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.

Tony Lourey; 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

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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I. INTRODUCTION

Defendants-Appellees ("Defendants") opposition to Plaintiffs-Appellants' ("Plaintiffs") current appeal inexplicably spends numerous pages discussing the prior bad acts of certain named plaintiffs – a set of facts irrelevant to this appeal. This appeal presents one, straight-forward issue: whether the district court applied the correct legal standard to decide Plaintiffs' remaining Phase One[1] claims raised in Counts III, V, VI and VII of the operative complaint.[2]

After the nearly six-week bench trial in 2015, the district court held the Act[3] unconstitutional on its face and as applied as alleged in Counts I and II of the Plaintiffs' complaint. The district court applied a "strict scrutiny" standard to those claims and its application of that standard was the basis of this Court's decision in *Karsjens v. Piper*, 845 F.3d 394, 411 (8th Cir.), *cert. denied*, 138 S. Ct. 106 (2017) (rejecting the strict scrutiny standard and reversing the district court decision (and injunction) after applying the "shocks the conscience" standard to Plaintiffs' applied claims and "reasonably related" standard to Plaintiffs' facial claims) (hereinafter "*Karsjens I*").

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[1] The district court bifurcated the trial in this litigation into Phase One (Counts I, II, III, V, VI and VII) and Phase Two (Counts VIII, IX, and X). This appeal involves only Phase One Counts III, V, VI and VII.

[2] All Complaint references are to Plaintiffs' Third Amended Consolidated Class Complaint, the operative complaint here. Plaintiffs-Appellants' Appendix ("PA") 001-086 (Doc. 635).

[3] Throughout this brief the "Act" is used to refer to the Minnesota Treatment and Commitment Act, codified at Minn. Stat. § 253B.

In its 2015 order, the district court specifically declined to decide the remaining Phase One claims – Counts III, V, VI and VII – which allege, in part, that the Act is punitive and therefore constitutionally infirm under the Fourteenth Amendment. The appeal of the 2015 order did not raise those counts, the Parties did not brief those counts and this Court did not address them.[4] Plaintiffs made this argument as an alternative basis for relief below and argued in the district court that this alternative theory is subject to a review based on whether the purpose and effect of the Act is punitive, and not whether the Act shocks the conscience. *See, e.g. Bell v. Wolfish,* 441 U.S. 520, 535 (1979).

Now the district court has dismissed Plaintiffs' remaining claims (in Counts III, V, VI and VII) stating that, even under the alternative theory, it was compelled to apply the "shocks the conscience" standard based on this Court's ruling in *Karsjens I.* Plaintiffs appeal on that legal question; the proper legal standard to be applied.

[4] As to Count I and II, the district court did make mention that the Act was punitive in its decision and Plaintiffs raised this contention as an alternative reason to support the district court's 2015 decision, *see* PA147-50, PA152-56 (Doc. 966, Conclusions of Law at ¶¶ 19-25, 30-36), but despite that, this Court did not address that argument in *Karsjens I.,* 845 F.3d 394 (8th Cir. 2017).

II. ARGUMENT

A. The Law of the Case Doctrine Does Not Apply to Counts III, V, VI, VII.

Contrary to Defendants' arguments, the law of the case doctrine does not apply to Counts III, V, VI and VII of the Complaint which alleges an alternative theory of relief: that the Act is punitive and therefore unconstitutional under the Fourteen Amendment. Neither the district court or this Court decided those claims in *Karsjens I.*

Defendants' expansive "law of the case" argument should be rejected for two reasons. First, the law of the case doctrine is a prudential, not a jurisdictional, doctrine. *Kessler v. Nat'l Enterprises, Inc.*, 203 F.3d 1058, 1059 (8th Cir. 2000). It applies to prevent the re-litigation of questions already decided by the court. But, in this case, the question of what standard should apply to the issue of whether the Act is punitive and therefore unconstitutional under the Fourteenth Amendment was not been decided by the district court nor was it decided by this Court in *Karsjens I.* As such, the "law of the case" doctrine does not apply.[5]

After trial, the district court applied strict scrutiny and held the Act unconstitutional as to Counts I and II of Plaintiffs' Complaint. The district court

[5] As this Court recently recognized, on appeal "parties should present alternative arguments whenever sound strategy dictates," but they are not, "required to anticipate every possible outcome on appeal and formulate a responsive argument for each alternative." *United States v. Castellanos*, 608 F.3d 1010, 1019 (8th Cir. 2010).

expressly stated that it was not deciding Counts III, V, VI and VII, which were tried as part of the 2015 bench trial. Although Plaintiffs also argued that the Act was "punitive" as to Counts I, II, III, V, VI and VII, the district court did not address that argument in its final decision except to the extent it made passing reference to the punitive nature of the Act as it related to Counts I and II; the Counts resolved by the district court.

After Defendants appealed, the Parties briefed the issues arising from the district court's application of strict scrutiny to Counts I and II, along with a few additional issues raised by the Defendants.[6] Because the district court never ruled on Counts III, V, VI and VII, there was no appeal related to those counts, no briefing on those counts and this Court did not decide those counts. Instead, this Court rejected the application of strict scrutiny to Counts I and II and remanded for further proceedings on the remaining claims.

Thus, despite that fact neither the district court nor this Court ruled on these remaining counts, Defendants' construction of the law of the case doctrine would require Plaintiffs to anticipate every possible outcome of *Karsjens I* and raise every possible argument that could potentially arise in that first appeal – even those Counts that were not on appeal. Such a strict application of the law of the case

[6] In addition, to the appeal of the standard to apply, Defendants raised issues relating to Rooker-Feldman, standing, improper injunction and bias by the district court.

doctrine makes no sense in this case where the district court specifically did not rule of Counts III, V, VI and VII. [7]

Second, a holding that Plaintiffs waived any alternative theories under the law of the case doctrine (as related to Counts III, V, VI and VII) by not raising them in support of the district court's initial holding as to Counts I and II would make the application of the law of the case doctrine punitive in nature. *See Kessler*, 203 F.3d at 1059 (stating that "appellate courts should not enforce the rule punitively against appellees, because that would motivate appellees to raise every possible alternative ground and to file every conceivable protective cross-appeal, thereby needlessly increasing the scope and complexity of initial appeals.").

Although Plaintiffs did not raise these alternative theories – with respect to Counts III, V, VI and VII – in their prior appeal, they raised them with respect to Counts I and II, *see Karsjens I*, 8th Cir. Case No. 15-3485, Entry ID: 4358824, at 47-52 (arguing that the Act is punitive, preventative detention, and disclaiming challenge as an *ex post facto* or double jeopardy challenge).[8]

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[7] *See Field v. Mans*, 157 F.3d 35, 41 (1st Cir. 1998) (concluding that "[i]t would be extremely unrealistic to expect Mans's attorney to buttress his client's case by putting forward an alternate theory in support of the lower court's judgment.")

[8] Plaintiffs' punitive argument in the first appeal related only to Counts I and II but neither the district court nor this Court specifically addressed those arguments. *Compare* PA144 (Doc. 966, Conclusion of Law at ¶12) (Stating the standard applied to decide the case; "[w]hen a fundamental right is involved, courts must subject the law to strict scrutiny, placing the burden on the state to show that the law is narrowly tailored to serve a compelling state interest."), *with Karsjens I*, 845 F.3d at 407–08 (stating that "the proper standard of scrutiny to be applied to plaintiffs' facial due process challenge is whether [the Act] bears a rational relationship to a

And they have consistently maintained throughout the litigation below that this case raises the question of whether the Act violated the Plaintiffs' constitutional right to be free from punishment. Defendants' Appendix ("D. App.") 322 (Doc. 914, at 20-22) (specifically raising the alternative argument that the Act is unconstitutionally punitive in nature, because the evidence presented under a strict scrutiny standard, "also supports the conclusion that the confinement under Minn. Stat. 253D is preventative detention and punitive in nature."); *Id.* at D. App. 513-14 (Doc. 914, at ¶¶ 54-55) (stating standard for when a civil commitment statute becomes punitive for constitutional purposes, citing *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) and *Seling v. Young*, 531 U.S. 250, 261 (2001)); *Id.* at D. App. 541-42 (Doc. 914, at ¶180) (arguing that Counts II and III "arise from the failure of the MSOP to provide treatment in accordance with the purpose of the civil commitment statute in violation of due process."); *Id.* at D. App. 559-60 (Doc. 914, at ¶¶250-55) (proposing Conclusions of Law that Counts I, II, III, V, VI and VII are unconstitutional because they are punitive).

Thus, to the extent that the law of the case doctrine operates in the present dispute, its effect should be limited to Counts I and II. *See Karsjens I*, 845 F.3d at

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legitimate government purpose."), and *id.* at 408 (stating that "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[.]" (internal punctuation omitted) (emphasis omitted)). The legal standard applied to whether the Act is punitive (even as it respects Counts I and II) was not addressed by this Court in *Karsjens I*.

411. By remanding the remaining counts for further proceedings, this Court anticipated that the district court would evaluate and decide the remaining counts under the applicable law and facts. *See Castellanos*, 608 F.3d at 1016–17 (stating that "[a]bsent instructions to hold further proceedings, a district court has no authority to re-examine an issue settled by a higher court. In contrast, while a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues." (alterations omitted) (quotation marks omitted) (citations omitted)).

On this appeal, Plaintiffs do not dispute that this Court already decided that the "reasonable relationship" standard applies to Plaintiffs' Count I facial challenge and that the "shocks the conscience" standard applies to their Count II "as applied" claim, and that this Court found in its decision that the evidence adduced at trial was insufficient to show conscience shocking behavior. *Karsjens I*, 845 F.3d at 408-10. The question of what standard the district court should apply to Counts III, V, VI and VIII, however, was not addressed in the district court's initial findings of fact and conclusions of law, nor was it address by this Court in *Karsjens I. Field v. Mans*, 157 F.3d 35, 42 (1st Cir. 1998) (rejecting "any notion of a law-of-the-case bar to the related issue [because] . . . [t]he lower court never made a definitive finding or ruling on that point.").

Counts III, V, VI and VII, advance a claim in the alternative to Counts I and II. Each of Counts III, V VI, and VII assert allegations that the Act is punitive in purpose and effect even if the Act is constitutional as written—as distinct from allegations that the Act is facially and as-applied unconstitutional as alleged in Counts I and II. Instead, Plaintiff argue in Counts III, V, VI and VII that the Act and Defendants violated Plaintiffs' constitutional rights, because the treatment program impeded their release (not that they have a constitutional right to treatment) and that the admitted lack of less restrictive confinement were impermissibility punitive.[9] There is nothing in the decision by this Court in *Karsjens I* that prohibits the district court from conducting a full and thorough review and analysis of the remaining Phase One Counts III, V, VI and VII under this alternative theory and its applicable legal standard.

B. Plaintiffs' Counts III, V, VI and VII Should be Analyzed Under *Bell v. Wolfish* and its Progeny.

As argued above, Plaintiffs' Counts III, V, VI and VII contain alternative theories, which rest on well-established United States Supreme Court precedent which has held that persons who are not subject to criminal sentence (like the Plaintiffs in this case) may not be punished. *Bell v. Wolfish*, 441 U.S. 520, 535

[9] Defendants' argument that the law of the case doctrine resolves each remaining Phase One Count ignores the pleadings and arguments made by Plaintiffs below. *See* PA064, PA068, PA071, PA072 (Doc. 635, at ¶¶ 256, 271, 287, 293) (commitment to the MSOP cannot be "tantamount to punishment.")).

(1979); *Youngberg, v. Romeo*, 457 U.S. 307, 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).

Where a statute is punitive in purpose and effect, it infringes on the constitutional rights of those it affects. *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."). Plaintiffs have, and continue, to argue that this provided an independent basis for relief, untethered to the claims alleged in Counts I and II.

Defendants' arguments with respect to Plaintiffs' reliance on *Kansas v. Hendricks*, 521 U.S. 346 (1997), are not persuasive, insomuch as Plaintiffs simply rely on *Hendricks* merely to set out the standard by which a court would determine whether a civil commitment scheme is punitive. Nothing in the language of *Hendricks* suggests it is limited to ex post facto or double jeopardy claims. *See, e.g., Kilper v. City of Arnold*, Mo., No. 4:08CV0267 TCM, 2009 WL 2208404, at *13-19 (E.D. Mo. July 23, 2009) (applying *Hendricks* to determine whether "The Red Light Camera Ordinance" dealing with drivers running red lights was civil or punitive in nature).

Hendricks states that a civil commitment statute initially found to be civil in nature can be overcome by the clearest evidence that it is, in fact, punitive, not

civil. *Hendricks*, 521 U.S. at 361 (stating that "[a]lthough we recognize that a civil label is not always dispositive, we will reject the legislature's manifest intent only 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." (alterations omitted) (quotation marks omitted) (citations omitted)).

Defendants argue that *Bell* does not apply because this Court has recognized that "*Bell* is not a Fourteenth Amendment substantive due process case; instead, it was evaluated under the Fifth Amendment whether a pretrial detainee's *procedural* due process rights were violated[.]" Defendants' Opp. Br. at 26.

But this Court has repeatedly applied *Bell* to substantive due process cases. Shortly after the Supreme Court issued its decision in *Bell*, for example, this Court, in *Campbell v. Cauthron*, held that "[a]lthough some courts have applied Eighth Amendment principles in evaluating the conditions under which unconvicted persons are imprisoned, the Supreme Court has recently held that such conditions are to be judged by the due process standard of the Fifth and Fourteenth Amendments." 623 F.2d 503, 505 (8th Cir. 1980) (citing *Bell,* 441 U.S. 520); *see also Morris v. Zefferi*, 601 F.3d 805, 809 (8th Cir. 2010) (citing *Bell* for the proposition that pretrial detainees' constitutional claims are analyzed under the Fourteenth Amendment); *Butler v. Fletcher*, 465 F.3d 340, 344 (8th Cir. 2006) (stating that "under *Bell*, the substantive due process inquiry is whether the

detainee has been improperly punished."); *Owens v. Scott County Jail*, 328 F.3d 1026, 1027 (8th Cir. 2003) (reiterating that pretrial detainees' claims are analyzed under Fourteenth, not Eighth Amendment); *Whitfield v. Dicker*, 41 F. App'x 6, 7 (8th Cir. 2002) (relying on *Bell* to analyze the Fourteenth Amendment question of whether defendants confined plaintiff to administrative segregation prior to any hearing for punitive reasons rather than for institutional security); *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1048 (8th Cir. 1989) (stating that unlike "convicted prisoners, the state has no right to punish [pre-trial detainees]. Their confinement conditions are analyzed under the due process clause of the Fifth and Fourteenth Amendments[.]").[10]

Thus, *Bell*, its progeny, and this Court's repeated interpretations of *Bell*, all stand for the proposition that the Fourteenth Amendment (for state action) provides committed persons – not in custody because of a criminal conviction – the right to challenge whether their commitment is punitive.[11]

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[10] There is nothing in *Bell*, or its subsequent application, that suggests it should be limited to pre-trial detainees. *Davis v. Wessel*, 792 F.3d 793, 800 (7th Cir. 2015) ("Although *Bell* involved a claim by a pretrial detainee rather than a civilly committed plaintiff such as Davis, the difference is immaterial for our purposes."); *see also Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004) ("At a bare minimum, then, an individual detained under civil process—like an individual accused but not convicted of a crime—cannot be subjected to conditions that 'amount to punishment.'" (quoting *Bell*, 441 U.S. at 536)).

[11] Defendants argue that *Seling v. Young*, 531 U.S. 250 (2001), precludes any argument that the Act is punitive in effect. But this case addresses a civil commitment scheme on behalf of the entire population (the certified class here), not just an individual (as in *Seling*), and is thus distinguishable. In fact, *Seling* specifically held, "[t]his case gives us no occasion to consider . . . the extent to which a court may look to actual conditions of confinement and implementation of

C. A Determination of Whether Plaintiffs' Alternative Argument is Futile is Premature.

In the alternative, Defendants seek to prevail in this appeal by arguing that even if the "shocks the conscience" standard does not apply, Plaintiffs' arguments that the Act is punitive are futile. They base that argument on a mischaracterization of Plaintiffs' claims in Counts III, V, VI and VII.[12] But even if they correctly characterized the claims, the district court did not rule on this issue and it should be therefore be remanded to the district court for full decision on the merits. *See Travelers Prop. Cas. Ins. Co. of Am. v. Nat'l Union Ins. Co. of Pittsburg, Pa.*, 621 F.3d 697, 708 n.6 (8th Cir. 2010) (declining to rule on an issue not fully briefed); *United Fire & Cas. Ins. Co. v. Garvey*, 19 F. App'x 478, 479 (8th Cir. 2001) (per curiam) (remanding case where "the parties have not fully briefed the agency question to this court."); *see also Hawkins v. Kroger Co.*, 906 F.3d 763, 773 (9th Cir. 2018) (declining to decide the appeal on alternative grounds, where that issue "was not fully briefed on appeal by either party."); *Mortellite v. Novartis Crop*

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the statue to determine in the first instance whether a confinement scheme is civil in nature." *Seling*, 531 U.S. at 266.

[12] Counts III, V, VI and VII each contend that under the Constitution, commitment to the MSOP cannot be "tantamount to punishment." However, the basis for Counts V and VII is that civil commitment under the Act is punitive, *see* PA067-70 (Doc. 635, at ¶¶ 269-283) (Count V, alleging denial of Plaintiffs' right to be free from punishment); *id.* at PA072-74 (Doc. 635, at ¶¶ 292-297) (Count VII, alleging denial of Plaintiffs' right to be free from inhumane treatment), while Counts III and VI allege that commitment to MSOP is tantamount to punishment because the sham treatment program and lack of less restrictive alternatives render Plaintiffs' commitment punitive. *See id.* at PA064-66, PA70-72 (Doc. 635, at ¶¶ 254-261, 284-291).

Prot., Inc., 460 F.3d 483, 491 (3d Cir. 2006) (declining to consider arguments "not fully briefed and argued on appeal.").

III. CONCLUSION

The district court failed to apply the correct legal standard to the alternative claims advanced by Plaintiffs in Counts III, V, VI and VIII. The decision in *Karsjens I*, while dispositive of Counts I and II, did not foreclose redress under all other counts remaining in Plaintiffs Complaint. The district court's order dismissing the remaining Phase One claims should be reversed and remanded for a proper analysis of the question of whether the Act is punitive in purpose or effect.

Dated: February 8, 2019

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 3,440 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: February 8, 2019

s/Daniel E. Gustafson
Daniel E. Gustafson

CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2019, 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: February 8, 2019

s/Daniel E. Gustafson
Daniel E. Gustafson