Case Number: 19-6892

ORIGINAL

In The
Supreme Court of the United States

John R. Van Orden,
Petitioner,

V.

Mark Stringer, et al.,
Respondents.

On Petition for a Writ of Certiorari
To The United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Respectfully Submitted,

John R. Van Orden

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QUESTIONS PRESENTED

I. **What is the proper analysis to review a substantive due process claim? Is it the conjunctive or disjunctive analysis?**

II. **Whether or not the Eighth Circuit erred in holding that Petitioner failed to show the evidence was conscience-shocking.**

III. **Is the loss of liberty due to involuntary commitment to a mental health center as a sexually violent predator a fundamental liberty interest?**

IV. **Whether a State can civilly confine a group of convicted sex offenders that have completed their prison terms on the basis of what they might do in the future.**

PARTIES TO THE PROCEEDING

Petitioner is:

John R. Van Orden

Respondents are:

Mark Stringer; Harold Myers, Reimbursement Officer, HealthLink, Individually and Officially; Alan Blake, Chief Operating Officer, MSOTC, Individually and Officially; Julie Inman; Jay Englehart; Justin Arnett; Rick Gowdy, in his official capacity as Director of the Missouri Department of Mental Health's Division of Behavioral Health; Robert Reitz; Linda Moll; Damon Longworth; Donna Augustine; David Schmitt, Ericka L. Kempker; Kristina Bender-Crice; Angeline Stanislaus, in her official capacity as Chief Clinical Officer of the Missouri Department of Mental Health; Anne Precythe, in her official capacity as Director of the Missouri Department of Corrections; Rikki Wright, in her official capacity as Deputy Director of the Missouri Department of Mental Health for the Division of Behavioral Health; David Schmitt, in his official capacity as Chief Operating Officer of Southeast Missouri Mental Health Center; Andy Atkinson, in his official capacity as Chief Operating Officer of Fulton State Hospital; Lee Ann McVay, in her official capacity as Program Coordinator at SORTS-Fulton State Hospital; Susan Knopflein, in her official capacity as Chief Nurse Executive at Fulton State Hospital.

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The United States District Court for the Eastern District of Missouri's judgment is reported at *Van Orden v. Stringer,* 262 F. Supp. 3d 887 (E.D. Mo. July 6, 2017). Judge Fleissig denied Petitioner relief on July 6, 2017.

JURISDICTION

The decision of the United States Courts of Appeals for the Eighth Circuit, affirming the District Court's Order, was handed down on September 11, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment 14, § 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. Factual

Petitioner is civilly committed resident of the State of Missouri Department of Mental Health ("Mo DMH"), housed at the Sex Offender Rehabilitation and Treatment Services ("SORTS") building located in Farmington, Missouri. Respondents operate another SORTS facility in Fulton, Missouri. There are approximately 225 residents in the SORTS program. Each facility is considered to be a maximum-security facility with 24/7 security. Respondents are state officials responsible for various operations at SORTS.

Missouri is one of twenty states in which has chosen to enact a statute requiring the indefinite confinement of men who have been adjudicated by Missouri State Courts as Sexually Violent Predators and have completed their prison sentences. In contrast, thirty states have no such law. The Missouri SVP Act became effective January 1, 1999. In Missouri a SVP is one "who suffers from a mental abnormality which makes [him] more likely than not to engage in predatory acts of sexual violence if not confined to a secure facility." R.S.Mo. 632.480(5). The SVP Act does recognize that an individual that has been adjudicated may later be conditionally released. That statute requires annual consideration of an individual's current mental condition and his likelihood to recommit, and it contemplates the release of a person whose "mental abnormality has so changed that the person is not likely to commit acts of sexual violence if released." R.S.Mo. 632.498.5(4). It contains another provision designed to facilitate release, including reports to the State Circuit Courts of the annual examination of his mental condition and authorization by the director of DMH of an individual's petition to those courts for his release. R.S.Mo. 632.498.1 and .501. Respondents' treatment procedures, described by the District Court, are intended to make release and reintegration into the community impossible.

The District Court made extensive findings of fact in its Liability Opinions reported at *Van Orden v. Stringer,* 129 F. Supp. 3d 839 (E.D. Mo. September 11, 2015).

In 2007, the Missouri Supreme Court ruled that SORTS residents are entitled to release when they are no longer likely to commit acts of sexual violence, even if they continue to suffer from the mental

abnormality. *In Re Care & Treatment of Coffman,* 225 S.W.3d 439, 446 (Mo. banc. 2007). However, in 2014 a SORTS-Fulton annual examiner thought they were unable to recommend a resident for release despite finding that he had significantly lowered his risk to reoffend. In their view, the mental abnormality had to change as well.

Among the facts the District Court cited were problems with the annual reports that Respondents submitted to the State Circuit Court reporting the mental condition of the residents. These problems included no uniformity to the annual reports being submitted to the State Circuit Courts. These annual reviews had no standard format. Some were long, and others were short. Some were a "cut and paste job". Some included information contrary to the Reviewer's recommendation while others did not. Some Reviewers did not even interview their subjects. Different Reviewers considered different statutory provisions in their reports. The District Court concluded that the flawed annual reports "has been to turn civil confinement into punitive, lifetime detention of SORTS residents, in violation of the Due Process Clause. *Van Orden, 129 F. Supp. 3d at 869* (citing *Kansas v. Hendricks,* 521 U.S. 346, 373 (2002) (Kennedy, J., concurring).

Another problem was the SORTS mission of "no more victims", meaning that residents were to remain in custody until it was determined they *would not* (rather than the statutory language of "no longer...more likely than not") to engage in acts of sexual violence if discharged (emphasis added). *Van Orden, 129 F. Supp. 3d at 849.* Respondents considered the community rather than the SORTS residents to be their primary client. For example, Respondent Schmitt (who served as COO) once expressed "our first customer is the community and our first obligation is community safety. We are overly cautious. We cannot afford to have a new offense from anyone released if there is any way to prevent it".

II. Procedural

Petitioner filed his *pro-se* action pursuant to 42 U.S.C. § 1983 seeking relief in the United States District Court for the Eastern District of Missouri in June 22, 2009, specifically seeking to declare the Missouri SVP Act as unconstitutional as written and as applied. The District Court certified two classes pursuant to Fed. R. Civ. P. 23(b)(2): (1) A "treatment Class" consisting of persons who are, or will be, during the pendency of

this action, residents of SORTS as a result of civil commitment; and (2) a "Charging Class" consisting of persons who were, are, or will be during the pendency of this action, residents of SORTS as a result of civil commitment, and who have been, or will be, billed, or charged for care, treatment, room, or board by SORTS. An eight-day trial was held solely on the issue of liability beginning on April 21, 2015. Evidence presented at the trial was creditable and showed Respondents: (1) have not performed annual reviews in accordance with the Missouri SVP Act as interpreted by the Missouri Supreme Court, and as required by the Due Process Clause; (2) have not properly implemented any program to ensure the least restrictive environment, and have not implemented or even designed – the community reintegration phase of the SORTS treatment programs; and (3) have not implemented release procedures, including director authorization for releases, in the manner required by the SVP Act and the Due Process Clause. *Van Orden, 129 F. Supp. 3d* at 869.

On September 11, 2015, the District Court for the Eastern District of Missouri, found Respondents liable for constitutional violations. However, after the Eighth Circuit Court of Appeals issued its opinion in *Karsjens v. Piper*, 845 F.3d 394 (8th. 2017) the District Court requested additional briefing in light of *Karsjens*. On July 6, 2017, the District Court amended its previous ruling in favor of Respondents to be unswerving with the Eighth Circuit Court of Appeals in what they had established within *Karsjens*. A timely appeal was filed. On September 11, 2019, the Eighth Circuit affirmed the District Court's findings.

REASONS FOR GRANTING THE PETITION

A. THE EIGHTH CIRCUIT APPLIED THE WRONG ANALYSES TO THIS CASE AND HELD THAT A SUBSTANTIVE DUE PROCESS CLAIM MUST BE REVIEWED CONJUNCTIVELY.

In the decision below, the Eighth Circuit Court of Appeals held "[t]o prevail on an as-applied substantive due process clam, the residents must show both that the state officials' conduct is conscience-shocking and that it violated a fundamental right of the resident." *Van Orden*, 937 F.3d at 1167 (citing *Moran v. Clarke*, 296 F.3d 638, 651 (8th Cir. 2002)

(en banc). This decision as set forth more fully below is in conflict with other Courts of Appeals, as well as this Court.

Multiple Courts of Appeals opinions conflict with the Eighth Circuit Appellate Court applying the conjunctive analysis to a substantive due process challenge. For example, the Tenth Circuit in *Seegmiller v. LaVerkin City*, 528 F.3d 762 (10th Cir. 2008), held a petitioner was able to prevail on a substantive due process claim by meeting only one of the prongs. Therefore, making the analysis disjunctive rather than conjunctive. Not only does the Tenth Circuit apply the disjunctive analysis, but so does the D.C. Circuit, Third Circuit, Sixth Circuit, and the Ninth Circuit Courts, making the Eighth Circuit a distinct minority.

This Court in *United States v. Salerno*, 481 U.S. 739, 746 (1987), cites its support for use of the disjunctive analysis by stating:

> The Due Process Clause protects individuals against two types of government action. So-called "Substantive Due Process" prevents the governments from engaging in conduct that "shocks the conscience" *or* interferes with rights implicit in the concept.

Id at 446 (internal citations and quotation marks omitted). *(emphasis added).* The Eighth Circuit has somehow become convoluted by a 2002 *en banc* opinion in *Moran v. Clarke*, 296 F.3d 638 (8th Cir. 2002) (en banc) suggesting that to prevail on a substantive due process claim the conjunctive analysis must be used. This determination was made from a mere footnote from Judge Bye from his reading of *Lewis, supra. See Moran*, 296 F.3d at 651 (Bye, J., concurring) (When a Plaintiff challenges the actions of an official under the substantive component of the Due Process Clause, they must demonstrate *both* the conduct was conscience shocking and violated one or more fundamental right.) It would be extraordinary for this Court to reverse a case on a mere footnote without explanation. Given the gravity of the components this case employs, to render a decision without providing clear procedural course would be to affirm already muddied legal waters.

The Eighth Circuit's decision rewrites the law of substantial due process by now requiring individuals to provide both evidence that shocks the conscience *and* a violation of a fundamental right (emphasis added). This is not the law of this Court, and now the Eighth Circuit

stands in conflict with this Court and numerous other Circuits; thus making this case ripe for Certiorari.

Therefore, Petitioner submits the proper analysis should have been the disjunctive analysis because a) he can prove a fundamental right has been violated by government actors, and, b) government actors were conscious shocking in their application of the laws. A conjunctively test would require Petitioner to prove egregious, outrages, malicious, or sadistic behavior from Respondents. In other words, Petitioner would have to prove Respondents were brutal to Petitioner coupled with a showing of a violation of fundamental right. This is an extremely difficult analysis to prove for any Petitioner. On the other hand, the disjunctive analysis would leave Petitioner only having to prove that Respondents were brutal to him *or* a violation of a fundamental right. Even if the Eighth Circuit's interpretation of conjunctive analysis was proper, Plaintiff would still prevail due to the fact that he has a fundamental right to release once he can prove he is no longer dangerous or mentally ill, *and* the evidence which Petitioner has submitted sufficiently met the standard of conscience shocking behavior by the Respondents through their oppressive and malicious application of their assessments.

A) Fundamental Right

The Fourteenth Amendment Due Process Clause represents a constitutional protection of an individual's right to a safeguard against deprivation of three fundamental core textural interests-life, liberty, and property. *U.S. Const. Amend. XIV.* It operates as a barrier against arbitrary abuse of governmental authorities. *Foucha v. Lousiana,* 504 U.S. 71, 80 (1992); *Collins v. Parker Heights,* 503 U.S. 115, 126-27 (1992).

A fundamental right or liberty is one that is "deeply rooted in this nation's history and tradition", and, "implicit in the concept of ordered liberty", such that "neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg,* 521 U.S. 702, 721 (1997). Without these rights, "neither liberty nor justice would exist". *Palko v. Connecticut,* 302 U.S. 319, 325 (1937). Reaching back to 1898, this Court held the Fourteenth Amendment contains a sweeping provision forbidding the states from abridging the privileges and immunities of citizens of the United States and denying them the benefit of due process or equal protection of the laws. *Holden v. Hardy,* 169 U.S. 366, 390

(1898). This Court in *Vitek v. Jones,* 445 U.S. 480 (1980) held "the loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement". Furthermore, the *Vitek* Court recognized that for the ordinary citizen, commitment to a mental hospital produces "a massive curtailment of liberty", *Id* at 491 (quoting *Humphrey v. Cady,* 405 U.S. 504, 509 (1972)). Likewise, this Court has repeatedly recognized that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas,* 441 U.S. 418, 425 (1979). In 1923 in *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923), this Court held that liberty and the due process clause without doubt entails freedom from bodily restraints.

Indeed, this Court began its analysis in *Kansas v. Hendricks,* 521 U.S. 346 (1997), by recognizing that "freedom from physical restraints 'has always been at the core of the liberty protected by the due process clause from arbitrary governmental action.'" *Id* at 356 (quoting *Foucha* 504 U.S. at 80). Because this liberty interest is so compelling, this Court has repeatedly held that a civil detainee is entitled to his freedom once he no longer suffers from a mental abnormality or is no longer dangerous. O'Connor *v. Donaldson,* 422 U.S. 563, 576 (1975). As the evidence shows, Petitioner is still being denied this basic fundamental right. These well-established foundations for these holdings are that "freedom from imprisonment-- from government custody, detention, or other forms of physical restraint- lies at the heart of liberty that the [due process clause] protects." *Zadvydas v. Davis,* 533 U.S. 678, 690 (2001).

Respondents are depriving Petitioner of his due process rights in they are a) failing to apply the correct standards for annual reviews, b) allowing annual Reviewers to continue to review him despite having a lack of legal training, and, c) have blocked/stalled individuals who were recommended for conditional release by an annual evaluator and supported by their treatment team and the SVP Committee. This Court has emphasized "time and again that 'the touchstone of due process is protection of the individual against arbitrary action of government.'" *County of Sacramento v. Lewis,* 523 U.S. 833 (1998) (quoting *Wolff v. McDonnell,* 418 U.S. 539 (1974)). The evidence in this case plainly demonstrates that Respondents' actions shocked the conscience of the District Court. First, the District Court found as a matter of fact Respondents nearly complete failure to protect the rights of Petitioner was so arbitrary and egregious as to shock the conscience based up the disturbing record presented at trial. *Van Orden 129 F.Supp.3d* at 869. Of course, there is a strong presumption that a District Court's factual

findings are correct. *Fed. R. Civ. P. 52(a).* Further examples of Respondents imposition of behavior that shocks the conscience include the decision not to train annual reviewers – including the failure to instruct reviewers and treatment providers on the proper construction of the SVP Act as set forth in *Coffman,* 225 S.W. 3d 439 (Mo. Banc 2007); the refusal to advance patients through the release steps for conditional release, and the practice of Respondents arbitrary creation of a policy termed "conditional release without discharge." *Van Orden,* 129 Fed. Supp. 3d. at 869. Respondents indifferences are reflected in their own words. For example: A full decade ago, Respondents were concerned their treatment of residents was a "disaster waiting to happen" (TR-PX29)[1]. Multiple emails from 2009 show Respondents knew that a number of men had been successfully treated and were safe to be in the community as were other residents who were aged or infirm and not likely to commit future acts of predatory sexual violence. Yet Respondents did nothing, even failing to include those findings in the required annual reports to the Missouri State Courts (TR-PX79;80;88; and 90). Most telling was the Respondents own recognition that their release process was a "sham" (TR-PX89).

The harmonious reading of fifty plus years' worth of cases from this Court leaves Petitioner no doubt that he has a fundamental right in avoiding confinement in a mental health institution/prison after meeting a threshold for being conditionally release. *Addington,* 441 U.S. at 426; *O'Connor,* 422 U.S. at 575; *Hendricks,* 521 U.S. at 358. Petitioner has established his rationale for his belief that freedom from governmental restraint is a fundamental right rooted within the Fourteenth Amendment. This rationale is especially compelling here because Petitioner having already served his criminal sentence but was placed in confinement again based on fear of what he might do in the future rather than on what he has done in the past. "[M]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty" *Hamdi v. Rumsfeld,* 542 U.S. 507, 530 (2004) (quoting *O'Connor* 422 U.S. at 575). As a matter of substantive due process, Respondents cannot continue to warehouse residents at SORTS until they die. *O'Conner,* 422 U.S. at 563; *Foucha,* 504 U.S. at 75.

The Eighth Circuit did not even consider that Petitioner had a fundamental right. They simply went on their own assumption that Petitioner could receive relief in a State Court. However, this is not the

1 TRPX will refer to Trial Record-Plaintiff's Exhibit

case. *See In Re Care & Treatment of King, 571 S.W.3d 169* (Mo. App. WD 2019) (State Judge applied his own interpretation of the statue and denied conditional release). This erroneous reasoning coupled with the fact they believed that a substantive due process had to be analyzed conjunctively, led to the Eighth Circuit affirming the District Court's opinion.

B) Shocks the Conscious

Civil Commitment cannot be punitive. *Kansas v. Crane*, 534 U.S. 437, 412 (2002). The Missouri Supreme Court has recognized the Missouri SVP cannot be "punishment" but rather it needs to be "rehabilitative." *In Re Care & Treatment of Murrell*, 215 S.W.3d. 96, 116 (Mo. banc. 2007) (Wolf, J., dissent). However, as Petitioner will demonstrate, and the record from the decisions below demonstrate, this is not the case. This Court in *Breithaupt v. Abrab,* 352 U.S. 432 (1957) noted that shocks the conscience was so brutal and offensive that it did not comport with traditional ideals of fair play and decency and would violate substantive due process. Conduct that shocks the judicial conscience, on the other hand, is deliberate government action that is "arbitrary" and "unrestrained by the established principles of private right and distributive justice". *Lewis*, 523 U.S. at 846 (quoting *Hurato v. Call,* 110 U.S. 516, 527, 4, (1884)). This strand of substantive due process is concerned with preventing government officials from "abusing their power, or employing it as an instrument of oppression". Not all government conduct is covered, however, as "only the most egregious official conduct can be said to be arbitrary in the constitutional sense". As Petitioner will demonstrate and the record reflects, Respondents' actions clearly meet this demanding standard.

The facts of this case demonstrate a classic case of deliberate indifference that shocks the conscience. To begin, Respondents failure to support anyone for conditional release in sixteen years exemplifies this statement. There is also the willful imposition of malicious intent by allowing the annual reviews that Respondents submitted to the State Circuit Courts to have systematically omitted critical information. These instances include willful omission of findings that residents are no longer dangerous, that an area of risk has diminished markedly, and/or milestones and achievements that more accurately inform the Court of a resident's current mental health condition and level of readiness for release. These points further entailed professional opinions about whether or not a patient is "likely" to reoffend, and could therefore be

entitled to release. Also, Respondents failed to train their annual reviewers on the proper legal test for continued confinement, and in so doing, allows them to apply erroneous legal standards in their assessments. Annual reviewers thus failed to follow the explicit directive of the Missouri Supreme Court by failing to recommend release for anyone no longer likely to commit crimes if released, even if he continues to suffer a mental abnormality. Thus, holding residents longer than constitutionally justified. *Foucha,* 504 U.S. at 77. In yet another example that shocks the conscience, Respondents effectively prevented release into the community after a resident achieved "conditional release" status by continuing to hold him in the institution, behind the same razor wire fence as everyone else while also withholding his right to conditional release as spelled out by Missouri Statute. To do this, they erected a non-statutory release "without discharge" program whereby anyone ordered released by a State Circuit Court remained confined inside the facility razor-wire fence. Finally, Respondents continued to house and incarcerate the elderly, infirm, and others who do not pose a risk to the community due to their advanced medical conditions. As a result, many of them needlessly died while in custody. Even the District Court found the "improper application of the annual review mechanism in this case has resulted inn the continued confinement of individuals beyond the time constitutionally justified." *Van Orden,* 129 F.Supp.3d at 868.

Petitioner believes that shocks the conscience is another term for deliberate indifference or an intent to harm and conveys the same meaning. The facts of this case are a perfect example of why such a wording may be used. It is applicable based on the facts of this case and the wording supports these facts. This Court in *Lewis* held "when Respondents have ample time to make unhurried judgments, their deliberate indifference shocks the conscience". *Lewis*, 523 U.S. at 851, 853. The decision below concerns a textbook example filled with opportunity to deliberate to avoid intentional harm of the Petitioner. Respondents conduct occurred over multiple decades in which they were made aware of by multiple individuals and through their own recognition of these wrongs, but still failed to take action. In addition to innumerable years of time to correct their errors, Respondents have experienced subsequent lawsuits, had internal grievances filed citing problems with annual assessments, experienced punitive measures as a result of such, have mistreated residents, and committed other basic human rights violations. Respondents' action in this way is malicious, egregious, and sadistic at its core. With respect to this Court, Petitioner believes that no other view can be taken. The record is clear that Respondents negligently

inflicted emotional and psychological harm by their deliberate indifference to Petitioner and his needs through effective, term-limited treatment, problematic annual assessments, and failure to release individuals they knew no longer met the criteria for continued civil commitment. They also blocked/stalled individuals who were petitioning the Missouri State Courts for conditional release once recommended by treatment teams, annual reviewers, and the Sexually Violent Predator Committee comprised of field specific, specialized doctors and social workers. *Van Orden,* 129 F.Supp 3d at 869. These examples demonstrate conscience shocking at its core. The evidence that was purported at trial supports a conscience shocking analysis for a fact finder to make a substantive due process violation/claim. *Salerno,* 481 U.S. at 746.

One area in particular that shows deliberate indifference in which shocks the conscience and is both malicious and unconstitutional is the intentional failure to properly train annual reviewers and treatment teams. Even Respondents acknowledge the inconsistency amongst their own annual evaluators/assessors. For example, Respondent Stanislaus, too, admitted that the SORTS annual reviewers do not understand and consistently apply the legal standards for risk assessment under the SVP Act. *Van Orden,* 129 F. Supp.3d at 853. Furthermore, Respondents' own witness, Dr. Schlank, concluded that the annual review at SORTS-Fulton did not know how to apply the statutory criteria for risk assessment. *Id.* Finally, evidence establishes conscience shocking examples of how annual reviewers were unsure of how to apply the correct standards, or if they should even consider individuals for conditional release. They had not been trained that a person may only be involuntarily confined if he is both dangerous and has a mental illness or abnormality even though the Missouri Supreme Court settled this in 2007. *In Re Care & Treatment of Coffman,* 225 S.W.3d 439, 446 (Mo. banc. 2007). This again illustrates how Respondents have turned civil commitment into lifetime incarceration, a clear constitutional violation of the Fourteenth Amendment.

Nearly every witness who testified at trial, including several Respondents and both of Respondent's expert witnesses agreed that SORTS residents and staff have expressed severe hopelessness and that there is a perception among committed individuals that the only way out of SORTS is to die. This hopelessness is counter-therapeutic and impedes the treatment progress of SORTS residents. In the words of the Respondents own expert, Dr. Schlank, "the failure [of SORTS] to discharge clients is a significant problem, and there appears to be both

some systemic difficulties and some characteristics of the program which may contribute to the failure to be released into the community." *Van Orden*, 129 F. Supp. 3d at 859. These words alone would shock the conscience of a layperson; therefore, it is no yardstick that a jurist should as be shocked.

In a concurring opinion, then-Judge Wolff of the Missouri Supreme Court voted to uphold portions of the Missouri Sexually Violent Predator law, however, in his opinion he noted, "[w]hile the statutory scheme is constitutional as written, I am doubtful about its constitutionality as applied". *In Re Care & Treatment of Norton*, 123 S.W.3d 170, 177 (Mo. banc. 2003) (Wolff, concur). As the evidence has shown to the District Court, Judge Wolff's prophetic words have indeed come true.

B. THE CIRCUIT COURTS OF APPEALS ARE DIVIDED ON CONJUNCTIVE/DISJUNCTIVE ANALYSIS

There is an inter-Circuit split on what is the proper analysis for a substantive due process challenge. Is it conjunctive or disjunctive? The Eighth Circuit Court of Appeals in their opinions of *Moran* and *Karsjens* are in a distinct minority by applying the conjunctive. At least six Circuits continue to follow *Salerno's* disjunctive analysis. *Robinson v. District of Columbia*, 686 F. App'x 1 (D.C. Cir. 2017); United States v. Rich, 708 F.3d 1135, 1139 (10th Cir. 2013); *B & G Constr. Co v. Director, Office of Workers' Comp. Programs*, 662 F.3d 233, 255 (3rd Cir. 2011); *United States v. Green*, 654 F.3d 637, 652 (6th Cir. 2011); *Corales v. Bennett*, 567 F.3d 554, 568 (9th Cir. 2009). Some cases have done so without any express reference to *Salerno*. *Seegmiller v. LaVerkin* City, 528 F.3d 762, 767 (10th Cir. 2008); *Pittman v. Cuyahoga Cnty. Dep't of Children & Family Servs.*, 640 F.3d 716, 728 (6th Cir. 2011).

The Eighth Circuit Court of Appeals has established a far-reaching heightened analysis on applying the conjunctive analysis to substantive due process challenges. This is based on *Moran*, *Karsjens*, and the decision below. Outside of their own decisions, the Eighth Circuit can cite no other authority to support the use of the conjunctive analysis. As noted above, this standard has imposed a burden of proof so high that it is likely impossible to meet. This is far overreaching in what this Court has clearly articulated in its previous holdings. Ignoring this Court's clearly articulated standard now leads to a wide variety of Appellate Courts, the Eighth Circuit in particular, misinterpreting *Lewis* and *Salerno* as they wish. The Eighth Circuit, just like all Courts of Appeals,

are bound *first and foremost* by this Court's holdings, not their own. "The Court of Appeals should follow the case which directly controls, leaving to [this Court] the prerogative of overruling its own decision." *Tenet v. Doe*, 544 U.S. 1, 10 (2005) (internal citations and quotes omitted). *Salerno* has been the controlling case for violations of substantive due process violations since 1987. It was reaffirmed by *Lewis* in 1998.

Even *Moran* dissenters voiced concern about opting for a conjunctive analysis verses a disjunctive analysis. In particular, Judge Loken expressed "[t]his case aptly illustrates the old adage, hard cases make bad law." *Moran,* 296 F.3d at 652 (Loken, J., dissent). *Moran* itself is the product of a badly-fractured Court. The majority of the Court opted for the disjunctive standard. *Moran,* 296 F.3d at 643. Nonetheless, the conjunctive analysis standard prevailed. Further, the Eighth Circuit in *Moran* and *Karsjens* created an approach that has set the bar too high for any individual who seeks to pursue a substantive due process challenge and reasonably expect relief. This interpretation by the Eighth Circuit expands holdings such as *Lewis* and *Salerno* by effectively putting words into the mouth of this Court. This Court clearly articulated in *Lewis* and *Salerno* that substantive due processes challenges *do not* require a conjunctive analysis. It merely required a Plaintiff/Petitioner to meet one or the other prong not but not *both.* However, the Eighth Circuit attempts to quell this Court's previous standards set forth by attempting to set its own standard. So the question remains, what is the proper analysis and who holds the proper analysis? Petitioner asserts that the proper analysis is in fact a disjunctive analysis based upon the facts below. The Eighth Circuit's holding in *Moran* is a striking example of *stare decisis.*

In *United States v. Salerno,* 481 U.S. 739, 746 (1987) this Court held that 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 (internal citations and quotes omitted) (emphasis added). Despite this Court's use of the disjunctive analysis, the Eighth Circuit in their decisions of *Moran, Karsjens,* and the decision below concluded that *both* elements were necessary for a substantive due process violation. It did so based upon Judge Bye's concurring opinion in *Moran* 296 F.3d at 651, which in turn relied upon a footnote from *Lewis,* 523 U.S. at 847 n.8. The *Karsjens* panel stated that Judge Bye had rejected *Salerno* as "a pre-Lewis decision." *Karsjen* 845 F.3d at 408. Nevertheless, footnote eight of *Lewis* does not mention *Salerno,* much less reject it. Thus, Judge Bye respectfully got it wrong.

Thus, Petitioner asserts that the majority view is the better view. The majority, including this Court, has said that establishing a fundamental right or shocks the conscience is enough. Footnote eight of *Lewis* does not mandate any additional query into fundamental rights. It cannot be read to silently to *Salerno*. If the conjunctive requirement is the law, cases such as *O'Connor* and *Foucha* would no longer be precedent, something even Respondents have suggested in previous briefings. Under a conjunctive standard, the only way to be released from civil confinement combined with a fundamental violation would be torturous or abusive actions by government officials, something that prior precedent of this Court has rejected and is not accepted by the Fourteenth Amendment. To rule otherwise would set established American jurisprudence on a dangerous and slippery course from which there may be no return. If this Court fails to intervene in Petitioner behalf, residents will continue to die at SORTS.

CONCLUSION

Just as the Respondents themselves predicted, the District Court ultimately concluded that their treatment program was a "sham". However, only by the grace of the Eighth Circuit and erroneous holdings were they able to maintain such a negative position and bad interpretation of law.

As Petitioner ably explains, the Court should grant Certiorari -- and Petitioner should prevail -- even under the framework set forth in *Moran*, but the Court could also use this case as a vehicle to provide greater clarity about it's approach in substantive due process claims.

The Eighth Circuit's decision within the case is in conflict with other Circuits and this Court; therefore, Petitioner urges this Court to step in and clarify the proper analysis for evaluating civilly committed resident's rights. For these reasons, and the above stated ones, Petitioner respectfully requests the Petition for *Writ of Certiorari* be granted.