.'" Doc. 1108, p. 10, PA222, Add. 10 (citing *Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs.*, 364 F.3d 925, 931
(Footnote Continued on Next Page)

"All issues decided by an appellate court become the law of the case. This rule extends not only to actual holdings but also to all issues implicitly settled in prior rulings." *Jones v. United States*, 255 F.3d 507, 510 (8th Cir. 2001) (citing *Roth v. Sawyer–Cleator Lumber Co.*, 61 F.3d 599, 602 (8th Cir.1995)). The law of the case doctrine applies against former appellees, like Plaintiffs, who could have argued an alternative theory in defending against a prior appeal but failed to do so. *Morris v. Am. Nat. Can Corp.*, 988 F.2d 50, 52 (8th Cir. 1993) ("By failing to raise the issue of whether 42 U.S.C. § 2000e–5(k) authorized an enhancement for contingency fee arrangements in [the prior appeal], American National waived the argument . . . . The law of the case as a result of waiver is no different than a matter that becomes the law of the case as a result of argument."). "This doctrine applies to both appellate courts and to district courts to which an action has been remanded." *Equal Employment Opportunity Comm'n v. CRST Van Expedited, Inc.*, 277 F. Supp. 3d 1000, 1009 (N.D. Iowa 2017) (citing *Little Earth of the*

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(8th Cir. 2004)). Defendants also noted below that "[t]he purpose of the current supplemental briefing on Counts III, V, VI, and VII is to allow the parties to discuss the effect of the Eighth Circuit's opinion on these claims on remand, not to allow Plaintiffs to advance a new legal theory twenty-one months after Phase One was fully submitted on the parties' closing arguments." Doc. 1102, p. 6 (citing *In re Neumann*, 374 B.R. 688 711 (Bankr. D. Minn. 2007) ("Putting [Defendants] under the onus of defending a new legal theory now, on a closed evidentiary record, would be patently unfair.").

United Tribes, Inc. v. U.S. Dep't of Hous. & Urban Dev., 807 F.2d 1433, 1441 (8th Cir. 1986)).[7]

A. The Law Of The Case Doctrine Required The District Court To Apply The "Shocks The Conscience" Standard To Counts III, V, VI, and VII.

In deciding Counts III, V, VI, and VII, the district court simply applied the law of the case dictated by this Court's decision in *Karsjens I*. As noted, in deciding Count II's challenge to Defendants' administration of MSOP, this Court considered whether Defendants' actions "were conscience-shocking and violate a fundamental liberty interest." *Karsjens I*, 845 F.3d at 410 (8th Cir.). The district court correctly noted its obligation to apply this standard to Plaintiffs' remaining claims, and did so. Doc. 1108, pp. 12-18, PA224-30, Add. 12-18. Application of the "shocks the conscience" standard was not only correct, but mandated by the law of the case.

B. In Addition, This Court Has Already Decided The Issues Raised In Counts III, V, VI, And VII.

In addition to the establishing the legal standard applicable to substantive due process challenges to executive action, *Karsjens I* established the law of the case applicable to the particular issues raised in Counts III, V, VI, and VII. The

[7] Not only did Plaintiffs fail to raise their current theory to this Court in *Karsjens I*, Plaintiffs failed to raise it to the district court before *Karsjens I*. *See* Doc. 914, 933, App.301-562, 710-95. The issue is therefore waived for this additional reason. *Liberty Mut. Ins. Co. v. Elgin Warehouse & Equip.*, 4 F.3d 567, 570 n.2 (8th Cir. 1993).

specific subject matter of those counts overlaps with the subject matter of Counts I and II, the claims already decided in *Karsjens I*.

First, Count III alleges that Defendants violate substantive due process by failing to provide adequate sex offender treatment. Doc. 635, pp. 64-66, PA64-66. This issue was already decided in *Karsjens I* as part of Count II: "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.'" *Karsjens I*, 845 F.3d at 410.

Second, Count VI alleges that Defendants violate substantive due process by failing to provide less restrictive alternative confinement. Doc. 635, pp. 70-72, PA70-72. And again, this issue was already decided in *Karsjens I*, as part of both Counts I and II. *Karsjens I*, 845 F.3d at 409-10 (holding that the alleged lack of less restrictive alternatives did not render Chapter 253D facially unconstitutional), 402-03, 410 (noting that the alleged lack of less restrictive alternatives was one of the six grounds on which the district court originally held Defendants' actions violated substantive due process, and holding that "[n]one 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.").

Finally, Counts V and VII allege that Defendants violated Plaintiffs' substantive due process rights to be "free from punishment" and "free from inhumane treatment." Doc. 635, pp. 67-70, 72-74, PA67-70, 72-74. But this Court already recognized that the district court's holding in *Karsjens I* was based on its conclusion that Chapter 253D is punitive. *See* 845 F.3d at 402 ("The court held that Minnesota's civil commitment scheme for sex offenders is a punitive system without the safeguards found in the criminal justice system. It also held that MCTA 'is not narrowly tailored and results in a punitive effect and application contrary to the purpose of civil commitment.'"). This Court nevertheless held that the "shocks the conscience" standard was appropriate to apply, and concluded that "[h]aving reviewed these grounds and the record on appeal, we conclude that the class plaintiffs have failed to demonstrate that any of the identified actions of the state defendants or arguable shortcomings in the MSOP were egregious, malicious, or sadistic as is necessary to meet the conscience-shocking standard." *Id*. at 410-11.

Because *Karsjens I* already decided the specific issues raised in Counts III, V, VI and VII, the law of the case doctrine mandated not only application of the

"shocks the conscience" standard but the particular result the district court reached under that standard.

II. EVEN IF THE LAW OF THE CASE DID NOT ACT AS A BAR, THE "SHOCKS THE CONSCIENCE" STANDARD – NOT PLAINTIFFS' NEW THEORY – APPLIES TO COUNTS III, V, VI, AND VII.

Even if the law of the case doctrine did not mandate the same result in this appeal as in *Karsjens I*, Plaintiffs mistakenly argue that a different standard applies to Counts III, V, VI, and VII than the "shocks the conscience" standard.

Plaintiffs' argument that the district court should have adopted their new theory is incorrect for at least three reasons. First, Plaintiffs address Counts III, V, VI, and VII as challenging the MCTA as punitive, apparently on the belief that those counts include some kind of statutory challenge. Pl. Br., pp. 8-9. As discussed above, however, Counts III, V, VI, and VII all explicitly challenge Defendants' executive actions in administering MSOP, not any statute. *See supra* at 15. "[I]n a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, or outrageous, that it may fairly be said to shock the contemporary conscience." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998); *see also Strutton v. Meade*, 668 F.3d 549, 557-58 (8th Cir. 2012) (holding that there is no fundamental right to sex offender treatment and that Missouri's admittedly substandard treatment did not violate substantive due process because it did not "shock the conscience.");

Montin v. Gibson, 718 F.3d 752, 754-56 (8th Cir. 2013) (explaining, in a case involving a claim of entitlement to a less restrictive alternative policy in a sex offender civil commitment facility, that "a plaintiff may maintain a substantive due process claim only if the contested state action is 'so egregious or outrageous that it is conscience-shocking.'"); *Karsjens I*, 845 F.3d at 408.

Second, even if Counts III, V, VI, and VII challenged the MCTA rather than executive action, Plaintiffs' erroneously rely upon the Supreme Court's holding in *Kansas v. Hendricks*, 521 U.S. 346 (1997). That case held that a commitment statute purportedly civil in nature may be deemed criminal "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. This portion of *Hendricks*, however, announces a standard for *ex post facto*/double jeopardy challenges to civil commitment statutes.[8] *Id*. But Counts III, V, VI, and VII only claim violations of substantive due process, not the *ex post facto* or double jeopardy clauses (in fact, Plaintiffs expressly disavowed any *ex post facto*/double jeopardy challenge). *See supra* at 11-12; Doc. 1100,

[8] Even if Counts III, V, VI, and VII challenged the MCTA rather than Defendants' executive actions, the Court has already affirmed and applied to this case the standard governing substantive due process challenges to civil commitment statutes. As noted above, that standard asks "whether MCTA bears a rational relationship to a legitimate government purpose," *Karsjens I*, 845 F.3d at 407–08, a question this Court has already answered in the affirmative. *Id*. at 409-10.

p. 12 n.6, App.851 n.6 ("Contrary to Defendants' argument, Plaintiffs are not asserting *ex post facto* or double jeopardy claims, as shown by the plain language of the Complaint.").

Plaintiffs cannot use substantive due process claims to argue the illegality of behavior properly addressed in the context of *ex post facto*/double jeopardy. Indeed, "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Lewis*, 523 U.S. at 842. For these reasons, Plaintiffs' discussion of *Hendricks* and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, which evaluated the facial punitiveness of a statute in disposing of a claim that the statute imposed a criminal penalty without procedural due process, is inapposite.[9]

Finally, Plaintiffs' reliance on *Bell v. Wolfish*, 441 U.S. 520 (1979), is similarly misplaced. As this Court has recognized, *Bell* is not a Fourteenth

[9] Even if Plaintiffs had brought an "as applied" *ex post facto*/double jeopardy challenge, that claim is foreclosed by *Seling v. Young*, which held that "[t]he civil nature of a confinement scheme cannot be altered based merely on vagaries in the implementation of the authorizing statute"; such an analysis would be "unworkable" because it "would never conclusively resolve whether a particular scheme is punitive and would thereby prevent a final determination of the scheme's validity under the Double Jeopardy and Ex Post Facto Clauses." 531 U.S. 250, 263 (2001).

Amendment substantive due process case; instead, it evaluated under the Fifth Amendment whether a pretrial detainee's *procedural* due process rights were violated by being subjected to certain institutional rules (allegedly punitive, criminal sanctions) without being first convicted of a crime. *Id*. at 535; *see also Hall v. Ramsey Cty.*, 801 F.3d 912, 919 (8th Cir. 2015) (evaluating whether a civil committee's placement in segregation violated procedural due process, and noting that "'if a particular condition or restriction of . . . detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.''" (quoting *Smith v. Copeland*, 87 F.3d 265, 268 (8th Cir.1996)). Plaintiffs never raised a procedural due process claim, *see* Doc. 635, PA001-086; Doc. 1100, p. 12 n.6, App.851 n.6, and they cannot use a procedural due process standard in the context of their substantive due process claims. *See Lewis*, 523 U.S. at 842. In any event, *Bell* applies only to allegedly restrictive institutional conditions, not whether a statutory civil commitment scheme is punitive because the treatment program or discharge process allegedly are not conducive to release, as Plaintiffs now contend. *Hall*, 801 F.3d at 919.

In sum, consistent with this Court's decision in *Karsjens I*, on remand the district court properly applied the "shocks the conscience" standard to dismiss Counts III, V, VI, and VII, and should be affirmed.

III. Even If The District Court Had Applied The Wrong Standard, Remand Would Be Futile.

This Court should affirm the dismissal of Counts III, V, VI, and VII even if it concludes the district court should have applied the "framework" set forth in *Bell* and *Kennedy*, as Plaintiffs contend. Pl. Br. 7. Remand for consideration of Plaintiffs' claims under their new theory would be futile. *United States v. Timley*, 507 F.3d 1125, 1131 (8th Cir. 2007) (allowing affirmance where "a remand to the district court would be both futile and a waste of judicial resources."). *LeMay v. U.S. Postal Serv.*, 450 F.3d 797, 799 (8th Cir. 2006) ("We may affirm the district court's dismissal on any basis supported by the record.").

Even if *Bell* applied (which it does not), it stands for the unremarkable proposition that MSOP administrators' actions must have a rational basis: conditions or restrictions of detention do not constitute punishment if they are reasonably related to a legitimate governmental objective. *See Hall*, 801 F.3d at 919. The Supreme Court has long held that "[t]he State may take measures to restrict the freedom of the dangerously mentally ill. This is a legitimate nonpunitive governmental objective and has been historically so regarded." *Hendricks*, 521 U.S. at 363.

Faced with this black letter law, Plaintiffs vaguely claim that Minnesota's civil commitment system results in individuals being held too long (whether because of allegedly inadequate treatment, facilities, or discharge procedures, *see*

Doc. 1100, pp. 15-22, App.854-61), but ignore that they failed to prove that any individual at MSOP was entitled to release. *See* Doc. 930, p. 11, App.573 (quoting Tr. 16). Similarly, the *Hendricks* court already considered factors similar to those announced in *Kennedy* in considering whether civil commitment schemes like Minnesota's are lawful, under both *ex post facto*/double jeopardy and substantive due process challenges, and concluded they are. *Hendricks*, 521 U.S. at 356-71.

CONCLUSION

For the reasons stated above, Defendants respectfully request that the Court affirm the judgment of the district court.

Dated: January 18, 2019.

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CERTIFICATE OF COMPLIANCE
WITH FRAP 32(a)

1. This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,216 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 pt. Times New Roman font.

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The undersigned, on behalf of the party filing and serving this Brief, certifies that the Brief has been scanned for viruses and that the Brief is virus-free.

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