APPENDIX

APPENDIX

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United States Court of Appeals
For the Eighth Circuit

No. 18-3343

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[1]; Kevin Moser; Peter Puffer; Nancy Johnston; Jannine Hebert; Ann Zimmerman, in their individual and official capacities

Defendants - Appellees

Appeal from United States District Court
for the District of Minnesota

Submitted: October 20, 2020
Filed: February 24, 2021

Before BENTON, SHEPHERD, and KELLY, Circuit Judges.

SHEPHERD, Circuit Judge.

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

This 42 U.S.C. § 1983 action, on appeal for the second time, requires us to clarify the legal standard applicable to the conditions of confinement claims brought by these civilly committed individuals. Having jurisdiction under 28 U.S.C. § 1291, we conclude that the district court employed the wrong legal standard in evaluating these claims. Accordingly, we affirm in part and vacate in part the district court's judgment and remand for further proceedings.

I.

Appellants are a class of sex offenders civilly committed to the Minnesota Sex Offender Program (MSOP) pursuant to the Minnesota Civil Commitment and Treatment Act: Sexually Dangerous Persons and Sexual Psychopathic Personalities, codified at Minnesota Statute § 253D (MCTA). Appellees are various MSOP managers and officials as well as the Commissioner of the Minnesota Department of Human Services. The factual background, including the histories of the MSOP and the MCTA, is detailed in our opinion from the first appeal, Karsjens v. Piper, 845 F.3d 394 (8th Cir. 2017) (hereinafter Karsjens I).

In the initial proceedings before the district court, Appellees moved for summary judgment on all claims. The district court denied summary judgment, and it divided the claims into two "phases" for trial: Phase 1, comprising Counts 1, 2, 3, 5, 6, and 7; and Phase 2, comprising Counts 8, 9, and 10.[2] Counts 1 and 2 alleged facial and as-applied substantive due process challenges, respectively, to the MCTA. Count 3 alleged that Appellants receive constitutionally inadequate treatment, which is tantamount to punishment; Count 5 alleged that Appellants were subjected to improper punishment; Count 6 alleged that Appellants have been denied less restrictive alternative confinement, which is tantamount to punishment; and Count 7 alleged that Appellants were subjected to inhumane treatment, all in violation of the Fourteenth Amendment.

[2]Count 4 was also included in Phase 1, but it was dismissed with prejudice after trial at Appellants' request. Additionally, as explained below, see infra note 3, none of the Phase 2 claims is before us in this appeal.

Following a six-week bench trial on the Phase 1 claims, the district court found in favor of Appellants on Counts 1 and 2. The court declared the MCTA unconstitutional both facially and as applied to Appellants and entered an injunction. The district court ordered no separate relief with respect to Counts 3, 5, 6, or 7.

In Karsjens I, we held that the district court had applied the wrong legal standards in finding for Appellants on Counts 1 and 2. See id. at 398. We explained that the "rational relationship" test, rather than strict scrutiny, was the proper standard for the facial challenge (Count 1). Id. at 407-08. We further explained that the proper inquiry for the as-applied challenge (Count 2) was whether the officials' actions "shock[] the conscience." Id. at 408. After applying the correct legal standards, we reversed the district court's judgment and remanded "for further proceedings on the remaining claims in the Third Amended Complaint." Id. at 410-11.

On remand, the parties submitted supplemental briefing to the district court on Counts 3, 5, 6, and 7. Citing Karsjens I, Appellees argued that the "shocks the conscience" standard applied, and accordingly the remaining claims failed as a matter of law. Appellants, on the other hand, argued that the remaining claims alleged conditions of confinement that were punitive in effect and that such claims are governed by the standard announced by the Supreme Court in Bell v. Wolfish, 441 U.S. 520, 535 (1979) (holding, as to pretrial detainees, that conditions of confinement violate due process if they "amount to punishment of the detainee"). The district court found that Karsjens I required it to apply the "shocks the conscience" standard to the remaining claims, and accordingly dismissed Counts 3, 5, 6, and 7 with prejudice.[3] It appears that the district court reached this conclusion on the grounds that Counts 3, 5, 6, and 7—like Counts 1 and 2—sounded in Fourteenth Amendment substantive due process. See R. Doc. 1108, at 15-19.

[3]Appellees also renewed their motion for summary judgment on the Phase 2 claims, which the district court granted. Appellants do not challenge this decision on appeal.

II.

The issue in this appeal is whether the district court applied the correct legal standard in dismissing Appellants' claims in Counts 3, 5, 6, and 7 of the Third Amended Complaint. This is a question of law which we review de novo. See, e.g., Highmark Inc. v. Allcare Health Mgmt. Sys., Inc., 572 U.S. 559, 563 (2014); Karsjens I, 845 F.3d at 403 (recognizing that questions of law are reviewed de novo).

A.

We first consider Appellants' claim of constitutionally inadequate treatment (Count 3). Particularly in light of Appellants' arguments to the district court on remand and to this Court, we find this claim to be duplicative of the as-applied due process claim (Count 2) that we previously dismissed after applying the "shocks the conscience" standard. See Karsjens I, 845 F.3d at 410. Moreover, as we stated in Karsjens I, the Supreme Court has not recognized a "due process right to appropriate or effective or reasonable treatment of the illness or disability that triggered the patient's involuntary confinement." Id. (quoting Strutton v. Meade, 668 F.3d 549, 557 (8th Cir. 2012)). Accordingly, we conclude that the district court properly dismissed Count 3 of Appellants' Third Amended Complaint after applying the "shocks the conscience" standard.

B.

The remaining claims and supporting allegations presently before us differ from those we evaluated in Karsjens I. In Karsjens I, the claims and allegations in Counts 1 and 2—and subsequent bench trial and findings—focused on the statutory scheme itself and the officials' implementation thereof, specifically the indefinite nature of Appellants' confinement; the lack of automatic periodic review; and the administration of the treatment program. By contrast, the present claims and allegations focus squarely on the conditions of confinement, including the inadequacy of meals, double-bunking, overly harsh punishment for rules violations,

property being taken and destroyed before any hearing, the lack of less restrictive alternatives, and the inadequacy of medical care. Cf. Wilson v. Seiter, 501 U.S. 294, 303 (1991) ("[T]he medical care a prisoner receives is just as much a 'condition' of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates."). In other words, in Counts 5, 6, and 7, Appellants do not challenge their inability to be released from the facility but rather the conditions within the facility. They contend that, considered as a whole, their conditions of confinement amount to punishment in violation of the Fourteenth Amendment. See Youngberg v. Romeo, 457 U.S. 307, 315-16 (1982) (noting that civilly confined persons "may not be punished at all").

1.

We next consider Appellants' contentions that they were deprived of adequate medical care. In the "Facts" section of the Third Amended Complaint, Appellants allege that they have experienced delays in their receipt of necessary prescription medication. They further allege that Appellees do not provide "necessary insulin and other diabetic management care to the [Appellants] with diabetes." R. Doc. 635, at 47. In Count 7, Appellants allege that they are "subject to inadequate medical treatment that has resulted in injury." R. Doc. 635, at 73.

We previously found that the "deliberate indifference" standard applied to a civilly committed individual's claim of inadequate medical care. See Senty-Haugen v. Goodno, 462 F.3d 876, 889-90 (8th Cir. 2006) (citing Davis v. Hall, 992 F.2d 151, 152-53 (8th Cir. 1993) (per curiam)) (considering allegations regarding the Missouri Sex Offender Program's treatment of individual's heart condition, broken leg, and cyst). To prevail under that standard, a plaintiff must show that "officials knew about excessive risks to his health but disregarded them, and that their unconstitutional actions in fact caused his injuries." Id. at 890 (citation omitted). We conclude that the district court should have applied the deliberate indifference standard, rather than the "shocks the conscience" standard, to Appellants' inadequate medical care claim.

2.

We now turn to the remaining claims in Counts 5, 6, and 7, in which Appellants allege that they were subjected to punitive conditions of confinement. Neither pretrial detainees nor civilly committed individuals may be punished without running afoul of the Fourteenth Amendment. See Bell, 441 U.S. at 535 (holding that pretrial detainees may not be punished); Youngberg, 457 U.S. at 316. Regarding pretrial detainees, this prohibition against punishment encompasses conditions of confinement. Bell, 441 U.S. at 535-37; accord Stearns v. Inmate Servs. Corp., 957 F.3d 902, 908-09 (8th Cir. 2020). In analyzing whether a condition of confinement is punitive, courts "decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." Bell, 441 U.S. at 538. Unless the detainee can show "an expressed intent to punish . . . , that determination generally will turn on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation'" to such alternative purpose. Id. (alteration in original) (citation omitted); see also Kingsley v. Hendrickson, 576 U.S. 389, 398 (2015) ("[A]s Bell itself shows (and as our later precedent affirms), a pretrial detainee can prevail by providing . . . objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose.").

Although the Supreme Court has not established a constitutional standard for evaluating the conditions of a civilly committed individual's confinement, it has stated that "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." Jackson v. Indiana, 406 U.S. 715, 738 (1972). In Beaulieu v. Ludeman, we applied the Bell standard to a claim brought by an individual who alleged that the MSOP's practice of double-bunking was punitive. See 690 F.3d 1017, 1042-43 (8th Cir. 2012).

Although we have not yet considered other allegedly punitive conditions in the context of civil commitment, we find our decisions regarding pretrial detainees to be instructive.[4] "Since Bell became law, we have applied its standard to conditions-of-confinement claims brought by pretrial detainees." Stearns, 957 F.3d at 908 (applying Bell to detainee's claim that he was shackled for eight days during an extradition transport). Indeed, we have applied Bell to a variety of conditions of confinement claims, including: restrictive confinement in a small cell, see Villanueva v. George, 659 F.2d 851, 854 (8th Cir. 1981) (en banc) (holding that the jury could conclude conditions were punitive and thus unconstitutional "based upon the totality of the circumstances," including the size of the cell, time spent in the cell, and lack of opportunities for exercise and recreation) (finding that officials' explanation that the conditions were due to "a shortage of correctional officers" was "not a valid defense"); a detainee's transport in a dog cage, see Morris v. Zefferi, 601 F.3d 805, 809, 811 (8th Cir. 2010) (concluding that such conditions were punitive because they were "excessive in relation to the goal of preventing escape"); overcrowding, see Campbell v. Cauthron, 623 F.2d 503, 505-07 (8th Cir. 1980) (holding that conditions were punitive where detainees had room in their cells only to sit and lie down, were kept in cells 24 hours a day, and were permitted to leave only three times a week for 15-30 minutes); exposure to an overflowing toilet, see Smith v. Copeland, 87 F.3d 265, 268 (8th Cir. 1996) (finding no constitutional violation because detainee's alleged exposure to the stench of his own feces and urine for four days was *de minimis*; detainee did not allege that he was exposed to disease or suffered any other consequence from the exposure); and deprivation of clothing, see Green v. Baron, 879 F.2d 305, 310 (8th Cir. 1989) (holding that jury could conclude conditions were "reasonably related to a legitimate governmental

[4]We have previously considered a claim of inadequate nutrition, but because that claim involved only the medical effects of inadequate nutrition and the plaintiff did not allege it was punitive, we applied the deliberate indifference standard. See Ingrassia v. Schafer, 825 F.3d 891, 897 (8th Cir. 2016).

objective and not excessive in relation[] to that objective").[5] But see Crow v. Montgomery, 403 F.3d 598, 600-01 (8th Cir. 2005) (applying deliberate indifference standard to pretrial detainee's claim that jail officials failed to adequately protect him from violence of other detainees; noting plaintiff alleged that officials acted with deliberate indifference), overruled in part on other grounds by Pearson v. Callahan, 555 U.S. 223 (2009).

Based on the Supreme Court's pronouncements in Bell and Youngberg, we conclude that the Bell standard applies equally to conditions of confinement claims brought by pretrial detainees and civilly committed individuals, as neither group may be punished. This conclusion is further supported by our consistent application of the Bell standard to such claims brought by pretrial detainees. Moreover, several circuits have applied Bell to conditions of confinement claims brought by individuals in civil commitment. See Matherly v. Andrews, 859 F.3d 264, 274-76 (4th Cir. 2017); Healey v. Spencer, 765 F.3d 65, 78-79 (1st Cir. 2014); Allison v. Snyder, 332 F.3d 1076, 1079 (7th Cir. 2003). In light of Supreme Court precedent, our own precedent governing pretrial detainees, and persuasive authority from our sister circuits, we hold that the Bell standard governs the claims in Counts 5, 6, and 7 (except the claim of inadequate medical care) that allege punitive conditions of confinement.

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[5]We note that in Beaulieu, the plaintiffs also brought a claim alleging inadequate sanitation at the MSOP. See 690 F.3d at 1043-45. We evaluated this claim under the deliberate indifference standard, considering whether the conditions posed a substantial risk of serious harm of which officials were aware but deliberately disregarded. Id. at 1045. This is not the standard we have applied to such claims brought by pretrial detainees. See, e.g., Smith, 87 F.3d at 268. It appears that the Beaulieu plaintiffs framed their sanitation claim under the deliberate indifference standard. See 690 F.3d at 1044 ("The Patients assert that they presented adequate evidence showing the unsanitary conditions posed a substantial risk of harm and that the DHS officials knew of and disregarded their health and safety. They argue that the DHS officials' actions constitute deliberate indifference . . . ."). Because Appellants here do not allege any problems with sanitation, we need not address or resolve this potential discrepancy in our treatment of sanitation claims.

C.

Accordingly, the district court erred as a matter of law when it applied the "shocks the conscience" standard to Counts 5, 6, and 7. On remand, the district court is instructed to consider the claim of inadequate medical care under the deliberate indifference standard outlined in Senty-Haugen, and to consider the remaining claims under the standard for punitive conditions of confinement outlined in Bell. "In considering whether the conditions . . . are unconstitutionally punitive," the court must "review the totality of the circumstances of [Appellants'] confinement." Morris, 601 F.3d at 810.

III.

For the foregoing reasons, we affirm the district court's dismissal of Count 3 but vacate the district court's dismissal of Counts 5, 6, and 7, and remand for further proceedings not inconsistent with this opinion.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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,

v.

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

Defendants.

Civil No. 11-3659 (DWF/TNL)

MEMORANDUM OPINION AND ORDER

Daniel E. Gustafson, Esq., Karla M. Gluek, Esq., David A. Goodwin, Esq., Raina Borrelli, Esq., and Eric S. Taubel, Esq., Gustafson Gluek PLLC, counsel for Plaintiffs.

Scott H. Ikeda, Adam H. Welle, and Aaron Winter, Assistant Attorneys General, Minnesota Attorney General's Office, counsel for Defendants.

INTRODUCTION

This matter is before the Court following remand on three separate matters. First, the parties dispute the proper disposition of Plaintiffs' remaining Phase One counts in light of the Eighth Circuit's decision. (*See* Doc. Nos. 1095, 1097, 1100, 1102.) Second, Defendants seek summary judgment on all Phase Two counts. (*See* Doc. Nos. 1095,

1097, 1102, 1105.) Plaintiffs oppose summary judgment and assert that the class should be decertified with respect to these counts. (*See* Doc. Nos. 1100, 1106.) Third, Defendants ask the Court to apportion the cost of the Rule 706 Experts to Plaintiffs. (Doc. Nos. 1095, 1097, 1102.) Plaintiffs oppose this request. (Doc. No. 1100.) For the reasons set forth below, all remaining claims raised in Plaintiffs' Third Amended Complaint shall be dismissed with prejudice. The Court shall reserve determination on the final apportionment of Rule 706 Expert costs.

BACKGROUND

This case has an extensive and complex history which has been discussed at length in prior orders. The Court incorporates by reference the factual background in the Court's February 2, 2015 Memorandum Opinion and Order addressing Defendants' prior Motion for Summary Judgment (Doc. No. 828), as well as the factual findings from Phase One of trial contained in the Court's June 17, 2015 Findings of Fact, Conclusions of Law, and Order (Doc. No. 966). The Court assumes familiarity with these and other relevant orders and only briefly summarizes the relevant background here.

Plaintiffs are individuals residing at the Minnesota Sex Offender Program (the "MSOP") who are civilly committed under Minnesota Statute § 253D, the Minnesota Civil Commitment and Treatment Act ("MCTA"). (*See* Doc. No. 635 ("Third Am. Compl") ¶ 2.) The fourteen named Plaintiffs represent a class certified pursuant to Federal Rule of Civil Procedure 23(b)(2), consisting of "[a]ll patients currently civilly committed to [the MSOP] pursuant to Minn. Stat § 253B." (*See* Doc. No. 203.) Plaintiffs' lawsuit challenges the constitutionality of the MCTA on its face and as

applied, as well as various aspects of the MSOP's operation and treatment regime. (*See generally* Third Am. Compl. ¶ 1.)

Specifically, Plaintiffs' Third Amended Complaint raises the following thirteen claims: (I) Minnesota Statute § 253D is facially unconstitutional; (II) Minnesota Statute § 253D is unconstitutional as applied; (III) Defendants have failed to provide treatment in violation of the Fourteenth Amendment to the United States Constitution and the Minnesota Constitution; (IV) Defendants have failed to provide treatment in violation of the MCTA; (V) Defendants have denied Plaintiffs the right to be free from punishment in violation of the Fourteenth Amendment to the United States Constitution and the Minnesota Constitution; (VI) Defendants have denied Plaintiffs the right to less restrictive alternative confinement in violation of the Fourteenth Amendment to the United States Constitution and the Minnesota Constitution; (VII) Defendants have denied Plaintiffs the right to be free from inhumane treatment in violation of the Fourteenth Amendment to the United States Constitution and the Minnesota Constitution; (VIII) Defendants have denied Plaintiffs the right to religion and religious freedom in violation of the First and Fourteenth Amendments to the United States Constitution; (IX) Defendants have unreasonably restricted free speech and free association in violation of the First Amendment to the United States Constitution and the Minnesota Constitution; (X) Defendants have conducted unreasonable searches and seizures in violation of the Fourth Amendment to the United States Constitution and the Minnesota Constitution; (XI) Defendants have violated court ordered treatment; (XII) Defendants Jesson, Benson, Moser, Lundquist, Johnston, and Hébert have breached Plaintiffs'

contractual rights; and (XIII) Defendants Jesson, Benson, Moser, Lundquist, Johnston, and Hébert have tortiously interfered with contractual rights and have intentionally violated Minn. Stat. § 253B.03, subd. 7. (Third Am. Compl. at 59-84.)

On February 2, 2015, the Court issued an order denying Defendants' Motion for Summary Judgment on all counts in Plaintiffs' Third Amended Complaint. (Doc. No. 828.) The matter proceeded to trial in two phases. (*See* Doc. No. 647.) The Court explained the two phases of trial as follows:

> Phase One will be comprised of the presentation of evidence and argument on the following issues: (1) whether Minnesota Statute Chapter 253D is unconstitutional on its face and as applied; (2) whether the treatment provided is constitutionally and/or statutorily infirm; (3) whether the treatment program complies with court-ordered treatment; (4) whether confinement is tantamount to unconstitutional punitive detention; and (5) whether less restrictive alternatives to confinement are constitutionally required.
> . . .
> Phase Two shall be comprised of the presentation of evidence and argument on the following issues: (1) whether confinement conditions constitute unconstitutional restrictions on freedom of speech, religion, and association; (2) whether confinement procedures constitute unconstitutional searches and seizures; (3) whether the treatment program and its implementation constitutes a breach of contract, tortious interference with contract, and intentional violation of Minnesota Statute Section 253B.03(7).

(*Id.* at 2.) Phase One of trial took place between February 9, 2015 and March 18, 2015. (*See* Doc. Nos. 839, 908.)

On June 17, 2015, the Court issued its Findings of Fact, Conclusions of Law, and Order, granting Plaintiffs' request for declaratory relief on Counts I and II. (Doc. No. 966 at 75.) The Court stated, "[b]ecause the Court finds the program is unconstitutional on its face and as applied (Counts I and II), and because any remedy

fashioned will address the issues raised in the remaining Phase One Counts, the Court need not address Counts III, V, VI, and VII." (*Id.* at 65.) The Court noted that its "determination that the MSOP and its governing civil commitment statutes are unconstitutional concludes Phase One of this case." (*Id.* at 5.) The Court also reiterated that "Counts VIII, IX, and X, will be tried in the second phase of trial ('Phase Two')."[1] (*Id.* at 76.) On October 29, 2015, the Court issued a First Interim Relief Order directing injunctive relief to remedy the court's findings of unconstitutionality. (Doc. No. 1035.)

Defendants appealed the Court's June 17, 2015 and October 29, 2015 Orders to the Eighth Circuit Court of Appeals. (Doc. No. 1036.) On January 3, 2017, the Eighth Circuit issued an opinion "revers[ing] the district court's finding of a constitutional violation and vacat[ing] the injunctive order." *Karsjens v. Piper*, 845 F.3d 394, 411 (8th Cir. 2017). It remanded the case to this Court "for further proceedings on the remaining claims in the Third Amended Complaint." *Id.*

Following a series of stays during which Plaintiff sought further review at the United States Supreme Court, the Court and the parties met for a Status Conference on October 25, 2017. (*See* Doc. Nos. 1080, 1086, 1093.) Thereafter, Defendants filed a renewed Motion for Summary Judgment, seeking summary judgment on Counts VIII, IX, and X, as well as apportionment of the Rule 706 Expert costs to Plaintiffs. In briefing this motion, Defendants also briefed the issue of how the Court should address the remaining Phase One counts (Counts III, V, VI, and VII) in light of the Eighth Circuit's

[1] On August 10, 2015, Counts IV, XI, XII, and XIII were dismissed with prejudice. (Doc. No. 1005.)

decision. (Doc. No. 1095.) The parties fully briefed these issues, and the Court heard argument on February 5, 2018. (Doc. Nos. 1097, 1100, 1102, 1103.) The Court notes additional facts as necessary to resolve the pending matters, below.

DISCUSSION

I. Remaining Phase One Counts

Defendants argue that the remaining claims in Phase One should be dismissed because these claims were determined by the Eighth Circuit's decision in *Karsjens*, 845 F.3d 394 (8th Cir. 2017). Specifically, Defendants assert that, "[f]or the same reasons the Eighth Circuit reversed the Court's substantive due process analysis as to Counts I and II, the substantive due process claims asserted in Counts III, V, VI, and VII should also be dismissed." (Doc. No. 1097 at 4.) According to Defendants, the remaining Phase One counts must be dismissed because the Eighth Circuit has already reviewed the trial record and determined that Defendants did not engage in conduct that shocks the conscience. Defendants also contend that the Eighth Circuit implicitly decided Counts III, V, VI, and VII, precluding further review of these claims on remand.[2]

Plaintiffs, on the other hand, argue that the remaining Phase One counts "have yet to be decided by the Court, and that their outcome is not dictated by the Eighth Circuit's decision with respect to Counts I and II." (Doc. No. 110 at 1-2.) Plaintiffs urge the Court

[2] Defendants also argue that the remaining counts in Phase One must be dismissed for lack of subject matter jurisdiction to the extent they are based on allegations that Defendants have violated Minnesota state law. Plaintiffs do not dispute that such claims are subject to dismissal under *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984), and the Eleventh Amendment. Thus, the Court shall grant Defendants' motion on this issue.

to make "a full analysis and ruling on these claims" and to conclude that Plaintiffs' remaining substantive due process claims are supported by evidence of "both conscience-shocking conduct by Defendants and the violation of a fundamental liberty right such that they should prevail." (*Id.* at 2, 4.) According to Plaintiffs, "[i]f the Eighth Circuit's opinion is read as broadly as Defendants suggest, then there is no path for Plaintiffs, or any civilly committed sex offender, to ever prevail on a substantive due process claim." (*Id.* at 4-5.) Plaintiffs argue that the trial record supports a determination in their favor on the remaining substantive due process claims in Counts III, V, VI, and VII because Defendants were deliberately indifferent to a substantial risk of harm to Plaintiffs, and such conduct amounts to conscience-shocking behavior.[3]

A. The Eighth Circuit's Opinion

In the Eighth Circuit's *Karsjens* opinion, the appellate court reversed this Court's liability findings on Counts I and II of Plaintiffs' Third Amended Complaint. 845 F.3d at 411. In doing so, the Eighth Circuit rejected this Court's application of a strict scrutiny standard to Plaintiffs' facial and as-applied substantive due process claims. *Id.* at 407. On Plaintiffs' facial due process claim in Count I, the Eighth Circuit stated that "the Supreme Court . . . has never declared that persons who pose a significant danger to themselves or others possess a fundamental liberty interest in freedom from physical restraint." *Id.* Thus, it held that "the proper standard of scrutiny to be applied . . . is

[3] Plaintiffs acknowledge that the Eighth Circuit's decision with respect to Count II addressed overlapping allegations as Counts III and VI, relating to treatment and the lack of less restrictive alternatives. However, Plaintiffs argue that "the Court should specifically address the allegations in Counts III and IV and apply the 'shocks-the-conscience' standard to those counts." (*Id.* at 7 n.5.)

whether MCTA bears a rational relationship to a legitimate government purpose." *Id.* at 407-08. The Court held that the MCTA met this "highly deferential" standard, reversing this Court's conclusion that the statute was facially unconstitutional for six specified reasons.[4] *See id.* at 409-10.

With regard to Count II, Plaintiffs' as-applied substantive due process challenge, the Eighth Circuit held that "the court should determine both whether the state defendants' actions were conscience-shocking and if those actions violated a fundamental liberty interest." *Id.* at 408. The Eighth Circuit clarified that actions that meet the conscience-shocking standard must be "egregious or outrageous" and "must involve conduct 'so severe . . . so disproportionate to the need presented, and . . . so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.'" *Id.* (citations omitted).

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[4] As summarized by the Eighth Circuit, the six reasons this Court identified for finding the MCA unconstitutional as applied included the following:

> (1) MCTA did not require periodic risk assessments of all committed persons, (2) MCTA did not provide for a judicial bypass mechanism, (3) MCTA rendered discharge from the MSOP more onerous than admission because discharge criteria was more stringent than admission criteria, (4) MCTA impermissibly shifted the burden to petition for a reduction in custody to the committed person, (5) MCTA did not provide less restrictive alternatives although the statute indicated such would be available, and (6) MCTA did not require state officials to petition for a reduction in custody on behalf of committed individuals who might qualify for a reduction.

Karsjens v. Piper, 845 F.3d 394, 408-09 (8th Cir. 2017).

In discussing whether Plaintiffs' allegations implicated a fundamental liberty interest, the Eighth Circuit stated, "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.'" *Id.* at 410 (quoting *Strutton v. Meade*, 668 F.3d 549, 557 (8th Cir. 2012)). It also noted that "the Supreme Court [has] recognized [that] the Constitution does not prevent 'a State from civilly detaining those for whom no treatment is available.'" *Id.* at 410 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)).

The Eighth Circuit then turned to the shocks-the-conscience prong of the substantive due process analysis and stated 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." *Id.* at 410. These six grounds included the following:

> (1) Defendants do not conduct periodic independent risk assessments or otherwise evaluate whether an individual continues to meet the initial commitment criteria or the discharge criteria if an individual does not file a petition; (2) those risk assessments that have been performed have not all been performed in a constitutional manner; (3) individuals have remained confined at the MSOP even though they have completed treatment or sufficiently reduced their risk; (4) discharge procedures are not working properly at the MSOP; (5) although section 253D expressly allows the referral of committed individuals to less restrictive alternatives, this is not occurring in practice because there are insufficient less restrictive alternatives available for transfer and no less restrictive alternatives available for initial commitment; and (6) although treatment has been made available, the treatment program's structure has been an institutional failure and there is no meaningful relationship between the treatment program and an end to indefinite detention.

Id. at 402–03. The court explained, "[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. It then reversed the findings of a constitutional violation, vacated the injunctive order, and "remand[ed] this matter to the district court for further proceedings on the remaining claims in the Third Amended Complaint." *Id.* at 411.

B. Scope of Review on Remand

As discussed above, the parties dispute whether the remaining Phase One counts were explicitly or implicitly decided by the Eighth Circuit. Defendants contend that the Eighth Circuit explicitly, or at a minimum implicitly, decided these claims. Plaintiffs dispute that the Eighth Circuit decided these claims, emphasizing that it never even mentioned them in its opinion.

Under 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." *Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs.*, 364 F.3d 925, 931 (8th Cir. 2004). However, the court may consider "any issue 'not expressly or impliedly disposed of on appeal.'" *Id.* (citation omitted). If the appellate court directs the lower court to consider a specific claim upon remand, that "does not restrict its decision to *only* that matter." *Id.* Rather, any unresolved claims are "within the province of the district court to entertain." *Id.* Even where the language in an appellate decision appears broad, "it is necessarily limited

by the context of the claims and issues decided in that appeal." *See Forest Park II v. Hadley*, 408 F.3d 1052, 1057 (8th Cir. 2005); *see also U.S. Fid. & Guar. Co. v. Concrete Holding Co.*, 168 F.3d 340, 342 (8th Cir. 1999) ("Subjects an appellate court does not discuss, because the parties did not raise them, do not become the law of the case by default." (quoting *Bone v. City of Lafayette, Ind.*, 919 F.2d 64, 66 (7th Cir. 1990))).

Counts III, V, VI, and VII all arise under the due process clause of the Fourteenth Amendment[5] and challenge Defendants' acts and omissions relating to the creation and implementation of various policies at the MSOP. (*See* Third Am. Compl. ¶¶ 254-61, 269-97.) Count III raises a failure-to-provide treatment claim. (*Id.* ¶¶ 254-61.) Count V alleges a denial of the right to be free from punishment. (*Id.* ¶¶ 269-83.) Count VI asserts a denial of the right to less restrictive alternative confinement. (*Id.* ¶¶ 284-91.) Finally, Count VII alleges a denial of the right to be free from inhumane treatment. (*Id.* ¶¶ 292-97.) In its June 17, 2015 Findings of Fact, Conclusions of Law, and Order, the Court declined to resolve these counts, stating that "[b]ecause the Court finds the program is unconstitutional on its face and as applied (Counts I and II), and because any remedy fashioned will address the issues raised in the remaining Phase One Counts, the Court need not address Counts III, V, VI, and VII." (Doc. No. 966 at 65.)

None of these claims were identified by Defendants in their list of issues being appealed to the Eighth Circuit. (*See* Doc. No. 1036-1 at 2.) Thus, the Eighth Circuit's

[5] To the extent these counts arise under the Minnesota Constitution, they are dismissed with prejudice. *See supra* note 2.

opinion did not specifically reference these claims.[6] *See generally Karsjens*, 845 F.3d 394. The Eighth Circuit only analyzed the Court's constitutionality determinations with respect to Counts I and II, Plaintiffs' facial and as-applied due process challenges to the MCTA. *See id.* at 406-11. Although the Eighth Circuit's analysis of these claims addressed a number of issues that overlap with the Phase One counts that were left undecided, Counts III, V, VI, and VII were neither expressly nor impliedly decided by the Eighth Circuit on appeal. Thus, on remand, these claims remain viable, and the Court shall resolve these claims on their merits in light of the Eighth Circuit's decision.

C. Remaining Phase One Claims on the Merits

As noted, Plaintiffs' remaining Phase One claims allege Fourteenth Amendment due process violations arising out of Defendants' acts and omissions in connection with the operation of the MSOP. These claims are thus governed by the substantive due process standard outlined in the Eighth Circuit's *Karsjens* opinion. Specifically, to hold Defendants liable under Counts III, V, VI, and VII, the court must conclude that "the state defendants' actions were conscience-shocking and [that] those actions violated a fundamental liberty interest." *Karsjens*, 845 F.3d at 408.

Plaintiffs' arguments with respect to these counts center on the punitive nature of the MSOP combined with treatment and release procedures that result in indefinite

[6] In discussing this Court's liability order, the Eighth Circuit explained, "[t]he court noted it would address the remaining claims in the Third Amended Complaint in a second phase of the trial and in a separate order." *Karsjens*, 845 F.3d at 403. This reference appears to relate to Counts IV, XI, XII, and XIII which the Court stated "will be addressed under separate Order," as well as Counts VII, IX, and X which the Court stated "will be tried in the second phase of trial." (Doc. No. 966 at 76.)

confinement. The Eighth Circuit has recently affirmed that "a committed acquittee is entitled to release once he is no longer dangerous or no longer mentally ill." *Andrews v. Schafer*, 888 F.3d 981, 984 (8th Cir. 2018). While this proposition may support an individual's challenge to a court order that restrains his liberty, however, to successfully assert a substantive due process claim in this context, the plaintiff must establish both parts of the Eighth Circuit's two-part inquiry outlined in *Karsjens*. *Id.* at 984. The Eighth Circuit's established standard affirms that "[i]n the context of substantive due process, an individual must overcome a very heavy burden to show a violation of the Fourteenth Amendment." *Hall v. Ramsey Cty.*, 801 F.3d 912, 917 (8th Cir. 2015).

1. Failure to Provide Treatment Claim (Count III)

Turning to Plaintiff's failure-to-provide-treatment claim in Count III, the Eighth Circuit stated in *Karsjens*, "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*, 845 F.3d at 410 (quoting *Strutton*, 668 F.3d at 557). In *Strutton v. Meade*, the Eighth Circuit had held that the plaintiff, an individual civilly committed under the Missouri Sexually Violent Predators Act, "does not have a fundamental due process right to sex offender treatment." 668 F.3d at 557. This was so even though Missouri's statutory scheme authorized commitment "for control, care and treatment until such time as [the offender's] mental abnormality has so changed that [he] is safe to be at large." *Id.* (quoting Mo. Rev. Stat. § 632.495(2)). The Eighth Circuit

applied the shocks-the-conscience standard and held that "[a]lthough the treatment [plaintiff] received may have been less than ideal, and perhaps even inadequate by professional standards, it was not so lacking as to shock the conscience." *Id.* at 558.[7]

Notwithstanding the Eighth Circuit's comments in *Karsjens*, Plaintiffs contend that the Supreme Court has not determined whether committed individuals have a constitutional right to treatment under the circumstances of this case. Plaintiffs argue that their allegations in Count III center on the manner in which Defendants' treatment program blocks Plaintiffs' release from the MSOP "rather than alleging a constitutional right to treatment per se." (Doc. No. 1100 at 8.) In this context, Plaintiffs argue that "[t]he multitude of issues with the MSOP's treatment program, when considered as a system-wide problem, reach the level of conscience shocking behavior that violates due process." (*Id.* at 9.) Plaintiffs also assert that this claim implicates the "fundamental liberty right to be free from commitment, or bodily restraint, when the basis for the commitment no longer exists." (*Id.* at 14.) Plaintiffs dispute that the Eighth Circuit established that Plaintiffs have no such fundamental liberty right. With respect to Count III, Defendants argue that "[t]he Eighth Circuit explicitly rejected Plaintiffs' contention

[7] This Court previously distinguished *Strutton* based on differences between Minnesota and Missouri's statutory mandate directing treatment and because "the plaintiff's claims [in *Strutton*] were limited to his access to treatment; he neither raised a systemic challenge to the implementation of the program as a whole, nor did he allege that his confinement was punitive in nature." (Doc. No. 828 at 21 n.27 (quoting Doc. No. 427 at 24).) The Eighth Circuit's reference to *Strutton* in its *Karsjens* opinion suggests that these bases for distinguishing *Strutton* do not materially impact the relevant substantive-due-process inquiry applicable to the Plaintiffs' claims in this case.

that they have a fundamental substantive due process right to treatment." (Doc. No. 1097 at 5.)

The Court concludes that Plaintiffs have failed to establish Defendants' liability under Count III. In this circuit, committed individuals do not have a recognized "due process right to appropriate or effective or reasonable treatment of the illness or disability that triggered the patient's involuntary confinement." *Karsjens*, 845 F.3d at 410 (quoting *Strutton*, 668 F.3d at 557). Furthermore, the Eighth Circuit appears to reject the notion that committed individuals such as Plaintiffs have a fundamental liberty interest in freedom from unjustified confinement. *See id.* at 407 ("[T]he Supreme Court . . . has never declared that persons who pose a significant danger to themselves or others possess a fundamental liberty interest in freedom from physical restraint."). Finally, the Eighth Circuit reviewed the Phase One trial record, including this Court's finding that "although treatment has been made available, the treatment program's structure has been an institutional failure and there is no meaningful relationship between the treatment program and an end to indefinite detention." *See id.* at 403, 410-11. Nonetheless, the Eighth Circuit held that Defendants' conduct was not conscience-shocking to support substantive due process liability. *See id.* at 410-11 ("[T]he 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."). Thus, under controlling Eighth Circuit precedent, Plaintiffs' Fourteenth Amendment failure-to-provide treatment claim lacks merit.

2. Lack of Less Restrictive Alternatives Claim (Count VI)

Count VI asserts a related claim that Defendants have infringed upon Plaintiffs' constitutionally-protected right to less restrictive alternative confinement under the Fourteenth Amendment. Plaintiffs argue that the lack of less restrictive alternatives available to committed individuals is conscience-shocking. In particular, Plaintiffs contend that "[i]ntentionally failing to provide confinement that is appropriate for the varying levels of risk presented by Plaintiffs and the Class, and actually knowing that there are committed individuals who could be properly treated and managed in less restrictive settings, is conscience shocking." (Doc. No. 1100 at 11.) Plaintiffs suggest that Defendants' conduct amounts to deliberate indifference that supports finding a Fourteenth Amendment substantive due process violation. Defendants, on the other hand, argue that "[t]he Eighth Circuit . . . explicitly rejected Plaintiffs' contention that due process requires the availability of less restrictive facilities." (Doc. No. 1097 at 6.)

As with Plaintiffs' failure-to-provide-treatment claim, the Eighth Circuit's *Karsjens* decision forecloses finding Defendants' liable under Count VI. The Eighth Circuit's statements regarding the lack of a fundamental right to treatment and the lack of a fundamental liberty interest in freedom from physical restraint strongly imply that civilly committed individuals do not retain a fundamental liberty interest in the least restrictive confinement appropriate for their risk level. What is more, the Eighth Circuit specifically acknowledged this Court's findings that "individuals have remained confined at the MSOP even though they have completed treatment or sufficiently reduced their risk" and that "there are insufficient less restrictive alternatives available for transfer and

no less restrictive alternatives available for initial commitment." *Karsjens*, 845 F.3d at 402-03. It nevertheless held that "[n]one of the . . . 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." *Id.* at 410. The Court is therefore bound by the Eighth Circuit's decision to conclude that Defendants are not liable under the Fourteenth Amendment for failing to provide less restrictive alternatives to the Plaintiff Class.

3. Punitive Nature of Confinement Claims (Counts V, VII)

Counts V and VII challenge the punitive nature of confinement at the MSOP based on the asserted rights under the Fourteenth Amendment to be free from punishment and inhumane treatment. With respect to these claims, Plaintiffs argue "that commitment to the MSOP continues in duration beyond a time that it is constitutionally permissible." (Doc. No. 1100 at 12.) Plaintiffs emphasize that "Defendants do not even know whether hundreds of Plaintiffs and Class members continue to meet the constitutional criteria for commitment," and highlight the barriers the MSOP has imposed in the reduction-in-custody process. (*Id.*) On the merits of Counts V and VII, Defendants argue that Plaintiffs' theory challenging the punitive nature of the MSOP fails under the Fourteenth Amendment and the Eighth Circuit's application of the shocks-the-conscience standard.

The Court concludes that the Eighth Circuit's holdings and reasoning preclude finding a substantive due process violation under Counts V and VII. Notwithstanding this Court's finding holding that the MCTA "results in a punitive effect and application contrary to the purpose of civil commitment," the Eighth Circuit reversed the Court's

finding of liability under the Fourteenth Amendment. *Karsjens*, 845 F.3d at 402. Ultimately, the Eighth Circuit reviewed the Phase One record and determined 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. In light of these conclusions and the applicable standard for imposing substantive due process liability, the Court concludes that Defendants are not liable under Counts V and VII.

4. Plaintiffs' Unconstitutionally Punitive Theory

Alternatively, Plaintiffs contend that they should prevail on their remaining Phase One claims because Defendants are unconstitutionally punishing civilly committed individuals. Plaintiffs assert that "[w]hether commitment to the MSOP is punitive, as alleged in each of these claims, has not yet been determined by the Court," and that the Eighth Circuit has not identified the proper standard by which to analyze such allegations. (Doc. No. 1100 at 5.) According to Plaintiffs, the trial record supports a finding that "Plaintiffs' commitment to the MSOP under the Act is punitive in effect" based on the treatment, living conditions, and discharge process, "the consequence of which is effectively life-long punitive detention." (*Id.* at 16.) Plaintiffs also point to the lack of periodic risk assessments conducted at the MSOP and argue that "[h]olding Plaintiffs and Class members beyond such a time as they meet commitment standards, as well as not even knowing whether people should continue to be confined, is certainly not rationally related to a nonpunitive purpose, the rendering the Act punitive in effect." (*Id.*

at 21.) In short, Plaintiffs argue that the record supports a finding that the MCTA is punitive and therefore unconstitutional under Counts III, V, VI, and VII.

In response, Defendants contend that Plaintiffs are merely repeating arguments that have been rejected by the Eighth Circuit. In particular, Defendants note that "the Eighth Circuit considered and rejected Plaintiffs' theory that the MSOP 'results in a punitive effect and application contrary to the purpose of civil commitment' in violation of substantive due process." (Doc. No. 1102 at 5 n.7 (quoting *Karsjens*, 845 F.3d at 402).) In any event, Defendants contend that Plaintiffs' alternative punitiveness theory under *Bell v. Wolfish*, 441 U.S. 520 (1979), and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), is meritless and should be rejected because it was not advanced during the Phase One trial. Defendants ultimately assert that it is irrelevant whether the remaining Phase One claims are analyzed under a theory of deliberate indifference or general punitiveness; in any case, Defendants argue, the shocks-the-conscience standard controls.

Even under this alternative theory of liability, the Court once again concludes that the Eighth Circuit's holdings are dispositive of Plaintiffs' remaining Phase One claims. Regardless of the theory of liability alleged, Plaintiffs' Fourteenth Amendment substantive due process claims are analyzed under the two-part test identified by the Eighth Circuit in its *Karsjens* opinion. Furthermore, the Eighth Circuit has explicitly held that Defendants' actions, as revealed in Phase One of trial, do not rise to the conscience-shocking level necessary to support Fourteenth Amendment substantive due process liability. Even if this Court were free to conclude that the MSOP and Defendants' implementation of the MCTA amount to punishment of individuals who are

subject to civil commitment, the Eighth Circuit's decision compels the conclusion that Defendants have not engaged in conscience-shocking conduct to support the imposition of liability under the Fourteenth Amendment.[8]

For the reasons stated above, in light of the Eighth Circuit's decision, the Court finds that Defendants are not liable under Plaintiffs' remaining Phase One claims. Thus, Counts III, V, VI, and VII shall be dismissed with prejudice. The Court next turns to Phase Two and Defendants' renewed Motion for Summary Judgment on Counts VII, IX, and X.

II. Decertification of Plaintiffs' Phase Two Class Claims

Plaintiffs' Phase Two claims raise constitutional challenges to Defendants' implementation of various policies at the MSOP. (*See* Third Am. Compl. ¶¶ 298-325.) Specifically, Count VIII alleges a First Amendment religious freedom claim. (*Id.* ¶¶ 298-306.) Count IX alleges unreasonable restrictions on Plaintiffs' First Amendment freedom of speech and association rights. (*Id.* ¶¶ 307-15.) Count X asserts that Defendants have conducted unreasonable searches and seizures in violation of the Fourth Amendment. (*Id.* ¶¶ 316-25.) With respect to Counts VIII and IX, Plaintiffs allege that the challenged "policies, procedures and practices are not related to a legitimate institutional or therapeutic interest of the Defendants." (*Id.* ¶¶ 303, 312.) Concerning Count X, Plaintiffs contend that Defendants' "search policies, procedures and practices unnecessarily invade the personal rights of Plaintiffs and Class members." (*Id.* ¶ 322.)

[8] Significantly, the Court's conclusion on the viability of this theory in this case is not meant to foreclose committed individuals from advancing this theory in separate litigation.

In briefing their renewed Motion for Summary Judgment with respect to Plaintiffs' Phase Two claims, Defendants asserted in footnotes that Plaintiffs' alleged injuries were subject to individualized inquiry and "not capable of classwide resolution." (Doc. No. 1102 at 13 n.13, 15 n.14.) Despite neither party formally requesting decertification of the Class with respect to Phase Two, Plaintiffs stated at oral argument that these claims should be decertified. The Court requested letter briefs from the parties on this issue, and each party filed a supplemental response.

Defendants contend that "[t]he Court should enter judgment on the merits in favor of Defendants on Plaintiffs' Phase Two claims." (Doc. No. 1105 at 1.) Defendants emphasize that there are no new circumstances to support Plaintiffs' belated change in position and new litigation strategy. "After six years of litigation," Defendants contend, "Plaintiffs should not be permitted to avoid a determination of the claims on the merits, and the Court should grant Defendants summary judgment." (*Id.* at 2.) At a minimum, Defendants ask the Court to grant summary judgment with respect to the class representatives' individual claims.

Plaintiffs state that the Court should render a decision with respect to Plaintiffs' Phase Two claims based on the parties' arguments and the evidentiary record. Plaintiffs also contend, however, that "[t]he Court has the discretion, and the obligation, to decertify a class where class treatment is no longer appropriate, even where the initial certification has not been challenged." (Doc. No. 1106 at 1.) According to Plaintiffs, "[a]s this case has progressed through discovery, trial, and appeals, it has become apparent that class treatment is not appropriate for the Phase Two claims" because

Defendants' conduct in applying various MSOP policies "[does not] apply generally to the class." (*Id.* at 2 (quoting Fed. R. Civ. P. 23(b)(2)).) In Plaintiff's view, "the Court has a duty to decertify the Class for the Phase two claims and allow Plaintiffs and Class member[s] to pursue any claims they may have on an individual basis." (*Id.*)

Once a class is certified pursuant to Federal Rule of Civil Procedure 23, the court retains a continuing duty to assure the propriety of certification. *See Hervey v. City of Little Rock*, 787 F.2d 1223, 1227 (8th Cir. 1986). In addition, "[a]n order that grants or denies class certification may be altered or amended before final judgment." Fed. R. Civ. P. 23(c)(1)(C). A decision to decertify a class should arise based on changed circumstances that were not present when the class was certified. *See* William B. Rubenstein, *Newberg on Class Actions* § 7:34 (5th ed. 2018 Update). And whether to decertify a class is within the district court's discretion. *See Webb v. Exxon Mobil Corp.*, 856 F.3d 1150, 1157 (8th Cir. 2017).

The Court certified the Plaintiff Class on July 24, 2012, pursuant to Federal Rule of Civil Procedure 23(b)(2), concluding "that Defendants' alleged acts and omissions regarding the Plaintiffs' claims constitute actions generally applicable to the Class." (Doc. No. 203 at 11.) Among others, the Court identified the following common questions of law or fact applicable to the Class:

> "Whether Defendants violated Plaintiffs' and Class members' rights to be free from unreasonable searches and seizures as protected by the Fourth Amendment to the United States Constitution; [and] . . .
>
> "Whether Defendants violated Plaintiffs' and Class members' rights to freedom of expression, speech, and religious exercise as protected by the First Amendment to the United States Constitution[.]"

(*Id.* at 6-7.) The Court also concluded that "resolution of the Plaintiffs' claims will necessarily remedy the injuries suffered by all potential Class members." (*Id.* at 7.) Finally, the Court emphasized the shared interests between the named plaintiffs and the proposed class, noting that "they share the common goal of being housed in a humane, therapeutic environment while receiving adequate treatment that gives them a realistic opportunity for release." (*Id.* at 10.)

As Plaintiffs noted in their brief in response to Defendants' renewed Motion for Summary Judgment, Counts VIII, IX, and X "all claim that the policies and practices at the MSOP are punitive." (Doc. No. 1100 at 24.) Plaintiffs acknowledge that "[c]laims regarding the application of specific policies to a particular Plaintiff or Class member are not appropriate for class treatment" if such claims arise from conduct that is not generally applicable to the class. (*Id.* at 25.) Plaintiffs' theory concerning these claims, however, is "that when viewed collectively, these policies are clear violations of Plaintiffs' and Class members' constitutional rights." (*Id.*) Plaintiffs argue, "it is these policies and practices in combination and when applied to the Class as a whole, that rise to the level of a constitutional violation, along with the fact that they are applied uniformly to all Plaintiffs without regard for individual treatment needs or risk levels." (*Id.*)

The Court declines to decertify the Class in this matter because the common questions and shared interests identified in the Court's order granting class certification remain with respect to the MSOP's generally-applicable policies and practices. To be sure, individuals residing at the MSOP may have viable individual claims regarding the

application of specific policies to them as individuals. However, this fact does not foreclose the Court from considering Plaintiffs' claims on a classwide basis to the extent the policies affect the Class as a whole. Thus, the Court shall consider Plaintiffs' classwide claims on their merits to the extent they allege systemic challenges to the punitive nature of confinement at the MSOP arising under the First and Fourth Amendments.

III. Defendants' Motion for Summary Judgment on Phase Two Claims

Defendants argue that the Eighth Circuit's decision eliminates the rationale on which the Court previously denied summary judgment on Plaintiffs' remaining Phase Two claims. Specifically, Defendants emphasize that "the Court based its denial of Defendants' previous summary judgment on Counts VIII, IX, and X on the proposition that they might have merit in combination with Plaintiffs' Phase One substantive due process claims regarding the conditions of their confinement." (Doc. No. 1097 at 23.) Defendants dispute this rationale and further contend that, in any case, it is "disposed of by the Eighth Circuit's opinion."[9] (*Id.*) Defendants point to recent caselaw decided since the Court's prior summary judgment decision that supports granting summary judgment to Defendants on Plaintiffs' Phase Two claims. Finally, Defendants assert that "Plaintiffs continue to cite no authority for the proposition that constitutional policies somehow become unconstitutional in combination with one another."[10] (Doc. No. 1102 at 10.)

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[9] Defendants further note that "even Plaintiffs previously agreed that the disposition of Phase One would affect Phase Two." (Doc. No. 1102 at 10.)

[10] Defendants also argue that Counts IX and X must be dismissed to the extent they

Contrary to Defendants' view, Plaintiffs argue that "[t]he Eighth Circuit's opinion . . . has no bearing on the analysis of these claims." (Doc. No. 1100 at 25 n.12.) Plaintiffs explain that their First, Fourth, and Fourteenth Amendment claims in Counts VIII, IX, and X all arise from the contention "that the policies and practices at MSOP are punitive." (*Id.* at 24.) According to Plaintiffs, although "[e]ach of these claims involves a number of policies and practices that, when viewed individually, may not rise to the level of a constitutional violation," if the Court considers the policies "collectively," they amount to "clear violations of Plaintiffs' and class members' constitutional rights." (*Id.* at 24-25.) In short, Plaintiffs contend that the MSOP "operates as a punitive detention center rather than a treatment facility," supporting a finding of unconstitutionality.[11] (*Id.* at 26.)

A. Legal Standard

Summary judgment is appropriate if the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Courts must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Weitz Co., LLC v. Lloyd's of London*, 574 F.3d 885, 892 (8th Cir. 2009). However, "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the

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arise under the Minnesota Constitution. As noted above, Plaintiffs do not dispute that such claims are subject to dismissal, and the Court shall grant dismissal on this basis.

[11] Plaintiffs contend that Defendants should be precluded from relitigating summary judgment on the Phase Two Counts. However, the Court and the parties agreed that Defendants would be permitted to bring a renewed motion for summary judgment.

Federal Rules as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1).

The moving party bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Enter. Bank v. Magna Bank of Mo.*, 92 F.3d 743, 747 (8th Cir. 1996). The nonmoving party must demonstrate the existence of specific facts in the record that create a genuine issue for trial. *Krenik v. Cty. of Le Sueur*, 47 F.3d 953, 957 (8th Cir. 1995). "[A] party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

B. Impact of Phase One on Plaintiffs' Phase Two Claims

On February 2, 2015, the Court denied Defendants' initial Motion for Summary judgment with respect to Counts VIII, IX, and X. (Doc. No. 828 at 32-39.) The Court also denied summary judgment on the Phase One claims that proceeded to trial. (*Id.* at 16-32.) The Court stated that "[a]t the heart of Plaintiffs' Third Amended Complaint is the contention that Minnesota's civil commitment scheme for sex offenders constitutes a punitive system of preventive detention in violation of the due process requirements of the Fourteenth Amendment." (*Id.* at 24.) The Court concluded that "[t]he record before the Court indicates that Plaintiffs have presented sufficient evidence to allow a reasonable factfinder to conclude that the civil commitment system is unconstitutionally punitive in nature." (*Id.* at 31.)

In analyzing Plaintiffs' Phase Two claims, the Court indicated that Plaintiffs' allegations as a whole influenced the Court's conclusions, particularly with respect to Counts IX and X. Specifically, concerning Count IX, the Court stated, "considering Plaintiffs' claims with respect to restrictions on their ability to freely associate and speak and in light of all of Plaintiffs' allegations regarding their conditions of confinement, the Court finds that Plaintiffs have presented sufficient evidence to support a claim that survives summary judgment." (*Id.* at 36.) Similarly, with respect to Count X, the Court held that "[c]onsidering Plaintiffs' Fourth Amendment claim in conjunction with other evidence presented by Plaintiffs surrounding the punitive nature of their confinement, the Court determines that a genuine issue of material fact exists as to whether the search policies in this case are reasonable and appropriate." (*Id.* at 39.)

Although the Eighth Circuit's opinion did not address Plaintiffs' Phase Two claims, its conclusions regarding Counts I and II minimized the constitutional significance of Plaintiffs' overall allegations regarding the punitive nature of confinement at the MSOP. The Eighth Circuit noted the Court's holding "that Minnesota's civil commitment scheme for sex offenders is a punitive system without the safeguards found in the criminal justice system." *Karsjens*, 845 F.3d at 402. It also considered the Court's determination that MCTA "results in a punitive effect and application contrary to the purpose of civil commitment." *Id.* Without implying that these findings were in error, the Eighth Circuit nonetheless "reverse[d] the district court's finding of a constitutional violation" in Phase One. *Id.* The Court concludes that its analysis of Plaintiffs' Phase Two claims at this stage must be considered in light of the Eighth Circuit's decision.

Furthermore, as Defendants have pointed out, the Phase One trial testimony of all four Rule 706 Experts provides additional record evidence relevant to Plaintiffs' Phase Two claims. Rule 706 Expert Deborah McCulloch agreed that neither the MSOP's mail policy nor search policies were "outside the bounds of what you would expect at a highly secure sex offender treatment center." (Doc. No. 936 ("Tr. Vol. I") at 147-48.) She testified that the MSOP's policies were developed with attention to the need to balance security and treatment at the facility. (*See* Doc. No. 937 ("Tr. Vol. II") at 304-05.) Based on her review of the MSOP's policies concerning searches, client transportation, spiritual practices, media, mail, client movement, yard use, visitation, and client property, McCulloch did not identify any particular problems. (*Id.* at 306-11, 321, 323-25.)

Dr. Naomi Freeman, another Rule 706 Expert, testified that she deferred to McCulloch's expertise concerning facility policies, but that she had no concerns with the MSOP policies she had reviewed as written. (Doc. No. 939 ("Tr. Vol. IV") at 876.) She also explained that her own state's civil commitment program subjects clients to room searches, monitoring of mail, and restraints during transportation. (*Id.* at 877.) Freeman agreed that "the policies [she] reviewed are within acceptable standards." (*Id.* at 878.) Dr. Robin Wilson and Dr. Michael Miner largely deferred to McCulloch and Freeman's expertise and opinions regarding the MSOP's policies. (Doc. No. 938 ("Tr. Vol. III") at 626-28; Doc. No. 941 ("Tr. Vol. VI") at 1128.) Both of these experts generally agreed that the MSOP administrators created the policies through the exercise of professional judgment. (*See* Tr. Vol. III at 628; Tr. Vol. VI at 1173.)

The Court shall consider Defendants' renewed Motion for Summary Judgment on Plaintiffs' Phase Two claims in light of the Eighth Circuit's *Karsjens* opinion, the Court's conclusions above regarding Plaintiffs' remaining Phase One claims, and the Rule 706 Expert testimony elicited during Phase One of trial.

C. First and Fourteenth Amendment Religious Freedom (Count VIII)

In order to succeed on a claim under the Free Exercise Clause of the First Amendment, Plaintiffs must establish that Defendants' challenged policies and practices place a "substantial burden" on Plaintiffs' ability to practice their religion. *See Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 813 (8th Cir. 2008); *see also Weir v. Nix*, 114 F.3d 817, 820 (8th Cir. 1997) ("[A] person claiming that a governmental policy or action violates his right to exercise his religion freely must establish that the action substantially burdens his sincerely held religious belief."). To find a substantial burden, the court must determine that the challenged practices: (1) "significantly inhibit or constrain conduct or expression that manifests some central tenet of a person's individual religious beliefs"; (2) "meaningfully curtail a person's ability to express adherence to his or her faith"; or (3) "deny a person reasonable opportunities to engage in those activities that are fundamental to a person's religion." *Patel*, 515 F.3d at 813 (citation omitted). A policy which requires an individual to choose between "adhering to their religious beliefs or facing serious disciplinary action" constitutes a substantial burden. *Mueller v. Mesojedec*, Civ. No. 16- 277, 2017 WL 764866, at *5 (D. Minn. Jan. 6, 2017), *report and recommendation adopted,* Civ. No. 16- 277, 2017 WL 758929 (D. Minn. Feb. 27, 2017). However, the alleged burden must be "more than an inconvenience." *See id.*

Where an institutional policy infringes a civilly committed individual's constitutional rights, courts in this District have applied a modified version of the Supreme Court's four-part test outlined in *Turner v. Safley*, 482 U.S. 48 (1987), to determine whether the restriction is valid. *See Ivey v. Mooney*, Civ. No. 05-2666, 2008 WL 4527792, at *4 (D. Minn. Sept. 30, 2008); *Stone v. Jesson*, Civ. No. 11 -0951, 2017 WL 1050393, at *3 (D. Minn. Mar. 17, 2017). According to *Turner,* "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Ivey*, 2208 WL 4527792, at *4 (quoting *Turner*, 482 U.S. at 89). Because *Turner* arose in the context of prisoner litigation, the modified version of this test applicable to civilly committed individuals considers "whether [the policy or regulation] is reasonably related to legitimate institutional and therapeutic interests." *See id.* at *5, *10. The *Turner* standard requires courts to consider the following four factors:

> (1) whether there is a valid rational connection between the regulation and the legitimate government interest it purports to further; (2) whether the inmate has an alternative means of exercising his constitutional right; (3) the impact that accommodation of the inmate's right would have upon others, including inmates as well as non-inmates; and (4) the absence of a ready alternative to the regulation.

Id. (quoting *Ortiz v. Fort Dodge Corr. Facility*, 368 F.3d 1024, 1026 (8th Cir. 2004)). The burden rests with the plaintiff "to prove that a restriction is not reasonably related to the legitimate interest it purports to further." *Stone*, 2017 WL 1050393, at *3.

Defendants contend that they are entitled to summary judgment on Plaintiffs' First Amendment free exercise claim because "the record contains no evidence of a substantial burden on any client's religious practice" or that the MSOP's policies have "caused a

widespread substantial burden on clients' religious practice, as required to demonstrate class liability." (Doc. No. 1097 at 26.) Further, Defendants argue that the evidence establishes "that MSOP's policies are crafted in order to balance the rights of clients with therapeutic and security interests," and assert that Plaintiffs have failed to establish that the MSOP's policies are not related to a legitimate therapeutic or institutional interest. (*Id.* at 27.) Defendants also assert that they are entitled to summary judgment on this claim to the extent it is based on the Fourteenth Amendment because Plaintiffs may not simultaneously assert a Fourteenth Amendment claim based on conduct that is alleged to violate the First Amendment, and even if they could, the record lacks evidence that Plaintiffs' fundamental rights have been violated by conduct that shocks that conscience.

Plaintiffs contend that the record establishes that the MSOP's policies and practices relating to religion impose a substantial burden on Plaintiffs' practice of religion. Plaintiffs point to a number of examples, including restrictions on room usage for religious meetings, clothing and jewelry restrictions, restrictions on religious articles, and restrictive policies governing meetings with clergy. Plaintiffs assert that they may face disciplinary measures that could impact treatment progress if they fail to follow the MSOP's restrictive policies regarding religious practices. According to Plaintiffs, "[t]hese policies and practices substantially burden Plaintiffs' ability to engage in their sincerely held religious beliefs and are not related to legitimate facility safety concerns or therapeutic interests." (Doc. No. 1100 at 30.) Plaintiffs also argue that they may assert a Fourteenth Amendment claim in the alternative based on the conscience-shocking use of disciplinary measures against individuals who seek to exercise their religious beliefs.

The Court concludes that Defendants are entitled to summary judgment on Count VIII. Even if Plaintiffs could establish that Defendants' policies respecting religion impose a substantial burden on Class members' religious practices, Plaintiffs have failed to identify record evidence by which a jury could conclude that the MSOP's policies applied to the Class as a whole are not reasonably related to legitimate therapeutic and institutional interests. The Court shall thus grant Defendants' Motion for Summary Judgment on Count VIII.[12]

D. First Amendment Freedom of Speech and Association (Count IX)

The First Amendment's freedom-of-speech protections include "the right to utter or to print, . . . the right to distribute, the right to receive, the right to read," and the freedom to exercise inquiry and thought. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). The related First Amendment right of association includes "more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means." *See id.* at 483.

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[12] To the extent Plaintiffs' free-exercise claim in Count VIII arises under the Fourteenth Amendment, the Court concludes it is subject to dismissal. The Supreme Court has held that "where 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." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998) (citation omitted). This holding disposes of Plaintiffs' religion-based claim to the extent it alleges a burden on religion covered by the First Amendment. Even if the Court were to conclude that any part of this claim separately states a substantive due process violation under the Fourteenth Amendment, the Court further finds that Plaintiffs have failed to raise a genuine issue of material fact as to whether any of Defendants' conduct with respect to religious practices is truly conscience-shocking to support liability.

Importantly, the Court's conclusions on the viability of Plaintiffs' classwide religion-based claims in this case are not meant to foreclose committed individuals at the MSOP from advancing individual religion-based claims in separate litigation.

Although civilly committed individuals retain these First Amendment protections, "[a]ny form of involuntary confinement, whether incarceration or involuntary commitment, may necessitate restrictions on the right to free speech." *Beaulieu v. Ludeman*, 690 F.3d 1017, 1038-39 (8th Cir. 2012) (emphasis and citation omitted).

The same modified *Turner* analysis outlined above applies to claims that certain institutional policies inhibit committed individuals' First Amendment freedom-of-speech and association rights. *See Banks v. Jesson*, Civ. No. 11- 1706, 2016 WL 3566207, at *3 (D. Minn. June 27, 2016); *Williams v. Johnston*, Civ. No. 14-369, 2015 WL 1333991, at *7 (D. Minn. Jan. 28, 2015), *report and recommendation adopted,* Civ. No. 14-369, 2015 WL 1334015 (D. Minn. Mar. 25, 2015). The MSOP's media policy restricting access to certain objectionable content has been deemed constitutional within this District. *See Banks*, 2016 WL 3566207, at *8 ("MSOP is constitutionally allowed to implement and enforce a policy which prohibits detainees from possessing items depicting nudity and visible genitals."). Similarly, an MSOP mail policy permitting the inspection of mail and an MSOP telephone policy imposing charges for calls and permitting monitoring have survived First Amendment scrutiny under *Turner*. *Semler v. Ludeman*, Civ. No. 09-0732, 2010 WL 145275, at *11, *15-16 (D. Minn. Jan. 8, 2010).

Defendants argue that the MSOP's policies challenged in Count IX should be upheld consistent with governing Eighth Circuit precedent and multiple cases out of this District. Specifically, Defendants point to caselaw which has upheld the MSOP's mail policy, phone policy, media policy, and vendor policy against First Amendment challenge. Contrary to Plaintiffs' position, Defendants argue, "there is no legal authority

for [the Plaintiffs'] belief that the conglomeration of a number of constitutional policies can result in something unconstitutional." (Doc. No. 1102 at 13.)

Plaintiffs contend that the MSOP's policies infringe their speech and association rights under the First Amendment. According to Plaintiffs, "[w]hen all of the MSOP's policies and practices affecting Plaintiffs' freedom of speech and association are considered together, it is clear that the MSOP does not limit its restrictions to those that are necessary for therapeutic or security reasons." (Doc. No. 1100 at 31.) In particular, Plaintiffs point to the MSOP's mail policy, visitation policy, media policy, and phone policy. Plaintiffs dispute Defendants' safety and security justification for such policies, arguing that Defendants offer only conclusory assertions.

As with Count VIII, above, the Court concludes that summary judgment is warranted on Plaintiffs' First Amendment claims in Count IX. In particular, the Phase One trial testimony of the Rule 706 Experts as well as caselaw evaluating the MSOP policies informs this Court's conclusions with respect to the policies challenged under this claim. Plaintiffs have failed to raise a genuine dispute over whether Defendants' policies implicating speech and association are an unreasonable restriction on Plaintiffs' First Amendment rights as applied to the Class as a whole. The Court therefore grants summary judgment to Defendants' on Count IX.[13]

[13] Notably, the Court's conclusions on the viability of Plaintiffs' freedom-of-speech and association claims in this case are not meant to foreclose committed individuals at the MSOP from advancing individual freedom-of-speech and association claims in separate litigation.

E. Fourth Amendment Search and Seizure (Count X)

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "[I]nvoluntarily civilly committed persons retain the Fourth Amendment right to be free from unreasonable searches that is analogous to the right retained by pretrial detainees." *Arnzen v. Palmer*, 713 F.3d 369, 372 (8th Cir. 2013) (quoting *Beaulieu*, 690 F.3d at 1028). To determine "reasonableness" in an institutional setting, a court must balance "the need for the particular search against the invasion of personal rights that the search entails." *Bell v. Wolfish*, 441 U.S. 520, 558-59 (1979). In applying this balancing test, courts are to consider: (1) the scope of the intrusion; (2) the manner in which the search is conducted; (3) the justification for the search; and (4) the location where the search is conducted. *See id.* at 559; *Serna v. Goodno*, 567 F.3d 944, 949 (8th Cir. 2009) (applying the *Bell* balancing test to evaluate the reasonableness of a search at the MSOP). The degree of suspicion is a relevant component within this balancing test, but it should not override the other identified factors. *See Serna*, 567 F.3d at 950-51. A court is obligated to defer to the judgment of institutional officials "unless the record contains substantial evidence showing their policies are an unnecessary or unjustified response to problems of institutional security." *Arnzen*, 713 F.3d at 373 (quoting *Beaulieu*, 690 F.3d at 1029). Furthermore, in evaluating search policies at the MSOP, the Eighth Circuit has rejected the need to "strictly apply a 'less intrusive means' test." *Beaulieu*, 690 F.3d at 1029; *see also Serna*, 567 F.3d at 955.

A number of courts have previously addressed the constitutionality of various MSOP policies under the Fourth Amendment. "[R]andom room searches at MSOP" have repeatedly survived Fourth Amendment scrutiny. *See Housman v. Jesson*, Civ. No. 15- 2209, 2016 WL 7231600, at *3 (D. Minn. Dec. 14, 2016); *see also Daniels v. Jesson*, Civ. No. 13-736, 2014 WL 3629874, at *6 (D. Minn. July 22, 2014). A court in this District has also held post-work pat searches at the MSOP to be constitutional. *See Semler*, 2010 WL 145275, at *19. In *Beaulieu*, the Eighth Circuit upheld the MSOP's unclothed visual body search policy under the facts of that case. *See Beaulieu*, 690 F.3d at 1030. Evaluating the constitutionality of such searches, however, is a fact-dependent inquiry. *See Allan v. Ludeman*, Civ. No. 10-176, 2011 WL 978768, at *4 (D. Minn. Jan. 18, 2011*), report and recommendation adopted*, Civ. No. 10-176, 2011 WL 978658 (D. Minn. Mar. 17, 2011) ("[S]trip searches conducted at MSOP facilities may or may not be reasonable, and thus may or may not be constitutional, depending on the circumstances."). The same is true of the use of shackles and restraints. *See id.* at *6.

With respect to Plaintiffs' Fourth Amendment claims, Defendants emphasize that the Eighth Circuit has previously evaluated the MSOP search policies and acknowledged the need to maintain safety and security at the MSOP. Defendants also point to expert testimony which supports the validity and reasonableness of the MSOP's search policies. According to Defendants, the MSOP's room search policy, pat-search policy, unclothed visual body search policy, and restraint policy have all survived constitutional challenges in prior cases. Defendants argue that "Plaintiffs failed to provide anything more than

mere allegations regarding their search and seizure claim, which is insufficient to survive summary judgment." (Doc. No. 1102 at 15.)

Plaintiffs contend that "[i]t is clear that the MSOP's strip-search policy is not therapeutic." (Doc. No. 1100 at 33.) According to Plaintiffs, these unclothed visual body searches are not conducted based on any consideration of individual risk. Plaintiffs also allege that the MSOP's pat-search and restraint policies similarly fail to account for individualized suspicion or risk level. In addition, Plaintiffs challenge the MSOP's room-search policies. Plaintiffs argue that the caselaw identified by Defendants failed to consider "whether the policies were appropriately applied to all MSOP patients or whether application on an individual basis would be less restrictive." (*Id.* at 35.) "Considering all of the MSOP's search policies together," Plaintiffs contend, "it is apparent that Defendants do not take less intrusive measures into consideration, nor are all of these policies necessary for the safety of the facility." (*Id.*)

The Court determines that Defendants are entitled to summary judgment on Plaintiffs' classwide challenge to the MSOP's policies implicating the Fourth Amendment. The record lacks "substantial evidence showing [that the MSOP's] policies are an unnecessary or unjustified response to problems of institutional security," and the Court is thus bound to defer to Defendants' institutional judgment regarding the need for particular search policies. *See Arnzen*, 713 F.3d at 373 (quoting *Beaulieu*, 690 F.3d at 1029). Furthermore, caselaw has consistently affirmed the constitutionality of various search policies at the MSOP, and the Rule 706 Expert testimony suggests that the policies are reasonable for a sex offender civil commitment facility. The Court concludes that the

record fails to support Plaintiffs' classwide challenge alleging that the punitive nature of the MSOP renders its search and seizure policies unconstitutional under the Fourth Amendment. Therefore, the Court grants summary judgment to Defendants on Count X.[14]

IV. Defendants' Motion For Final Apportionment of Rule 706 Expert Costs

Finally, Defendants ask the Court to make a final determination on the apportionment of costs for the Rule 706 Experts in this matter. The Court appointed the Rule 706 Experts to aid the Court in its resolution of this complex litigation. (*See* Doc. No. 354 at 4 ("To the extent Plaintiffs seek the appointment of expert witnesses for the benefit of the Court Pursuant to Rule 706, the motion is GRANTED.").) In its Order appointing the Rule 706 Experts, the Court stated that "Pursuant to Rule 706(c), the compensation shall be charged as costs in this litigation." (Doc. No. 393 at 5.) The Court thereafter ordered that "[w]ithout prejudice to subsequent adjustment, [the Rule 706 Expert] costs shall be initially allocated to Defendants." (Doc. No. 427 at 75.)

Experts appointed by the court pursuant to Federal Rule of Evidence 706 are "entitled to a reasonable compensation as set by the court." Fed. R. Evid. 706(c). Such compensation shall be paid "by the parties in the proportion and at the time that the court directs—and the compensation is then charged like other costs." Fed. R. Evid. 706(c)(2); *see also U.S. Marshals Serv. v. Means*, 724 F.2d 642, 648 (8th Cir. 1983), *on reh'g,* 741 F.2d 1053 (8th Cir. 1984). Pursuant to Federal Rule of Civil Procedure 54(d), "costs

[14] Significantly, the Court's conclusions on the viability of Plaintiffs' search and seizure claims in this case are not meant to foreclose committed individuals at the MSOP from advancing individual search and seizure claims in separate litigation.

. . . should be allowed to the prevailing party." Fed. R. Civ. P. 54(d). Such costs may be taxed by the clerk and are then subject to the court's review upon motion. *See* Fed. R. Civ. P. 54(d)(1). "Under Rule 54(d), allocation of costs is within the sound discretion of the trial court." *Cross v. Gen. Motors Corp.*, 721 F.2d 1152, 1157 (8th Cir. 1983).

Defendants argue that the Court should order Plaintiffs to pay for the Rule 706 Expert costs. According to Defendants, "[h]aving both asked for the appointment of the Rule 706 Experts and lost on appeal, Plaintiffs cannot plausibly argue that Defendants should have to pay the Rule 706 Experts." (Doc. No. 1097 at 12.) In addition, Defendants emphasize that the Plaintiffs' indigent status does not preclude the Court from apportioning the cost of expert compensation to them. To support their request, Defendants point to Federal Rule of Civil Procedure 54(d)(1) under which a prevailing party may recover its costs in litigation. In short, Defendants argue, "Plaintiffs[] lost and should have to pay for the experts they wanted." (Doc. No. 1102 at 8.)

Plaintiffs dispute Defendants' characterization that the Court appointed the Rule 706 Experts for their benefit, noting that the Rule 706 Experts' work was developed based on input from both parties. Plaintiffs also emphasize "that Defendants have relied on, and continue to rely on, the Rule 706 Experts' findings and testimony." (Doc. No. 1100 at 23.) Finally, Plaintiffs point out that they are indigent and argue that the Court may appropriately apportion the Rule 706 Expert costs to Defendants on this basis.

The Court concludes that an order apportioning the costs of the Rule 706 Experts to Plaintiffs would be premature at this stage. The Court reserves the right to revisit the

issue of apportioning these costs pursuant to Rule 54 following the entry of final judgment and upon complete briefing by the parties.

CONCLUSION

The Court's determinations, above, resolve Plaintiffs' remaining Phase One and Phase Two claims. After many years of vigorous advocacy on all sides, the *Karsjens* litigation has effectively reached its end. With respect to Plaintiffs' remaining Phase One claims, the Court's conclusions are largely dictated by the Eighth Circuit's decision reversing this Court's finding of a constitutional violation under the Fourteenth Amendment. In light of the applicable substantive due process standard outlined in the Eighth Circuit's opinion and its broad holding 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," *Karsjens*, 845 F.3d at 410-11, the Court determines that Defendants are not liable for the remaining counts in Phase One. Concerning Defendants' Phase Two claims challenging the conditions of confinement at the MSOP under the First and Fourth Amendments on a classwide basis, the Court concludes that there is no genuine issue of material fact in dispute and Defendants are entitled to judgment as a matter of law.

With respect to Phase Two, the Court emphasizes that its conclusions solely address Plaintiffs' classwide claims of systemic constitutional violations. To the extent individual class members residing at the MSOP seek to raise individual claims based on alleged violations of their constitutional rights, it is this Court's view that such claims are

not foreclosed by the Court's determinations relating to Counts VIII, IX, and X of Plaintiffs' Third Amended Complaint. This suggestion applies, for example, to individual claims that the MSOP's application of particular policies has infringed a committed individual's right to freely exercise his religion, to exercise protected speech rights, to freely associate with individuals both within and outside of the MSOP, and to be free from an unreasonable search.

A number of lawsuits filed by civilly committed individuals at the MSOP are currently stayed pending the resolution of this case. (*See* Doc. Nos. 1080, 1083.) As noted above, it is this Court's view that its conclusions regarding Plaintiffs' classwide claims will leave any individual claims in these and future lawsuits unresolved. The prospect of these many individual lawsuits going forward may be a compelling reason for all parties to sit down in an attempt to reach an agreement to settle any remaining issues in this case, with or without the assistance of the Court, instead of incurring the significant costs and delay associated with pursuing an appeal. To do so might well serve the best interests of the parties, the public interest, and the interests of justice.

Finally, the Court expresses its view that some of the facts revealed during the lengthy Phase One trial in this matter are indeed shocking to this Court's conscience. In particular, the Court finds the circumstances surrounding the confinement of Rhonda Bailey, the MSOP's sole civilly committed female, to be truly conscience-shocking. Furthermore, the Court views the continued confinement of elderly individuals with a low likelihood of re-offense as an egregious affront to liberty, particularly in light of the pervasive sense of hopelessness at the MSOP. Similarly, the confinement of individuals

with cognitive disabilities or juvenile-only offenders who could safely reside in a less restrictive alternative facility or in the community remains of great concern to the Court.

Notwithstanding these observations and concerns, however, the Eighth Circuit's reversal of this Court's liability findings in large part compels the conclusions the Court reaches today. The Court hopes that the public and all stakeholders will carefully consider the complex issues raised by this litigation, moving forward in a manner that balances the interests of public safety, fundamental justice, and basic human dignity. Justice requires no less.

ORDER

Based upon the foregoing, **IT IS HEREBY ORDERED** that:

1. Plaintiffs' remaining Phase One claims (Counts III, V, VI and VII) are **DISMISSED WITH PREJUDICE**.

2. Defendants' Motion for Summary Judgment on Phase Two (Counts VIII, IX, and X) (Doc. No. [1095]) is **GRANTED** and these counts are **DISMISSED WITH PREJUDICE**.

3. Defendants' Motion for Final Apportionment of Rule 706 Expert Costs (Doc. No. [1095]) is **DENIED WITHOUT PREJUDICE** to renewal in connection with a Motion for Costs pursuant to Federal Rule of Civil Procedure 54.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: August 23, 2018

s/Donovan W. Frank
DONOVAN W. FRANK
United States District Judge

UNITED STATES DISTRICT COURT

District of Minnesota

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,

Plaintiff(s),

v.

Emily Johnson Piper, Kevin Moser, Peter Puffer, Nancy Johnston, Jannine Hébert, Ann Zimmerman,

Defendant(s).

JUDGMENT IN A CIVIL CASE

Case Number: 11cv3659 DWF/TNL

☐ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT:

1. Plaintiffs' remaining Phase One claims (Counts III, V, VI and VII) are DISMISSED WITH PREJUDICE.

2. Defendants' Motion for Summary Judgment on Phase Two (Counts VIII, IX, and X) (Doc. No. [1095]) is GRANTED and these counts are DISMISSED WITH PREJUDICE.

3. Defendants' Motion for Final Apportionment of Rule 706 Expert Costs (Doc. No. [1095]) is DENIED WITHOUT PREJUDICE to renewal in connection with a Motion for Costs pursuant to Federal Rule of Civil Procedure 54.

Date: 8/25/2018

KATE M. FOGARTY, CLERK

s/M. Giorgini

(By) M. Giorgini, Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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,

v.

Lucinda Jesson, Dennis Benson, Kevin Moser, Tom Lundquist, Nancy Johnston, Jannine Hébert, and Ann Zimmerman, in their official capacities,

Defendants.

Civil No. 11-3659 (DWF/JJK)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Daniel E. Gustafson, Esq., Karla M. Gluek, Esq., David A. Goodwin, Esq., Raina Borrelli, Esq., Lucia G. Massopust, Esq., and Eric S. Taubel, Esq., Gustafson Gluek PLLC, counsel for Plaintiffs.

Nathan A. Brennaman, Deputy Attorney General, Scott H. Ikeda, Adam H. Welle, and Aaron Winter, Assistant Attorneys General, Minnesota Attorney General's Office, counsel for Defendants.

INTRODUCTION

This case challenges the constitutionality of the statutes governing civil commitment and treatment of sex offenders in Minnesota as written and as applied, and in so doing, challenges the boundaries that we the people set on the notions of individual liberty and freedom, the bedrock principles embedded in the United States Constitution. As has been long recognized, the government may involuntarily detain an individual outside of the criminal justice system through the so-called "civil commitment" process, which permits the state to detain individuals who are suffering from acute symptoms of severe mental illness and who are truly dangerous to the public as a result of their psychiatric condition. But our constitutional preservation of liberty requires that we carefully scrutinize any such deprivation of an individual's freedom to ensure that the civil commitment process is narrowly tailored so that detention is absolutely limited to a period of time necessary to achieve these narrow governmental objectives. After all, the individual who is civilly committed is not being detained in order to be punished for the commission of a crime. If it turns out that the civil commitment is in reality punishment for past crimes or a way to prevent future crimes that might be committed, or, in the words of Justice Anthony M. Kennedy, "[i]f the civil system is used simply to impose punishment after the State makes an improvident plea bargain on the criminal side, then it is not performing its proper function." *Kansas v. Hendricks*, 521 U.S. 346, 373 (1997) (Kennedy, J., concurring); *see also id.* ("We should bear in mind that while incapacitation is a goal common to both the criminal and civil systems of confinement, retribution and general deterrence are reserved for the criminal system alone.").

One reason why we must be so careful about civil commitment is that it can be used by the state to segregate undesirables from society by labeling them with a mental abnormality or personality disorder. For example, civil commitment might improperly be used to indefinitely extend the prison terms of individuals who have been criminally convicted of a crime and who have finished serving their defined terms of imprisonment. As the Court has observed previously, the fact that those committed to and confined at the Minnesota Sex Offender Program (the "MSOP") are sex offenders, who may indeed be subject to society's opprobrium, does not insulate the criminal and civil justice systems from a fair and probing constitutional inquiry. (*See* Doc. No. 427 ("February 20, 2014 Order") at 66.)

It is fundamental to our notions of a free society that we do not imprison citizens because we fear that they might commit a crime in the future. Although the public might be safer if the government, using the latest "scientific" methods of predicting human behavior, locked up potential murderers, rapists, robbers, and, of course, sex offenders, our system of justice, enshrined in rights guaranteed by our Constitution, prohibits the imposition of preventive detention except in very limited circumstances. This strikes at the very heart of what it means to be a free society where liberty is a primary value of our heritage. Significantly, when the criminal justice system and the civil commitment system carry out their responsibilities, the constitutional rights of all citizens, including sex offenders, can be upheld without compromising public safety or disrespecting the rights, concerns, and fears of victims.

It is against this backdrop that the Court has closely scrutinized the constitutionality of the civil commitment scheme that the State of Minnesota has adopted, which has resulted in the indefinite detention of over 700 sex offenders at the MSOP.

SUMMARY OF DECISION

As detailed below, the Court conducted a lengthy trial over six weeks to determine whether it should declare that the Minnesota statutes governing civil commitment and treatment of sex offenders are unconstitutional as written and as applied. The Court concludes that Minnesota's civil commitment statutes and sex offender program do not pass constitutional scrutiny. The overwhelming evidence at trial established that Minnesota's civil commitment scheme is a punitive system that segregates and indefinitely detains a class of potentially dangerous individuals without the safeguards of the criminal justice system.

The stark reality is that there is something very wrong with this state's method of dealing with sex offenders in a program that has never fully discharged anyone committed to its detention facilities in Moose Lake and St. Peter since its inception in 1994. The number of committed individuals at these facilities keeps growing, with a current count of approximately 714 committed individuals and a projection of 1,215 committed individuals by 2022. In light of the structure of the MSOP and the history of its operation, no one has any realistic hope of ever getting out of this "civil" detention. Instead, it is undisputed that there are committed individuals who meet the criteria for reduction in custody or who no longer meet the criteria for commitment who continue to be confined at the MSOP.

The Court's determination that the MSOP and its governing civil commitment statutes are unconstitutional concludes Phase One of this case. The next part of this case will involve the difficult question of what the remedy should be to address this complex problem. The public should know that the Moose Lake and St. Peter facilities will not be immediately closed. This case has never been about the immediate release of any single committed individual or committed individuals. Recognizing that the MSOP system is unconstitutional, there may well be changes that could be made immediately, short of ordering the closure of the facilities, to remedy this problem. The Court will hold a hearing to determine what remedy should be imposed, including, but not limited to, the potential remedies set forth in the Conclusion section below. In the meantime, the Court will hold a Remedies Phase pre-hearing conference on August 10, 2015, where all stakeholders, including state legislative and executive leadership, will be called upon to fashion suitable remedies to be presented to the Court.

Moreover, the parties to this case and all stakeholders know that what is true today, was also true before this lawsuit was filed in 2011. That is, there are some sex offenders who are truly dangerous and who should not be released; however, the criminal and civil justice systems should say so and implement appropriate procedures so as to afford individuals their constitutional protections. So too, there are individuals who should have been released, provisionally or otherwise, some time ago, and those individuals should be released with a significant support system and appropriate conditions of supervision, all of which can be accomplished without compromising public safety or the concerns and fears of victims.

DECISION

Based upon the presentations of counsel, including the extensive testimony of the witnesses and the voluminous exhibits produced at trial, as well as counsel's arguments and post-trial submissions, the entire record before the Court, and the Court being otherwise duly advised in the premises, the Court hereby issues its findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure:

FINDINGS OF FACT

1. This is a civil rights action pursuant to 42 U.S.C. § 1983.

2. The fourteen named Plaintiffs in this case, Kevin Scott Karsjens ("Karsjens"), David Leroy Gable, Jr., Kevin John DeVillion, Peter Gerard Lonergan ("Lonergan"), James Matthew Noyer, Sr., James John Rud, James Allen Barber, Craig Allen Bolte ("Bolte"), Dennis Richard Steiner ("Steiner"), Kaine Joseph Braun, Brian Christopher John Thuringer ("Thuringer"), Kenny S. Daywitt, Bradley Wayne Foster ("Foster"), and Brian K. Hausfeld (collectively, "Named Plaintiffs"), represent a class of over 700 individuals (collectively, "Plaintiffs" or "Class Members") who are all currently civilly committed to the MSOP in the care and custody of the Minnesota Department of Human Services ("DHS").

3. The seven individual Defendants in this case are all senior managers of the MSOP and employees of the State of Minnesota (collectively, "Defendants").

4. Defendant Lucinda Jesson ("Commissioner Jesson") is the Commissioner of DHS. Commissioner Jesson has served in that position since January 2011. Commissioner Jesson is ultimately responsible for all operations of the MSOP.

5. Defendant Dennis Benson ("Benson") is the former Executive Director of the MSOP. Benson served in that position from 2008 to 2012. As Executive Director, Benson was primarily responsible for developing the programming and policies of the MSOP.

6. Defendant Kevin Moser ("Moser") is the Operational Director of the MSOP at Moose Lake. Moser has served in that position since December 2011. Moser is responsible for overseeing all facility and security operations and for setting policies relating to security, facility maintenance, living unit management, and special services.

7. Defendant Tom Lundquist ("Lundquist") is the Associate Clinical Director of the MSOP at Moose Lake. Lundquist has served in that position since at least September 2010.

8. Defendant Nancy Johnston ("Johnston") is the Executive Director of the MSOP. Johnston has served in that position since 2012. Johnston is responsible for overseeing the programming, policies, and facilities of the MSOP. As part of these responsibilities, Johnston is vested with the authority to change the operations of the MSOP.

9. Defendant Jannine Hébert ("Hébert") is the Executive Clinical Director of the MSOP. Hébert has served in that position since 2008. Hébert is responsible for overall treatment programming at the MSOP.

10. Defendant Ann Zimmerman ("Zimmerman") is the Security Director of the MSOP. Zimmerman has served in that position since 2010. Zimmerman is responsible

for overseeing security functions and maintaining a secure environment at the MSOP's Moose Lake facility.

11. Plaintiffs initiated this action against Defendants on December 21, 2011. Plaintiffs filed an Amended Complaint on March 15, 2012, and a Second Amended Complaint on August 8, 2013.

12. Plaintiffs filed the Third Amended Complaint on October 28, 2014. In the Third Amended Complaint, Plaintiffs seek a declaratory judgment that the Minnesota statutes governing civil commitment and treatment of sex offenders are unconstitutional as written and as applied. Plaintiffs do not request that the Court order any specific individual or individuals released from civil confinement.

History of Civil Commitment in Minnesota

13. In 1939, the Minnesota Legislature adopted its first civil commitment law, now codified at Minn. Stat. § 526.10, which provides for the civil commitment of any individual found to have a "psychopathic personality" to the Minnesota State Security Hospital in St. Peter, Minnesota. Over the course of the next fifty years, the statute was used primarily as an alternative to criminal punishment, and individuals were civilly committed under the law rather than being criminally charged and convicted. By 1970, civil commitment under the "psychopathic personality" law had dramatically decreased; in the 1970s, only thirteen individuals were civilly committed, and in the 1980s, only fourteen individuals were civilly committed.

14. Following a series of horrific rape and murder crimes that were committed between 1987 and 1991 by recently released sex offenders from state prison, a task force

on the prevention of sexual violence against women recommended stiffer criminal sentences for dangerous sex offenders and increased use of the "psychopathic personality" law to confine and treat the most dangerous offenders being released from prison.

15. In 1989, the Minnesota Legislature modified the "psychopathic personality" law to include provisions that required the district court sentencing a sex offender to determine whether civil commitment under the statute would be appropriate and to refer such cases to the county attorney.

16. In 1992, the Minnesota Legislature enacted a screening process to evaluate "high-risk" sex offenders before their release from prison upon completing a criminal sentence. As a result of this enactment, commitments under the "psychopathic personality" law increased from two commitments in 1990 to twenty-two commitments in 1992. In contrast to earlier commitments under the statute, which typically involved first-time offenders who were civilly committed as an alternative to criminal punishment, individuals who were civilly committed during the early 1990s were repeat sex offenders who either had failed or refused to participate in sex offender treatment while in prison.

Civil Commitment under the Minnesota Civil Commitment and Treatment Act

17. In 1994, the Minnesota Legislature enacted the Minnesota Civil Commitment and Treatment Act: Sexually Dangerous Persons and Sexual Psychopathic Personalities ("MCTA"), Minn. Stat. § 253D (formerly Minn. Stat. § 253B), which provides for the involuntary civil commitment of any individual who is found by a court

to be a "sexually dangerous person" ("SDP") and/or a "sexual psychopathic personality" ("SPP") to the MSOP.

18. Under the MCTA, civil commitment proceedings are initiated by the county attorney, who determines whether good cause exists to file a petition for commitment after receiving a district court's preliminary determination or a referral from the Commissioner of Corrections. Minn. Stat. § 253D.07, subd. 1.

19. To be civilly committed to the MSOP, an individual must be found to be a SPP and/or SDP under the MCTA.

20. To be committed to the MSOP as a SPP, an individual must be found by a court to have "such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of personal acts, or a combination of any of these conditions, which render the person irresponsible for personal conduct with respect to sexual matters, if the person has evidenced, by a habitual course of misconduct in sexual matters, an utter lack of power to control the person's sexual impulses and, as a result, is dangerous to other persons." Minn. Stat. § 253D.02, subd. 15; Minn. Stat. § 253D.07.

21. To be committed to the MSOP as a SDP, an individual must be found by a court to be someone who "(1) has engaged in a course of harmful sexual conduct"; "(2) has manifested a sexual, personality, or other mental disorder or dysfunction"; and "(3) as a result, is likely to engage in acts of harmful sexual conduct." Minn. Stat. § 253D.02, subd. 16; Minn. Stat. § 253D.07.

22. If a court finds that an individual is a SPP and/or SDP, "the court shall commit the person to a secure treatment facility unless the person establishes by clear and convincing evidence that a less restrictive treatment program is available, is willing to accept the [person] under commitment, and is consistent with the person's treatment needs and the requirements of public safety." Minn. Stat. § 253D.07, subd. 3.

23. The Commissioner of DHS is vested with the authority to maintain the program, which "shall provide specialized sex offender assessment, diagnosis, care, treatment, supervision, and other services to civilly committed sex offenders," including "specialized programs at secure facilities," "consultative services, aftercare services, community-based services and programs, transition services, or other services consistent with the mission of the Department of Human Services." Minn. Stat. § 246B.02.

24. Following the enactment of the MCTA in 1994, several civilly committed individuals under the newly-enacted legislation challenged the statute's constitutionality. For example, Dennis Darol Linehan, who was subject to commitment under the new law, appealed the state court's commitment order on constitutional grounds. At the time of these challenges, the state represented to the courts that the MSOP was an approximately thirty-two-month program for "model patients."

25. However, the MSOP has developed into indefinite and lifetime detention. Since the program's inception in 1994, no committed individual has ever been fully discharged from the MSOP, and only three committed individuals have ever been provisionally discharged from the MSOP. By contrast, Wisconsin has fully discharged 118 individuals and placed approximately 135 individuals on supervised release since

1994. New York has fully discharged 30 individuals—without any recidivism incidents, placed 125 individuals on strict and intensive supervision and treatment ("SIST") upon their initial commitment, and transferred 64 individuals from secure facilities to SIST.

26. Minnesota presently has the lowest rate of release from commitment in the nation.

27. Since the MCTA's enactment in 1994, the number of civilly committed sex offenders in Minnesota has grown significantly. The total number of civilly committed sex offenders in Minnesota has grown from less than 30 in 1990, to 575 in 2010, to a current count of approximately 714. From 2000 to 2010, the civilly committed population in Minnesota grew nearly fourfold. The state projects that the number of civilly committed sex offenders will grow to 1,215 by 2022.

28. Minnesota presently has the highest per-capita population of civilly committed sex offenders in the nation.

29. The rate of commitment in Minnesota is 128.6 per million, the rate of commitment in North Dakota is 77.8 per million, and the rate of commitment in New York is 15 per million. The rate of commitment in Minnesota is significantly higher than the rate of commitment in Wisconsin, which is demographically similar to Minnesota.

30. A significant increase in commitment and referral rates followed the abduction and murder of Dru Sjodin in late 2003. Johnston credibly testified that the MSOP experienced a "tremendous growth" in early 2004 following the Dru Sjodin tragedy, which caused the treatment program to expand "at an enormous rate." Hébert

credibly testified that the MSOP received over 200 referrals in one month alone in 2003, followed by hundreds of referrals in subsequent months and years. Benson credibly testified that the Dru Sjodin murder "had a direct and dramatic impact on the program."

31. After the Dru Sjodin tragedy, state law was amended to increase the duration of conditional release for sex offenders and to increase the conditional release options available to a state court when sentencing sex offenders.

32. Minn. Stat. § 609.3455, subd. 6 requires that, when a district court commits a first-time sex offender to the custody of the Commissioner of the Department of Corrections ("DOC"), the court shall provide that, after the offender has been released from prison, the Commissioner of the DOC shall place the offender on conditional release for ten years.

33. Minn. Stat. § 609.3455, subd. 7 requires that, when a district court commits a sex offender with two or more offenses to the custody of the Commissioner of the DOC, the court shall provide that, after the offender has been released from prison, the Commissioner of the DOC shall place the offender on conditional release for the remainder of the offender's life.

34. Minn. Stat. § 609.3455, subd. 8, and Minn. Stat. § 244.05, subd. 6 provide that conditions of release for sex offenders sentenced to prison may include successful completion of treatment and aftercare programs, random drug testing, house arrest, daily curfews, electronic surveillance, and participation in an appropriate sex offender program.

35. In December 2003, the DOC began to use a formal review process to identify sex offenders in Minnesota's correctional facilities for referral to civil commitment following their incarceration. Prior to December 2003, the DOC focused on identifying sex offenders who were clearly dangerous for possible commitment. Beginning in December 2003, the DOC began referring all sex offenders who the DOC believed satisfied the legal commitment standard or who the DOC believed might qualify for civil commitment to county attorneys.

36. In December 2003, the DOC referred 236 additional sex offenders to county attorneys after an extensive review of incarcerated offenders and offenders on supervised release. This increase constituted more than seventy percent of the referrals that were made in the previous thirteen years.

37. Between 2004 and 2008, the DOC made approximately 157 referrals per year, which was 6 times the referral rate between January 1991, when the DOC began reviewing sex offenders for referral to civil commitment, and November 2003. In 2009, the DOC made 114 referrals to county attorneys. Currently, the DOC refers approximately one-third of those reviewed for commitment. Every sex offender that the DOC has referred for commitment has served their full prison sentence.

38. The majority of commitments result from referrals by the DOC to county attorneys.

39. There are significant geographic variations in petition and commitment rates across the state. On average, county attorneys in the seven most populous counties in Minnesota filed commitment petitions for forty-four percent of the referrals between

1991 and 2008. Between 1991 and 2008, the commitment rates varied from thirty-four percent to sixty-seven percent among the ten judicial districts, with the lowest commitment rates in counties around northeastern Minnesota and the highest commitment rates in counties in southeastern, southwestern, west central, and northwestern Minnesota.

40. Since 1994, various evaluators have published reports that are critical of the state's civil commitment system, the MCTA, and the MSOP's treatment program structure. The Governor's Commission on Sex Offender Policy ("Governor's Commission")[1] issued a report in January 2005 recommending, among other things, the transfer of the screening process of sex offenders for possible civil commitment to an independent panel and the establishment of a continuum of treatment options. The Office of the Legislative Auditor for the State of Minnesota ("OLA") issued a report in March 2011 ("OLA Report") recommending numerous changes to the civil commitment statutory scheme as well as to the MSOP, including revising statutory commitment standards and creating lower cost, reasonable alternatives to commitment at high-security facilities. The Sex Offender Civil Commitment Advisory Task Force ("Task Force")[2]

[1] The Governor's Commission consisted of twelve individuals appointed by Governor Tim Pawlenty to focus on current and best practices relating to sentencing, supervision, commitment, healthcare services, and registration of sex offenders.

[2] The Task Force was established pursuant to the Court's August 15, 2012 Order requiring the Commissioner of DHS to establish a fifteen-member advisory task force to examine and recommend legislative proposals to the Commissioner of DHS on topics related to the civil commitment process, less restrictive alternative options, and standards and processes for the reduction of custody. (*See* Doc. No. 208 at 2.)

recommended, among other things, that the Commissioner of DHS develop less restrictive programs throughout the state. The MSOP Program Evaluation Team ("MPET")[3] found that the MSOP's requirements for phase progression may be too stringent and recommended modification of the phase progression criteria. The Rule 706 Experts[4] published reports criticizing the commitment and placement of certain committed individuals and a final report identifying problems with various aspects of the program, including the lack of periodic assessments. The MSOP Site Visit Auditors[5] have issued reports every year since 2006 that have identified deficiencies in the program and statutory scheme and have included recommendations to improve the civil commitment system.

41. During the 2013-2014 legislative session, Senator Kathy Sheran introduced a bill, Senate File Number 1014, which included provisions that would have implemented

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[3] The MPET was established pursuant to the Court's November 9, 2012 Order requiring the Commissioner of DHS to create an evaluation team consisting of five qualified sex offender clinical professionals to evaluate sex offender treatment and to address possible program issues associated with phase progression. (*See* Doc. No. 275 at 2-3.) The MPET Program Evaluation team members include James Haaven ("Haaven"), Christopher Kunkle ("Kunkle"), Robert McGrath ("McGrath"), Dr. William Murphy ("Dr. Murphy"), and Dr. Jill D. Stinson ("Dr. Stinson").

[4] On December 6, 2013, the Court appointed four experts, Dr. Naomi Freeman ("Dr. Freeman"), Deborah McCulloch ("McCulloch"), Dr. Robin Wilson ("Dr. Wilson"), and Dr. Michael Miner ("Dr. Miner"), pursuant to Rule 706 of the Federal Rules of Evidence. (*See* Doc. No. 393.) The parties jointly nominated these four experts (*id.* at 1) and the parties submitted their respective proposals regarding the work of the Rule 706 Experts to the Court (*see* Doc. No. 421).

[5] The Site Visit Auditors, Haaven, McGrath, and Dr. Murphy, were hired by the MSOP to review and evaluate its treatment program.

certain recommendations by the Task Force. Although the bill passed the Senate on May 14, 2013, the bill did not become law because the companion bill that was introduced by Representative Tina Liebling in the House of Representatives, House File Number 1139, did not pass the House.

42. During the 2015-2016 legislative session, Senator Kathy Sheran, Senator Tony Lourey, and Senator Ron Latz introduced a bill, Senate File Number 415, which included provisions that would have established and appropriated funding to a civil commitment screening unit to review cases and conduct evaluations; required biennial reviews; implemented a statewide sex offender civil commitment judicial panel; and established a sex offender civil commitment defense office. The bill was referred to the Senate Committee on Health, Human Services and Housing in January 2015, but did not reach the Senate floor.

The MSOP Facilities

43. The MSOP provides housing for its civilly committed residents in three facilities, which include the secure treatment facility in Moose Lake, Minnesota; the secure treatment facility in St. Peter, Minnesota; and the Community Preparation Services ("CPS"), which is located on the St. Peter site outside of the secure perimeter.

44. The Moose Lake facility is the most restrictive facility and CPS is the least restrictive facility.

45. The St. Peter facility is designated for committed individuals in later stages of treatment and for individuals with special needs, such as individuals with cognitive disabilities, individuals with severe mental illness, or vulnerable adults. Approximately

257 committed individuals currently reside within the secure perimeter of the St. Peter facility.

46. The CPS facility currently has a thirty-eight bed capacity limit. Approximately thirty-two committed individuals currently reside at CPS. This is a significant increase from the six CPS residents in 2010, eight CPS residents in 2011, and nine CPS residents in 2012.

47. As a result of the limited bed capacity at the CPS facility, committed individuals have had to wait for beds to become available before being transferred to CPS from the more restrictive facilities at the MSOP. Dr. Elizabeth Barbo ("Dr. Barbo"), the MSOP Reintegration Director, credibly testified that there have been individuals who have been transferred to CPS who have had to wait due to a lack of bed space at the CPS facility.

48. Since the commencement of this lawsuit in 2011, the MSOP has started constructing a new facility, akin to CPS, with an additional thirty beds. Construction on the new building is projected to be completed by July 1, 2015. Dr. Barbo credibly testified that once construction on the new building is complete, CPS will have fifty-three licensed beds in total.

49. Committed individuals to the MSOP cannot be initially placed at the CPS facility. Dr. Barbo credibly testified that CPS is not available to a newly-committed individual in Minnesota.

50. Minnesota is one of two states that have reported providing housing for its female civilly committed residents in the same facility as its male civilly committed

residents. Currently, one female, Rhonda Bailey ("Bailey"), resides at the MSOP's St. Peter facility in a unit with twenty-two male civilly committed residents. Although Bailey has been committed to the MSOP since 1993 and has been housed at the St. Peter facility with all males since 2008, the Site Visit Auditors did not know that Bailey was housed with all men prior to 2014. Until recently, Bailey was receiving group therapy with all men and was denied recommended eye movement desensitization and reprocessing treatment. Despite the Rule 706 Experts' June 4, 2014 report and recommendation that Bailey be transferred or provisionally discharged from the MSOP to a supervised treatment setting, and Plaintiffs' motion to transfer Bailey to an appropriate treatment facility, the MSOP has not taken any steps to implement these recommendations. Dr. Haley Fox ("Dr. Fox"), Clinical Director of the MSOP St. Peter facility, credibly testified that it would be optimal if Bailey were placed in a different facility. Dr. Fox further credibly testified that the MSOP has the ability to contract with both in-state and out-of-state facilities to place Bailey in another setting.

51. The evidence clearly establishes that hopelessness pervades the environment at the MSOP, and that there is an emotional climate of despair among the facilities' residents, particularly among residents at the Moose Lake facility. Bolte, Karsjens, Foster, and Eric Terhaar ("Terhaar"),[6] offered compelling testimony regarding

[6] Bolte and Terhaar are only two of the sixty-seven committed individuals at the MSOP with no adult convictions ("juvenile-only offenders"). Bolte was civilly committed to the MSOP in June 2006 when he was nineteen years old. Terhaar was civilly committed to the MSOP in January 2009 when he was nineteen years old. On

(Footnote Continued on Next Page)

the "hopeless environment" at the MSOP. Bolte credibly testified that he is "[e]xtremely hopeless" because he believes that "the only way to get out is to die." Foster credibly testified that he does not want to move from the Moose Lake facility to the St. Peter facility and progress in treatment because he is more likely to see his ten-year-old son, who lives near the Moose Lake facility, while in Phase II at Moose Lake than if he moved to St. Peter and lingered in Phase III for years. Dr. Freeman corroborated that many individuals in CPS expressed severe hopelessness. Terrance Ulrich ("Ulrich"), a Senior Clinician at the MSOP Moose Lake facility, agreed that there is a perception among committed individuals that they will never be discharged from the MSOP and that "they might die in the facility." Ronda White ("White"), a Treatment Psychologist at the MSOP Moose Lake facility, offered persuasive testimony that working at the facility can be difficult "because of the hopelessness."

52. As of July 1, 2014, the cost of confining committed individuals at the MSOP was approximately $124,465 per resident per year. This cost is at least three times the cost of incarcerating an inmate at a Minnesota correctional facility.

53. There is no alternative placement option to allow individuals to be placed in a less restrictive facility at the time of their initial commitment to the MSOP. Dr. Fox credibly testified that the only facilities in which individuals can be placed at the beginning of their commitment are the secure facilities at Moose Lake and St. Peter.

(Footnote Continued From Previous Page)
May 18, 2014, the Rule 706 Experts issued a report recommending Terhaar's full discharge from the MSOP.

Sue Persons ("Persons"), former Associate Clinical Director of the MSOP, confirmed that the MSOP lacks less restrictive options, such as halfway houses, for committed individuals at the MSOP. This lack of less restrictive facilities and programs undermines the MCTA's provision allowing a committing court to consider placing an individual at a less restrictive alternative.

54. It is undisputed that there are civilly committed individuals at the MSOP who could be safely placed in the community or in less restrictive facilities. McCulloch credibly testified that there are individuals at both the Moose Lake and St. Peter facilities who could be treated in a less restrictive environment. Similarly, Dr. Nicole Elsen ("Dr. Elsen"), Clinical Supervisor of the MSOP St. Peter facility, James Berg ("Berg"), Associate Clinical Director of the MSOP, Ulrich, Benson, Persons, Peter Puffer ("Puffer"), Clinical Director of the MSOP Moose Lake facility, Hébert, Johnston, Anne Barry ("Deputy Commissioner Barry"), Deputy Commissioner of DHS Direct Care and Treatment, and Dr. Fox, all credibly testified that there are committed individuals at the MSOP, including some of the sixty-seven juvenile-only offenders at the MSOP, who could be treated safely in a less secure facility.

55. The Task Force recommended that the Commissioner of DHS develop less restrictive programs throughout the state. The Task Force recommended that less restrictive facilities be designed to serve both those who are already civilly committed to secure facilities as well as those who are subsequently civilly committed to the MSOP.

56. In recent years, DHS attempted to provide less restrictive placement options for civilly committed individuals at the MSOP. In September 2013,

Commissioner Jesson sent a letter to the Minnesota Legislature identifying committed individuals at the MSOP who could be transferred to an existing DHS site in Cambridge, Minnesota. Commissioner Jesson expected the facility to become available to the MSOP in 2014. Commissioner Jesson credibly testified that she planned to transform the Cambridge facility to become a less restrictive alternative for individuals committed as sex offenders. However, those efforts were halted by Governor Dayton's November 2013 letter. In that letter, Governor Dayton directed Commissioner Jesson to suspend DHS' plans to transfer any sex offenders to a less restrictive facility such as Cambridge until: (1) the Task Force issued its findings and recommendations; (2) the legislature had the opportunity to review existing statutes and make any necessary revisions; and (3) the legislature and the Governor's Administration have agreed to and provided sufficient funding for the additional facilities, programs, and staff necessary for the program's successful implementation.

57. The Task Force issued its final findings and recommendations on December 2, 2013. After the 2013-2014 legislative session, Minnesota renewed efforts to create less restrictive alternatives that could be used to relocate individuals committed to the MSOP. Commissioner Jesson credibly testified that DHS recently entered into third-party contracts to allow committed individuals to be placed outside of the current facilities in Moose Lake and St. Peter. Dr. Barbo credibly testified that the MSOP entered into approximately fifteen contracts for transitioning housing and adult foster care or treatment services. Despite this, there are currently only a very limited number of beds available in the MSOP's contracted alternative placement options. Outside of CPS,

the MSOP has less than twenty beds available for less restrictive alternative placements. In addition, these contracts are only for a limited type of population at the MSOP. The MSOP does not have any contracts in place to allow vulnerable adults in the Assisted Living Unit at the MSOP to be placed in other facilities. A Class Member, Harley Morris ("Morris"), passed away while he was on hospice care at the MSOP's Moose Lake facility.

58. The evidence overwhelmingly demonstrates, as Dr. Fox concluded, that providing less restrictive confinement options would be beneficial to the State of Minnesota and the entire civil commitment system without compromising public safety.

The MSOP Treatment Program

59. The MSOP Program Theory Manual, the MSOP Treatment Manual, and the MSOP Clinician's Guide describe the MSOP's program model.

60. The stated goal of the MSOP's treatment program, observed in theory but not in practice, is to treat and safely reintegrate committed individuals at the MSOP back into the community.

61. Currently, the MSOP treatment program is organized into three phases of indeterminate length.

62. The current three-phase program began in 2008 after Hébert became Executive Clinical Director of the MSOP. Prior to 2008, the MSOP used various programming over the years. Steiner credibly testified that there have been four or five clinical directors during his commitment at the MSOP, and that the MSOP's treatment program changed four or five times with each change in clinical leadership.

63. Currently, Phase I of the MSOP treatment program focuses on rule compliance, emotional regulation, and treatment engagement. In Phase I, the MSOP emphasizes learning to comply with facility rules and expectations, as well as providing an introduction to basic treatment concepts. However, in Phase I, individuals do not receive any specific sex offense related therapy.

64. Phase II focuses on identifying and addressing patterns of sexually abusive behavior and cycles. In Phase II, the MSOP emphasizes discussion and exploration of the committed individual's history of sexual offending behavior and maladaptive patterns of behavior, along with the motivations for those behaviors.

65. Phase III focuses on reintegration into the community. In Phase III, the MSOP emphasizes application of skills learned in Phase II to daily life, demonstrating utilization of pro-social coping strategies, and reintegrating back to the community.

66. Reintegration services are not available to individuals committed at the MSOP until they are in Phase III of the treatment program. Puffer, Darci Lewis ("Lewis"), a clinician at the MSOP Moose Lake facility, and Dr. Fox each credibly testified that reintegration training and services do not start until Phase III. Johnston credibly testified that the MSOP's reintegration staff does not assist committed individuals who are in Phase I or Phase II with discharge planning, which Johnston described as merely "finding an address and a place to live and putting together a supervision plan." Although Hébert credibly testified that the provisional discharge plan is "certainly more than an address," Hébert confirmed that the MSOP does not assist

committed individuals with finding an address as part of a provisional discharge plan when they are initially committed to the MSOP or are in an earlier treatment phase.

67. Although the MSOP's Treatment Manual states that individuals who are civilly committed at the MSOP may start treatment in other phases, virtually every offender enters the treatment program in Phase I. For example, Lewis credibly testified that all committed individuals are placed in Phase I of the treatment program at the Moose Lake facility and that she was not aware of any individuals who had started in any other phase.

68. There are no reports or assessments conducted at the time of admission to determine what phase of treatment a committed individual should be placed in at the MSOP.

69. The MSOP does not have a policy of seeking to obtain documents pertaining to a committed individual from the DOC when the DOC fails to provide them to the MSOP when a committed individual is initially placed at the MSOP.
Dr. Elizabeth Peterson ("Dr. Peterson"), Treatment Assessment Unit Supervisor of the MSOP Moose Lake facility, credibly testified that whether MSOP will be able to obtain the records varies by file and that the MSOP does not always obtain all of the documents or records.

70. The MSOP does not have a practice of considering past participation in sex offender treatment when placing committed individuals into assigned treatment phases or when attempting to individualize treatment. Bolte credibly testified that he started in Phase I, even though he had participated in sex offender treatment in previous juvenile

placements. Thuringer credibly testified that he started in Phase I, despite completing an inpatient treatment program prior to his commitment. Puffer credibly testified that the MSOP should assess committed individuals at the MSOP who have had sex offender treatment prior to commitment to determine if they are in the correct phase of the treatment program.

71. Some committed individuals at the MSOP are not in the proper phase of treatment. The MPET reported that thirty percent of the Phase I patient files reviewed reflected that the patients were not placed in the proper phase based on the MSOP's own policies. Since receiving the MPET Report, the MSOP has not reassessed all committed individuals to determine if they are in the proper phase of treatment. In addition, the MSOP clinicians credibly testified that there are individuals who are in the wrong treatment phase. For example, Lewis credibly testified that both Steiner and Foster should have been allowed to progress to a different treatment phase and should be moved to Phase III.

72. The requirements for progression from Phase I to Phase II are: (1) two consecutive quarterly reports that indicate the individual has achieved at least satisfactory scores of three plus out of five on the Phase I Matrix factors; (2) a score of at least a two on the Matrix Factors of healthy lifestyle and life enrichment; (3) participation in a maintenance polygraph; (4) two consecutive quarters of no major Behavioral Expectation Reports; and (5) active treatment participation as evidenced by requesting group time at least fifty percent of the time in the previous quarter.

73. The requirements for progression from Phase II to Phase III are: (1) two consecutive quarterly reports that indicate an average of four or better on each Phase II Matrix factor; (2) taking of a PPG or Abel/ABID assessment and addressing the results in treatment; (3) taking a maintenance polygraph to verify the individual's report regarding adherence to program reports; (4) taking a full disclosure polygraph to verify an agreed-upon sexual history; and (5) successfully addressing in core group, through goal presentation and discussion, the individual's offense cycle/chain, roots of offending, relapse prevention plan, and an understanding of sexual arousal patterns and a plan to manage sexual deviance.

74. The phase progression requirements apply to all committed individuals at the MSOP, including those in the Nova Unit for individuals with severe mental illness, those in the Alternative Program for individuals with cognitive disabilities, and those in the Young Adult Unit for juvenile-only offenders. Puffer and Dr. Fox credibly testified that the MSOP's phase progression policy applies to all committed individuals at the MSOP. Persons credibly testified that the MSOP treatment program is not structured differently for juvenile-only offenders, and that the three-phase progression model applies equally to juvenile-only offenders. Ulrich credibly testified that individuals in the mental health unit must meet the same phase progression criteria as all other committed individuals at the MSOP.

75. Committed individuals at the MSOP must meet the progression policy requirements outlined in the Clinician's Guide in order to progress through the treatment program. Puffer credibly testified that committed individuals generally must satisfy the

requirements for each phase in order to progress through treatment. Dr. Elsen credibly testified that she has never progressed an individual through the MSOP treatment program who has not satisfied each of the phase progression requirements listed in the Clinician's Guide.

76. Committed individuals at the MSOP may not skip phases of the treatment program. Persons credibly testified that it is not possible for committed individuals to skip a phase in the phase progression process.

77. The MSOP uses the Goal Matrix for Phases I, II, and III to identify treatment goals for each phase of the program, to measure treatment progress, and to reference as a benchmark for moving committed individuals between phases of the program. The MSOP began using the Goal Matrix in 2009.

78. Treatment progress is scored using the Matrix factors. Puffer credibly testified that committed individuals are scored on their Matrix factors to assess their treatment progress and to determine whether they should progress in treatment. Dr. Fox credibly testified that the Matrix factors are the primary tool used for measuring treatment progress at the MSOP.

79. The Matrix factors include group behavior, attitude toward change, self-monitoring, thinking errors, emotional regulation, interpersonal skills, sexuality, cooperation with rules/supervision, prosocial problem solving, productive use of time, healthy sexuality, and life enrichment.

80. The Matrix factors are used for all committed individuals at the MSOP, including those in the Nova Unit for individuals with severe mental illness, those in the

Alternative Program for individuals with cognitive disabilities, those in the Assisted Living Unit for vulnerable adults, those in the Behavior Therapy Unit for individuals who have demonstrated problematic behavioral issues, and those in the Young Adult Unit for juvenile-only offenders.

81. The Matrix factors are scored using the same scoring spectrum for all committed individuals at the MSOP, including those in the Nova Unit for individuals with severe mental illness, those in the Alternative Program for individuals with cognitive disabilities, those in the Assisted Living Unit for vulnerable adults, those in the Behavior Therapy Unit for individuals who have demonstrated problematic behavioral issues, and those in the Young Adult Unit for juvenile-only offenders.

82. The Matrix factors are not used by any other civil commitment program in the country.

83. Independent evaluators and internal staff at the MSOP have repeatedly observed confusion regarding how the Matrix factors were to be used and inconsistencies with the application of the Matrix factors. McCulloch and Puffer credibly testified that the MSOP clinicians were not applying and scoring the Matrix factors in a consistent manner on committed individuals at the MSOP. Dr. Mischelle Vietanen ("Dr. Vietanen"), the former MSOP Clinical Supervisor, credibly testified that she frequently saw individuals' scores on the Matrix factors fluctuate, due to changes in staffing, and that she was concerned by the lack of inter-rater reliability of the Matrix factors. Persons credibly testified that newer clinicians are more likely to give

lower Matrix scores. The Site Visit Auditors expressed concerns regarding the scoring accuracy and consistency of scoring of the Goal Matrix across the MSOP assessors.

84. Despite the critical reports by external reviewers, the MSOP has not implemented any system to determine how clinicians are scoring the Matrix factors or whether there is any consistency in scoring the Matrix factors.

85. The MSOP did not provide training to all staff on the Matrix factors until 2013 and 2014, and the MSOP did not provide any training on the Matrix scoring until 2014. Dr. Vietanen credibly testified that she did not receive any training on the Matrix factors.

86. Inconsistent scoring on the Matrix factors can slow treatment progression. Puffer and Dr. Fox credibly testified that inconsistency in scoring the Matrix factors could affect a committed individual's ability to progress in treatment phase.

87. To progress in treatment phase, a committed individual must have at least two consecutive quarters with no major Behavioral Expectation Reports ("BERs"), even if the major BERs are not related to sexual offending. Elsen credibly testified that she has never progressed an individual through the MSOP treatment program who has not achieved two consecutive quarters with no major BERs as required by the MSOP's phase progression policy.

88. Minor BERs, including those unrelated to sexual offending, can prevent a committed individual from progressing in treatment phase. Hébert and Berg credibly testified that minor BERs can hinder treatment progression. Bolte credibly testified that

receiving multiple minor BERs can prevent phase progression. Lewis credibly testified that minor BERs can be considered in making phase progression decisions.

89. BERs can also affect scoring on the Matrix factors. Bolte credibly testified that he was told by clinical staff that his Matrix scores were lowered due to BERs.

90. Committed individuals can be regressed in treatment as a result of receiving major BERs. Foster was moved from Phase II back to Phase I after receiving a major BER for possessing adult-themed pornography.

91. As of October 2012, the MSOP phase progression design time line indicated a range of six to nine years for a "model client" to progress from Phase I through Phase III.

92. Currently, the treatment program at the MSOP does not have any delineated end point.

93. The lack of clear guidelines for treatment completion or projected time lines for phase progression impedes a committed individual's motivation to participate in treatment for purposes of reintegration into the community. Bolte credibly testified that when he was initially committed to the MSOP, he was told that he would be "fast-tracked" through the program and would be one of the first individuals to ever complete the program, but that now, after years of being in Phase I without progressing, he has lost motivation to participate in the treatment program. The OLA Report found that lack of client motivation has been a barrier to progression in treatment at the MSOP. The Site Visit Auditors reported that committed individuals "consistently expressed concerns that slow movement through the program . . . was demoralizing, increased

hopelessness, and negatively impacted motivation and engagement." The Governor's Commission reported that "those who have made progress in treatment should have an expectation that their confinement in civil commitment will end one day."

94. Some committed individuals at the MSOP, such as Steiner, have been confined for more than twenty years.

95. Progression through the treatment program at MSOP has historically been very slow. As of June 30, 2010, approximately fifty percent of committed individuals at the MSOP were in Phase I, twenty-one percent were in Phase II, seven percent were in Phase III, and twenty-one percent had declined treatment. As of February 2011, only thirty committed individuals at the MSOP were in Phase III. As of the first quarter of 2012, sixty-five percent of committed individuals at the MSOP were in Phase I, twenty-five percent were in Phase II, four percent were in Phase III, and six percent had declined treatment.

96. Committed individuals only began progressing through the treatment phases at the MSOP in recent years. As of the fourth quarter of 2014, thirty-nine percent of committed individuals at the MSOP were in Phase I, fifty-one percent were in Phase II, nine percent were in Phase III, and one percent had declined treatment.

97. Independent evaluators and outside experts have repeatedly criticized the lack of progression. Every year since 2006, the Site Visit Auditors have voiced concerns in all of their evaluation reports to the MSOP about the disproportionately high number of committed individuals in Phase I compared to those in Phase III of the treatment program. In 2011 and 2012, the Site Visit Auditors reported that "[s]low movement

through the program and the multiple required legislative steps for discharge in Minnesota hampers program effectiveness" and that "[t]he lack of clients 'getting out' can be demoralizing to clients and staff, and in the long run may increase security concerns." These concerns have never been successfully addressed.

98. Some committed individuals in the Alternative Program have been in Phase I for over five years or in Phase II for over five years. Puffer credibly testified that some committed individuals in the Alternative Program may not be able to complete the treatment program due to cognitive capacity limitations.

99. As of March 31, 2013, the MSOP identified 131 individuals who had been in Phase I for 36 months or more, 67 individuals who had been in Phase II for 36 months or more, and 14 individuals who had been in Phase III for 36 months or more.

100. Although CPS was originally designed to last approximately nine months, no committed individual at the MSOP has moved through CPS in nine months or less. The first two individuals who were ever placed at CPS, sometime before 2010, John Rydberg ("Rydberg") and Thomas Duvall ("Duvall"), still remain at CPS.

101. There are committed individuals at the MSOP who have reached the maximum benefit and effect of treatment at the MSOP. Dr. Elsen identified individuals who had reached "maximum treatment effect" at the MSOP who could not receive any further benefit from sex offender treatment. Similarly, the Site Visit Auditors reported that there are individuals at the MSOP who may have reached the maximum benefit within the treatment program and who could receive services in a different setting.

102. The MSOP has no system or policy in place to ensure that committed individuals who are not progressing through the treatment phases in a timely manner are reviewed by clinicians at the MSOP or by external reviewers. Haaven credibly testified that the most important change he would like to see at the MSOP is a mechanism to identify barriers to phase progression.

103. Some committed individuals at the MSOP have regressed as a result of changes to the treatment program phase progression model. For example, Steiner had progressed to the last phase of the treatment program; the MSOP then adopted the current three-phase model, resulting in Steiner starting over and moving back to the MSOP Moose Lake facility.

104. Clinical staffing shortages and turnover at the MSOP have hindered the ability of the MSOP to provide treatment as designed and have impeded treatment progression of committed individuals at the MSOP. White credibly testified that since 2008, shortages in the clinical staffing at the MSOP have impacted the therapeutic alliance between committed individuals and their clinicians and have slowed down the treatment progression for some individuals. Berg credibly testified that a high vacancy rate of clinicians and a high turnover rate of clinicians at the MSOP could slow treatment progress. McCulloch acknowledged that staffing shortages have been a reoccurring problem at the MSOP due to staffing vacancies. Dr. Fox confirmed that the MSOP has experienced staff shortages and that, as a result of those shortages, clinicians' caseloads have tended to be greater at times, which have affected the quality of treatment. The

Site Visit Auditors also confirmed that frequent staff turnover, particularly at Moose Lake, has negatively impacted therapeutic treatment engagement.

105. Committed individuals at the MSOP are uncertain and unaware of how to progress through treatment. For example, Bolte credibly testified that "[n]obody knows how to complete the program." Terhaar credibly testified that he is confused as to what scores he needs to progress from Phase I to Phase II of the treatment program. Lonergan credibly testified that he does not know what he needs to do to progress to Phase II of the treatment program.

106. Some individuals confined at the MSOP have stopped participating in treatment, despite satisfying phase progression requirements, because they knew it was futile and they would never be released. Thuringer credibly testified that some individuals have been confined at the MSOP for over twenty years and have completed the treatment program three times, but are currently only in Phase II due to subsequent treatment program changes; he concluded it would be "futile" to even attempt to progress through the treatment program. Dr. Peterson credibly testified that some individuals do not participate in treatment because they do not see the purpose of participating if they do not believe they will ever be discharged from the MSOP, or because they previously participated in treatment but were forced to restart the treatment program when the program changed.

Risk Assessments

107. There are individuals who meet the reduction in custody criteria or who no longer meet the commitment criteria, but who continue to be confined at the MSOP.

108. Defendants are not required under the MCTA to conduct periodic risk assessments after the initial commitment to determine if individuals meet the statutory requirements for continued commitment or for discharge.

109. The large majority of states require regular risk assessments of all civilly committed sex offenders. For example, the Wisconsin and New York civil commitment statutes require annual risk assessments, and the Texas civil commitment statute requires biannual reviews and a hearing before a court to determine whether an individual no longer meets the criteria for commitment.

110. As of 2011, Minnesota and Massachusetts were the only two states that did not require annual reports to the courts regarding each sex offender's continuing need to be committed.

111. Significantly, a full risk assessment is the only way to determine whether a committed individual meets the discharge criteria.

112. Risk assessments are only valid for approximately twelve months. Johnston and Puffer credibly testified that if a risk assessment has not been conducted within the past year on civilly committed individuals at the MSOP, the MSOP does not know whether those individuals meet the statutory criteria for commitment or for discharge. Hébert credibly testified that all juvenile-only offenders who have not had a risk assessment within the last year should be reassessed to determine whether they meet the statutory criteria for continued commitment or for discharge.

113. Risk assessments need to be performed regularly to account for new research, aging of the individual, and to track an individual's changes through treatment.

114. The MSOP does not conduct risk assessments on a regular, periodic basis to determine whether an individual continues both to need further inpatient treatment and supervision for a sexual disorder and continues to pose a danger to the public.

115. The MSOP historically has not conducted risk assessments on civilly committed individuals outside of the petitioning process. Dr. Elsen, Puffer, Berg, and Dr. Fox credibly testified that risk assessments are only performed when a petition for a reduction in custody is filed.

116. In 2013, DHS attempted to implement a rolling risk assessment process. Commissioner Jesson, in a letter to Johnston, stated that the MSOP will implement a new plan so that all Class Members receive a full risk assessment on a rolling schedule. Although Hébert and Johnston testified that the MSOP had begun to undertake one or two risk assessments per month outside the petitioning process, many witnesses were not aware of Commissioner Jesson's letter or the proposed directive. For example, Dr. Elsen was unaware that the MSOP was conducting any rolling risk assessments. Puffer credibly testified that he had never seen Commissioner Jesson's letter regarding rolling risk assessments. Dr. Anne Pascucci ("Dr. Pascucci"), a Forensic Evaluator at the MSOP, credibly testified that she had not heard of Commissioner Jesson directing the MSOP to begin conducting risk assessments on a rolling basis. Dr. Fox credibly testified that the MSOP had not established a new policy regarding rolling risk assessments, but the MSOP had been "having conversations about doing more risk assessments on a more regular basis." At the proposed rolling assessment rate, it would take between thirty and

sixty years to finish just one risk assessment for each Class Member currently committed at the MSOP.

117. The MSOP could hire outside assessors to perform these rolling risk assessments. Hébert and Johnston credibly testified that the MSOP could hire outside experts to conduct risk assessments.

118. Only recently has the MSOP begun conducting risk assessments outside of the petitioning context. Recently, Dr. Pascucci was asked by Dr. Lauren Herbert ("Dr. Herbert"), the MSOP Risk Assessment Director, to conduct a risk assessment on Class Member Chad Plank ("Plank"). This is the first risk assessment the MSOP has ever conducted outside of the petitioning process.

119. There are currently eight risk assessors employed by the MSOP.

120. The MSOP has an internal forensic risk assessment unit. Risk assessments are not conducted by independent examiners outside of the MSOP unless a committed individual has a petition before the Judicial Appeal Panel (the "Supreme Court Appeal Panel" or the "SCAP").

121. Outside evaluators and reports, including the OLA Report, have discussed the benefits of independent reviewers for committed individuals. The OLA Report found that requiring an independent review body would shelter the MSOP from making unpopular decisions and would ensure that decisions on reduction in custody petitions are based on risk, not treatment performance.

122. There are no techniques or actuarial tools currently available for conducting an assessment of long-term risk for committed individuals with juvenile-only offenses.

Dr. Pascucci credibly testified that current actuarial assessment tools are not validated for juvenile-only offenders, and, therefore, risk assessment instruments cannot quantitatively assess risk for juvenile-only offenders. Dr. Amanda Powers-Sawyer ("Dr. Powers-Sawyer"), former Interim Clinical Director at the MSOP, credibly testified that long-term risk for juvenile-only offenders is impossible to calculate. The Rule 706 Experts reported that there are no techniques currently available for conducting an assessment of long-term risk for individuals with juvenile-only sexual offenses.

123. Juvenile-only offenders have low recidivism rates compared to adult offenders. Dr. Powers-Sawyer credibly testified that the majority of juvenile-only offenders do not recidivate. Dr. Freeman credibly testified that the re-offense rate for juvenile sex offenders is approximately five percent. In comparison to the sixty-seven juvenile-only offenders currently committed to the MSOP, McCulloch credibly testified that only two or three juvenile-only offenders have been committed to the Wisconsin sex offender program, and Dr. Freeman credibly testified that no juvenile-only offenders are committed to the New York sex offender program, as juvenile-only offenders cannot be civilly committed in New York.

124. The MSOP does not have a manual or guide regarding how to conduct risk assessments.

125. The MSOP risk assessors consider whether a committed individual has major or minor BERs when conducting a risk assessment.

126. The MSOP risk assessors most commonly use the Static-99R and the Stable-2007 as actuarial risk assessment tools.

127. The Static-99R is a risk assessment tool that measures static factors, which are generally unchangeable in nature, whereas the Stable-2007 measures dynamic risk factors that are changeable in nature. The Static-99R is scored by assessing the offender on a list of objective criteria, including the number of prior sexual offenses, whether they had unrelated victims, and age at release, which provides predictive recidivism rates based on the corresponding risk category. The Static-99R and the Stable-2007 can be combined to assess an overall risk category.

128. Both the Static-99R and Stable-2007 have limitations to their use as risk assessment tools. The Static-99R does not distinguish age for an individual who is over sixty years old or an individual who is over ninety years old. Dr. Herbert credibly testified that both the Static-99R and the Stable-2007 should be used with caution on individuals with cognitive disabilities. Dr. Pascucci credibly testified that the Stable-2007 is not generally used on individuals with cognitive limitations or severe mental illness and that when it is used, it is used with caution.

129. The MSOP risk assessors did not consider the statutory criteria in risk assessment reports until late 2010 or early 2011.

130. The MSOP risk assessors do not receive any formal legal training. Dr. Pascucci and Dr. Jennifer Jones ("Dr. Jones"), a Risk Assessor at the MSOP, credibly testified that they did not receive any training regarding the constitutional standards for commitment or discharge.

131. The standard set forth in the Minnesota Supreme Court's *Call v. Gomez* decision in 1995 was not incorporated into the language of the MSOP risk assessments until the risk assessment for Terhaar in June 2014.

Petitioning Process for Reduction in Custody

132. The MCTA provides that the process for a "reduction in custody," or a "transfer out of a secure treatment facility, a provisional discharge, or a discharge from commitment," begins with filing a petition with the Special Review Board ("SRB"). Minn. Stat. § 253D.27, subds. 1 & 2.

133. At least six months after initial commitment or a final decision on a prior petition, a committed individual or the Executive Director of the MSOP may file a petition for a reduction in custody with the SRB. Minn. Stat. § 253D.27, subd. 2.

134. Other state commitment statutes, including the Wisconsin and New York statutes, allow committed individuals to petition the committing court at any time to be discharged or for a reduction in custody.

135. Upon the filing of a petition, the SRB holds a hearing on the petition, and within thirty days of the hearing, the SRB issues a report with written findings of fact and recommendations of denial or approval of the petition to the SCAP. Minn. Stat. § 253D.27, subds. 3 & 4.

136. Petitions are generally heard in the order in which they are received.

137. The SCAP has the sole authority to grant a reduction in custody. No reduction in custody recommended by the SRB is effective until it has been both

reviewed by the SCAP and until fifteen days after the SCAP issues an order affirming, modifying, or denying the SRB's recommendation. Minn. Stat. § 253D.27, subd. 4.

138. Upon receipt of the SRB's recommendation, the committed individual, the county attorney of the county from which the person was committed or the county of financial responsibility, or the commissioner may petition the SCAP for a rehearing and reconsideration of the SRB's recommendation. Minn. Stat. § 253D.28, subd. 1(a). The SCAP hearing must be held "within 180 days of the filing of the petition [with the SCAP] unless an extension is granted for good cause." *Id.* If no party petitions the SCAP for a rehearing or reconsideration within thirty days, the SCAP shall either "issue an order adopting the recommendations of the [SRB] or set the matter on for a hearing." Minn. Stat. § 253D.28, subd. 1(c).

139. At the SCAP rehearing, "[t]he petitioning party seeking discharge or provisional discharge bears the burden of going forward with the evidence, which means presenting a prima facie case with competent evidence to show that the person is entitled to the requested relief." Minn. Stat. § 253D.28, subd. 2(d).

140. At the SCAP rehearing, the petitioning party seeking a transfer "must establish by a preponderance of the evidence that the transfer is appropriate." Minn. Stat. § 253D.28, subd. 2(e).

141. A party "aggrieved by an order of the [SCAP]" may appeal the SCAP decision to the Minnesota Court of Appeals. Minn. Stat. § 253D.28, subd. 4; *see also* Minn. Stat. § 253B.19, subd. 5.

142. To be transferred out from a secure treatment facility, the SCAP must be satisfied that transfer is appropriate based on five factors: "(1) the person's clinical progress and present treatment needs; (2) the need for security to accomplish continuing treatment; (3) the need for continued institutionalization; (4) which facility can best meet the person's needs; and (5) whether transfer can be accomplished with a reasonable degree of safety for the public." Minn. Stat. § 253D.29, subd. 1.

143. For a provisional discharge, the SCAP must be satisfied that "the committed person is capable of making an acceptable adjustment to open society" based on two factors: "(1) whether the committed person's course of treatment and present mental status indicate there is no longer a need for treatment and supervision in the committed person's current treatment setting; and (2) whether the conditions of the provisional discharge plan will provide a reasonable degree of protection to the public and will enable the committed person to adjust successfully to the community." Minn. Stat. § 253D.30, subd. 1.

144. For a full discharge, the SCAP must be satisfied that, after a hearing and recommendation by a majority of the SRB, "the committed person is capable of making an acceptable adjustment to open society, is no longer dangerous to the public, and is no longer in need of inpatient treatment and supervision." Minn. Stat. § 253D.31. In determining whether a discharge shall be recommended, the SRB and the SCAP "shall consider whether specific conditions exist to provide a reasonable degree of protection to the public and to assist the committed person in adjusting to the community." *Id.*

145. The discharge criteria is more stringent and harder to prove than the commitment criteria.

146. The SRB and the SCAP, with limited exception, will not grant provisional discharge or discharge without the support of the MSOP. The SRB nearly always follows the MSOP's recommendation. Dr. Fox credibly testified that the SRB and the SCAP have agreed with and granted petitions that the MSOP has supported and that she could not recall the SCAP not agreeing with the MSOP's recommendation in support of an individual's petition. Deputy Commissioner Barry credibly testified that the SRB generally follows the MSOP's recommendations for provisional discharge or discharge.

147. Since January 1, 2010, the SRB has recommended granting twenty-six petitions for transfer, eight petitions for provisional discharge, and no petitions for discharge.

148. The MSOP supported all of the provisional discharge petitions that were recommended to be granted by the SRB.

149. As of July 2014, the SCAP has granted transfer to CPS twenty-eight times, provisional discharge once, and full discharge zero times.

150. SRB hearings are scheduled by the MSOP. Currently, the SRB may hold up to four hearings a day for a total of sixteen hearings per month, although there are no restrictions on the number of hearings the SRB can hold.

151. There is no time limit on the SCAP decisions.

152. The SRB and the SCAP petitioning process, from the filing of the initial petition to receiving a final SCAP decision, can take years. Karsjens credibly testified

that he filed a petition for a reduction in custody on October 11, 2011, and he did not receive a final order until June 10, 2013. The petitioning process for Duvall took approximately five years. Deputy Commissioner Barry credibly testified that some petitions can take longer than five years to complete the petitioning process. Johnston credibly testified that these time lines for the SRB hearings are too long.

153. As of June 2014, approximately 105 SRB petitions were pending decision and 48 petitions were pending a SCAP decision.

154. The shortest number of days between the time a petition is filed and the time of the hearing on the petition is twenty-nine days. This time period referred to Terhaar's petitioning process, which occurred after the Rule 706 Experts issued a report on May 18, 2014, unanimously recommending full discharge for Terhaar, and after the Court issued an order on June 2, 2014, ordering Defendants to show cause why Terhaar's continued confinement is not unconstitutional and why Terhaar should not be immediately and unconditionally discharged from the MSOP.

155. The MSOP has previously attempted to address delays in the petitioning process, but has not attempted to address the problem recently. In 2013, Commissioner Jesson set a goal of having petitions supported by the MSOP heard more quickly.

156. The SRB and the SCAP process is unduly lengthy and is bogged down with difficult procedures; the process denies individuals the services necessary to navigate the process.

157. These delays, in substantial part, are a result of insufficient funding and staffing. Berg and Puffer credibly testified that the MSOP lacks sufficient staff to complete the reports needed by the SRB and the SCAP.

158. Commissioner Jesson determines the number of SRB members and selects the SRB members after an application process. Currently, seventeen or eighteen positions out of twenty-four available positions are filled.

159. A committed individual retains the right to the writ of habeas corpus during the petitioning process. Minn. Stat. § 253B.23, subd. 5. However, the habeas procedure does not provide for an independent psychologist or psychiatrist to conduct an evaluation of the petitioning committed individual, and the petitioner is not provided counsel as a matter of right.

160. There is no bypass mechanism available for individuals to challenge their commitment.

161. Defendants are not required under the MCTA to petition for transfer or reduction in custody of committed individuals who meet the statutory requirements for such a reduction in custody.

162. There is no policy or practice at the MSOP, nor a requirement in the statute, that requires the MSOP to file a petition on an individual's behalf, even if the MSOP knows or reasonably believes that the individual no longer satisfies the statutory or constitutional criteria for commitment or for discharge.

163. Defendants could choose and have the discretion to file a petition for a reduction in custody on behalf of committed individuals at the MSOP.

164. The MSOP knows that there are Class Members who meet the reduction in custody criteria or who no longer meet the commitment criteria but who continue to be confined at the MSOP.

165. Despite its knowledge that individuals have met the criteria for release, the MSOP has never petitioned on behalf of a committed individual for full discharge.

166. The MSOP had never filed a petition for a reduction in custody on behalf of a committed individual before 2013.

167. The MSOP has only filed a petition for a reduction in custody on behalf of a committed individual seven times in the history of the program. The seven petitions were for six individuals in the Alternative Program who were designated for transfer to Cambridge, but who ultimately were never transferred to Cambridge, and for Terhaar for transfer to CPS.

168. The MSOP has only filed a petition for transfer to CPS on behalf of one individual in the history of the program. In October 2014, Johnston filed a petition for transfer to CPS on behalf of Terhaar. Terhaar credibly testified that no one from the MSOP told him about the filing of the petition on his behalf for transfer to CPS, and that he wanted the petition to be for his discharge from the MSOP rather than for his transfer to CPS.

169. The MSOP has not filed a petition on behalf of any juvenile-only offender except Terhaar.

170. The MSOP does not have an established process or practice to determine whether to petition on behalf of a committed individual.

171. The MSOP's SRB policy states that when a petition for provisional discharge is supported by the treatment team, the MSOP staff are authorized to assist the individual petitioner with a provisional discharge plan.

172. The MSOP only assists committed individuals who are in Phase III of treatment with provisional discharge plans.

173. Although a committed individual must have a fully completed provisional discharge plan to support a provisional discharge petition, the MSOP does not assist committed individuals who are in Phase I or Phase II in creating a provisional discharge plan.

174. The MSOP does not provide legal advice to committed individuals regarding filing a petition.

175. Individuals confined at the MSOP have expressed confusion and uncertainty regarding the petitioning process, and some have been deterred from petitioning due to the daunting petitioning process. For example, Terhaar credibly testified that he has not filed a petition for a reduction in custody because the petitioning process is very long and complicated, and he does not know how to navigate the petitioning process. Foster credibly testified that he did not know about the petitioning form or process until another committed individual explained the form and process to him, after he had been committed for approximately six years.

176. Between January 2010 and June 2014, 441 committed individuals at the MSOP who were potentially eligible for discharge had not filed a petition for a reduction in custody.

177. The MSOP has never supported a full discharge petition.

178. The MSOP has supported fewer than ten petitions for provisional discharge.

179. The MSOP will only support a petition for a reduction in custody if the petitioning individual fully completes the treatment program. Commissioner Jesson credibly testified that the MSOP will only support individuals for discharge if they had been successful in finishing treatment and defined "successful" to mean "finished." Johnston credibly testified that the MSOP's practice is that committed individuals must be in Phase III for the MSOP to support their petition.

180. The MSOP has only supported one petition for transfer to CPS from a committed individual in Phase I. Dr. Fox credibly testified that the MSOP has only supported a petition for transfer to CPS for an individual in Phase I in one case, and that was for Terhaar. Dr. Pascucci credibly testified that she has never recommended that a committed individual in Phase I be transferred to CPS.

181. Within the last year, the MSOP has supported one petition for transfer to CPS from a committed individual in Phase II. Johnston credibly testified that "[i]t wasn't until more recently in the last year that treatment team support for transfer to CPS while a client is in Phase II has occurred."

182. Any conclusion of law which may be deemed a finding of fact is incorporated herein as such.

Based upon the above findings of fact, the Court hereby makes the following:

CONCLUSIONS OF LAW

Jurisdiction

1. The Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331.

2. The United States Supreme Court has held that to have standing to invoke the federal court's jurisdiction, a plaintiff must show the following:

> (1) "injury in fact," by which we mean an invasion of a legally protected interest that is "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; . . . (2) a causal relationship between the injury and the challenged conduct, by which we mean the injury "fairly can be traced to the challenged action of the defendant," and has not resulted "from the independent action of some third party not before the court"; . . . and (3) a likelihood that the injury will be redressed by a favorable decision, by which we mean that the "prospect of obtaining relief from the injury as a result of a favorable ruling" is not "too speculative."

See Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 663-64 (1993) (internal citations omitted).

3. Plaintiffs have standing in this case. Contrary to Defendants' assertion that Plaintiffs allege merely a generalized concern, Plaintiffs have shown that all Class Members have suffered an injury in fact—the loss of liberty in a manner not narrowly tailored to the purpose for commitment. Each Class Member has been harmed by not knowing whether they continue to meet the criteria for commitment to the MSOP through regular risk assessments. Each Class Member has been harmed by the treatment program's structural problems, resulting in delays in progression.

4. Plaintiffs have shown that each Class Member has been harmed and their liberty has been implicated as a result of Defendants' actions. For example, Defendants created the MSOP's treatment program structure, developed the phase progression policies, and had the discretion to conduct periodic risk assessments of each Class Member and to petition on behalf of the Class Members, but have chosen not to do so. By failing to provide the necessary process, Defendants have failed to maintain the program in such a way as to ensure that all Class Members are not unconstitutionally deprived of their right to liberty.

5. Plaintiffs have shown that each Class Member's injury with respect to their liberty interests will likely be redressed by a favorable decision, as is exemplified through the possible remedies proposed below.

Plaintiffs' Facial Challenge

6. A "plaintiff can only succeed in a facial challenge by establishing that no set of circumstances exists under which the Act would be valid, i.e., that the law is unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (internal quotation omitted).

7. The Due Process Clause of the Fourteenth Amendment of the United States Constitution provides that "[n]o state shall . . . deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV § 1.

8. "[T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990)

(internal quotation omitted); *see also Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (noting that the Supreme Court has "emphasized time and again that the touchstone of due process is protection of the individual against arbitrary action of government") (internal quotation omitted).

9. Substantive due process protects individuals against two types of government action: action that "shocks the conscience" or "interferes with rights implicit in the concept of ordered liberty." *United States v. Salerno*, 481 U.S. 739, 746 (1987); *see also Seegmiller v. LaVerkin City*, 528 F.3d 762 (10th Cir. 2008).

10. State and federal caselaw has long recognized that civil confinement is a "massive" curtailment of liberty. *Vitek v. Jones*, 445 U.S. 480, 491-92 (1980); *Addington v. Texas*, 441 U.S. 418, 425 (1979) ("[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."); *In re Blodgett*, 510 N.W.2d 910, 914 (Minn. 1994) ("To live one's life free of physical restraint by the state is a fundamental right; curtailment of a person's liberty is entitled to substantive due process protection.").

11. Substantive due process requires that civil committees may be confined only if they are both mentally ill and pose a substantial danger to the public as a result of that mental illness. *See Call v. Gomez*, 535 N.W.2d 312, 319 (Minn. 1995); *see also Foucha v. Louisiana*, 504 U.S. 71, 77 (1992) ("Even if the initial commitment was permissible," a civil commitment may not "constitutionally continue after that basis no longer exist[s].") (internal citations omitted); *see also id.* (explaining that a "committed

acquittee is entitled to release when he has recovered his sanity or is no longer dangerous").

12. When 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. *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) ("[T]he Fourteenth Amendment forbids the government to infringe . . . fundamental liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.") (internal citations and quotations omitted) (emphasis in original); *Gallagher v. City of Clayton*, 699 F.3d 1013, 1017 (8th Cir. 2012) (noting that, where legislation infringes upon a fundamental right, such legislation "must survive strict scrutiny—the law must be 'narrowly tailored to serve a compelling state interest'") (internal citations omitted).

13. The Court concludes that the strict scrutiny standard applies because Plaintiffs' fundamental right to live free of physical restraint is constrained by the curtailment of their liberty. *See, e.g.*, *Foucha*, 504 U.S. at 80 ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.") (internal citation omitted); *Jones v. United States*, 463 U.S. 354, 361 (1983) ("[C]ommitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.") (internal citation omitted); *see also Cooper v. Oklahoma*, 517 U.S. 348, 368-69 (1996) ("The requirement that the grounds for civil commitment be shown by clear and convincing evidence protects the individual's fundamental interest in liberty."); *Reno v. Flores*, 507 U.S. 292, 316 (1993)

(O'Connor, J., concurring) ("The institutionalization of an adult by the government triggers heightened, substantive due process scrutiny."); *Vitek*, 445 U.S. at 492 ("The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement."); *Blodgett*, 510 N.W.2d at 914 ("The state must show a legitimate and compelling interest to justify any deprivation of a person's physical freedom.").

14. This case is distinguishable from other challenges to the involuntary confinement of sex offenders where it was represented to the court that the program's anticipated duration of completion was a few years or only *potentially* indefinite; here, not one offender has been released from the MSOP program after over twenty years. *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 364 (1997) (stating that "commitment under the Act is only *potentially* indefinite" because "[t]he maximum amount of time an individual can be incapacitated pursuant to a single judicial proceeding is one year" and "[i]f Kansas seeks to continue the detention beyond that year, a court must once again determine beyond a reasonable doubt that the detainee satisfies the same standards as required for the initial confinement"); *In re Linehan*, 557 N.W.2d 171, 188 (Minn. 1996) (finding that "model patients" were expected to complete the program in approximately thirty-two months and finding that, in light of this finding, the program was remedial and not punitive in nature); *Call*, 535 N.W.2d at 318 n.5 (noting the state's representation that "[a]n average patient is expected to complete the program in a minimum of 24 months").

In addition, no other case has raised a systemic challenge to section 253D or specifically addressed section 253D's failure to require regular risk assessments to determine if class members continued to meet the criteria for continued commitment or

section 253D's failure to require the MSOP to initiate the petitioning process when it is aware that a committed individual likely meets the statutory discharge criteria.

15. The United States Supreme Court has held that a civil commitment statutory scheme is permitted provided that an individual is not detained past the time they are no longer dangerous or no longer have a mental illness without rendering the statute punitive in purpose or effect as to negate a legitimate nonpunitive civil objective. *See Hendricks*, 521 U.S. at 361-62. Thus, where, notwithstanding a "civil label," a statutory scheme "is so punitive either in purpose or effect as to negate the State's intention to deem it 'civil,'" a court will reject a legislature's "manifest intent" to create a civil proceeding and "will consider the statute to have established criminal proceedings for constitutional purposes." *Id.* at 361. Moreover, "[i]f the object or purpose" of a civil commitment law is to provide treatment, "but the treatment provisions were adopted as a sham or mere pretext," such a scheme would indicate "the forbidden purpose to punish." *Id.* at 371 (Kennedy, J., concurring).

16. To satisfy the narrowly tailored standard, section 253D must ensure that individuals are committed no longer than necessary to serve the state's compelling interests.

17. The purpose for which an individual is civilly committed to the MSOP is to provide treatment to and protect the public from individuals who are both mentally ill and pose a substantial danger to the public as a result of that mental illness.

18. The Court concludes that the state has failed to demonstrate that section 253D is narrowly tailored to achieve its compelling interests.

19. First, section 253D is not narrowly tailored because the statute indisputably fails to require periodic risk assessments. In the absence of such assessments, Defendants cannot know whether any Class Members satisfy the statutory criteria for continued commitment. The MSOP has no periodic risk assessment for individuals the MSOP knows or should know no longer meet the criteria to remain confined or restricted to early phases of the progression program. The statute, on its face, allows the continued civil commitment of sex offenders, even after they no longer meet the statutory criteria for commitment or meet the criteria for discharge or reduction in custody. By not providing for periodic risk assessments, the statute, on its face, authorizes prolonged commitment, even after committed individuals no longer pose a danger to the public and need further inpatient treatment and supervision for a sexual disorder. The statute is therefore not narrowly tailored and results in a punitive effect and application contrary to the purpose of civil commitment. *See Hendricks*, 521 U.S. at 361-62.

20. Second, section 253D is not narrowly tailored because it fails to provide a judicial bypass mechanism to the statutory reduction in custody process. Section 253D provides for a single process to obtain transfer, provisional release, or full discharge. As noted above, the SRB and the SCAP process takes too long, is burdened with difficult and cumbersome procedures, and denies committed individuals services necessary to navigate the process. The SRB and the SCAP process, and its corresponding duration and procedures, are insufficient to meet this standard. Neither the habeas process nor a Rule 60 motion provide sufficient bypass because neither provides the right to counsel or the right to medical professional assistance to individuals seeking those alternative

processes. The failure of the statute to provide for an adequate emergency or alternative mechanism by which someone who satisfies the discharge standard can obtain release from commitment in a reasonable time period demonstrates that the statute on its face is not narrowly tailored. The Court is unpersuaded by Defendants' argument that federal habeas law already provides a series of procedures allowing federal review of Minnesota's compliance with federal constitutional standards because the habeas process does not provide the right to counsel or the right to medical professional assistance to committed individuals seeking alternative processes. As written, section 253D contains no judicial bypass mechanism, and, as such, there is no way for Plaintiffs to timely and reasonably access the judicial process outside of the statutory discharge process to challenge their ongoing commitment. Therefore, section 253D is not narrowly tailored and results in a punitive effect and application contrary to the purpose of civil commitment. *See Hendricks*, 521 U.S. at 361-62.

21. Third, the Court concludes that section 253D is not narrowly tailored because the statutory discharge criteria is more stringent than the statutory commitment criteria. To be discharged from the MSOP, section 253D requires that a committed individual "no longer be dangerous" as opposed to being "highly likely to reoffend," which is the initial commitment standard. Although an individual may be initially committed to the MSOP on proof of being "highly likely to engage in harmful sexual conduct" in the future, an individual is prohibited from being discharged unless he demonstrates, among other things, that he is no longer dangerous. Because the statute renders discharge from the MSOP more onerous than admission to it, section 253D is not

narrowly tailored and results in a punitive effect and application contrary to the purpose of civil commitment. *See Hendricks*, 521 U.S. at 361-62.

22. Fourth, the Court concludes that section 253D is not narrowly tailored because the statute impermissibly places the burden on committed individuals to demonstrate that they may be placed in a less restrictive setting upon commitment or by transfer from the MSOP. The Court concludes that the burden of demonstrating the justification for continued confinement by clear and convincing evidence should remain on the state at all times. Because the burden to petition impermissibly shifts from the state to committed individuals, section 253D is not narrowly tailored and results in a punitive effect and application contrary to the purpose of civil commitment. *See Hendricks*, 521 U.S. at 361-62.

23. Fifth, the Court concludes that section 253D is not narrowly tailored because although the statutory scheme contemplates that less restrictive alternatives are available, *see* Minn. Stat. § 253D.07, subd. 3, and requires that committed individuals show by clear and convincing evidence that a less restrictive alternative is appropriate, *see id.*, the evidence demonstrates, and the Court concludes, that there are no less restrictive alternatives available upon commitment. Moreover, committed individuals can never meet the preponderance of the evidence standard to transfer to a "facility that best meets the person's needs," *see id.*, when those alternative facilities do not exist. Therefore, the Court concludes that section 253D is not narrowly tailored, and results in a punitive effect and application contrary to the purpose of civil commitment. *See Hendricks*, 521 U.S. at 361-62.

24. Finally, the Court concludes that section 253D is not narrowly tailored because the statute does not require the state to take any affirmative action, such as petition for reduction of custody, on behalf of individuals who no longer satisfy the criteria for continued commitment. The statute's failure to require the state to petition for individuals who no longer pose a danger to the public and no longer need inpatient treatment and supervision for a sexual disorder is a fatal flaw that renders the statute not narrowly tailored and results in a punitive effect and application contrary to the purpose of civil commitment. *See Hendricks*, 521 U.S. at 361-62.

25. For the reasons set forth above, section 253D is unconstitutional on its face because no application of the statute provides sufficient constitutional protections to render the statute narrowly tailored and results in a punitive effect and application contrary to the purpose of civil commitment. *See Hendricks*, 521 U.S. at 361-62.

Plaintiffs' As-Applied Challenge

26. The Court concludes that the strict scrutiny standard also applies to Plaintiffs' as-applied challenge because Plaintiffs' substantive due process claim involves the infringement of a fundamental right.

27. Under the strict scrutiny standard, the burden is on Defendants to demonstrate that the statute, as applied, is narrowly tailored to serve a compelling state interest.

28. Confinement under civil commitment at the MSOP is constitutional only if the state determines and confirms that the basis for commitment still exists or that the statutory reduction in custody criteria is not met. It is constitutionally mandated that only

individuals who constitute a "real, continuing, and serious danger to society" may continue to be civilly committed to the MSOP. *See Hendricks*, 521 U.S. at 372 (Kennedy, J., concurring). Individuals who are no longer dangerous cannot constitutionally continue to be confined at the MSOP. *See Foucha*, 504 U.S. at 77 (holding that a committed individual "may be held as long as he is *both* mentally ill *and* dangerous, but no longer") (quoting *Jones*, 463 U.S. at 368) (emphasis added). In *Call v. Gomez*, the Minnesota Supreme Court held that continued confinement of a committed individual is constitutional "for only so long as he or she continues *both* to need further inpatient treatment and supervision for his sexual disorder *and* to pose a danger to the public." *Call*, 535 N.W.2d at 319 (emphasis added). Consistent with these statutory and constitutional requirements, when the standard for commitment is no longer met or when the standard for discharge is satisfied, the state has no authority to continue detaining the confined individual at the MSOP.

29. The Court concludes that section 253D is unconstitutional as applied because Defendants apply the statute in a manner that results in Plaintiffs being confined to the MSOP beyond such a time as they either meet the statutory reduction in custody criteria or no longer satisfy the constitutional threshold for continued commitment.

30. First, the Court finds that section 253D, as applied, is not narrowly tailored because Defendants do not conduct periodic risk assessments of civilly committed individuals at the MSOP. Defendants admit that they do not know whether many individuals confined at the MSOP meet the commitment or discharge criteria, but they do know that certain individuals could be discharged or transferred to a less restrictive

facility. Although Defendants claim that the MSOP provides a risk assessment to the SRB upon the filing of a petition, Defendants do not purport to procure periodic, independent assessments or otherwise evaluate whether an individual continues to meet the initial commitment criteria or the discharge criteria if an individual does not file a petition. This is true even after decades of confinement in the program. In addition, although the statute currently does not require risk assessments, nothing in the statute prohibits the MSOP from conducting periodic risk assessments. The MSOP has yet to fix the periodic risk assessment problem even though Defendants concede they could add periodic risk assessments at their discretion.

Despite Defendants' assertions that they have started to conduct "rolling risk assessments," this plan is insufficient to pass constitutional muster. Defendants have not hired any additional risk assessors beyond the existing department vacancies to implement this plan, and many employees of the MSOP had never heard of this plan. In addition, even if Defendants were in fact implementing such a plan, the planned one or two risk assessments per month outside of the petitioning process would take 30 to 60 years in order to assess all currently committed Class Members at the MSOP, and yet risk assessments are only valid for one year. Therefore, section 253D, as applied, is not narrowly tailored and results in a punitive effect and application contrary to the purpose of civil commitment. *See Hendricks*, 521 U.S. at 361-62.

31. Second, section 253D, as applied, is not narrowly tailored because those risk assessments that have been performed have not all been performed in a constitutional manner. The testimony of several risk assessors at the MSOP support a conclusion that

the risk assessors have not been applying the correct legal standard when evaluating whether an individual meets the criteria for transfer, provisional discharge, or discharge. For example, Dr. Pascucci's testimony indicated that she did not use the correct standard for discharge under *Call*, which requires that a person be "confined for only so long as he or she continues *both* to need further inpatient treatment and supervision for his sexual disorder *and* to pose a danger to the public." *Call*, 535 N.W.2d at 319 (emphasis added). In other words, the Minnesota Supreme Court has indicated that discharge must be granted if the individual is *either* no longer dangerous to the public *or* no longer suffers from a mental condition requiring treatment. (*See id.*) Moreover, the MSOP did not use the correct legal standard until after these proceedings commenced in 2011, despite the fact that the Minnesota Supreme Court decided the *Call* case in 1995. Therefore, section 253D, as applied, is not narrowly tailored in that there is no requirement to apply the correct legal standard in risk assessments and it results in a punitive effect and application contrary to the purpose of civil commitment. *See Hendricks*, 521 U.S. at 361-62.

32. Third, section 253D, as applied, is not narrowly tailored because individuals have remained confined at the MSOP even though they have completed treatment, can no longer benefit from treatment, or have reduced their risk below either the "highly likely to reoffend" standard or below a "dangerous" standard. The fact that no one has been fully discharged from the MSOP since the program was created and that only three individuals have been provisionally discharged, one of whom was subsequently returned to civil confinement and who passed away at the MSOP,

underscores the failure of section 253D, as applied, to be narrowly tailored to confine only those individuals who should remain civilly committed at the MSOP. Therefore, section 253D, as applied, is not narrowly tailored and results in a punitive effect and application contrary to the purpose of civil commitment. *See Hendricks*, 521 U.S. at 361-62.

33. Fourth, section 253D, as applied, is not narrowly tailored because the discharge procedures are not working as they should at the MSOP. The Court finds that this is the result of the MSOP refusing to petition on behalf of committed individuals, the MSOP failing to provide discharge planning to committed individuals until they are in Phase III, and Defendants' failure to address impediments and delays in the reduction in custody process. These failures further delay Plaintiffs' ultimate discharge from the MSOP. As a result, section 253D, as applied, is not narrowly tailored, and results in a punitive effect and application contrary to the purpose of civil commitment. *See Hendricks*, 521 U.S. at 361-62.

34. Fifth, section 253D, as applied, is not narrowly tailored because there are no less restrictive alternatives. Although section 253D expressly allows for the referral of committed individuals to less restrictive alternatives, this is not occurring in practice. It is undisputed that there are individuals confined at the Moose Lake and St. Peter secure facilities who could be served in less restrictive alternatives. However, until recently, there were no less restrictive alternatives, aside from CPS, in which to place individuals. Even now, there are simply not enough less restrictive alternatives available for committed individuals seeking transfer to less restrictive alternatives. In addition,

committed individuals cannot be placed at CPS or other less restrictive alternatives upon initial commitment. Insisting on confinement at the secure facilities impinges on the individual's liberty interest, particularly given the statutorily proscribed less restrictive options, and thus the statute is not narrowly tailored, resulting in a punitive effect and application contrary to the purpose of civil commitment. *See Hendricks*, 521 U.S. at 361-62.

35. Finally, section 253D, as applied, is not narrowly tailored because, although treatment is made available, there is no meaningful relationship between the treatment program at the MSOP and discharge from custody. Progression through the phases of treatment at the MSOP has been so slow, for so many years, that treatment has never been a way out of confinement for committed individuals, especially in light of the fact that no periodic risk assessments are conducted. Most of the committed individuals get stuck in Phase I of the program, a part of the program where no specific offender-related therapy is provided, only institutional rule compliance training and preparation for therapy. The treatment program has been plagued by a lack of funding, staff shortages, and periodic alterations in the treatment program, resulting in committed individuals having to go through stoppages and starting over again. Even if the treatment that is provided has led to a reduction in risk of reoffending of some committed individuals, the previously identified risk assessment problems have nullified any such positive effect. The lack of a meaningful relationship between the treatment program and discharge is borne out by the fact that over the past twenty-one years, very few have been progressed to Phase III, no one has been fully discharged, and only three persons have been

provisionally discharged. The overall failure of the treatment program over so many years is evidence of the punitive effect and application of section 253D. *See Hendricks*, 521 U.S. at 361-62.

36. Each of the reasons set forth above are an independent reason for the Court to conclude that section 253D is unconstitutional as applied. Together, these reasons support the Court's conclusion that the statute, as applied, is not narrowly tailored to protect against individuals being confined to the MSOP beyond such time as they either satisfy the statutory reduction in custody criteria or no longer satisfy the constitutional standards for continued commitment. Instead, the statute, as applied, is a three-phased treatment system with "chutes-and-ladders"-type mechanisms for impeding progression, without periodic review of progress, which has the effect of confinement to the MSOP facilities for life. As a result, section 253D, on its face and as applied, is not narrowly tailored and results in a punitive effect and application contrary to the purpose of civil commitment. *See Hendricks*, 521 U.S. at 361-62.

37. Any finding of fact which may be deemed a conclusion of law is incorporated herein as such.

38. Because the Court finds the program is unconstitutional on its face and as applied (Counts I and II), and because any remedy fashioned will address the issues raised in the remaining Phase One Counts, the Court need not address Counts III, V, VI, and VII. Counts IV and XI will be addressed under separate Order.

CONCLUSION

The Court concludes that the evidence presented over the course of the six-week trial in this case demonstrates that Minnesota's civil commitment statutory scheme is unconstitutional both on its face and as applied. Contrary to Defendants' assertions, the Court concludes that the "shocks the conscience" standard does not apply to Plaintiffs' facial and as-applied challenges because Plaintiffs' substantive due process claims involve the infringement of a fundamental right. *See Cooper*, 517 U.S. at 368-69; *Flores*, 507 U.S. at 316 (O'Connor, J., concurring); *Foucha*, 504 U.S. at 80; *Jones*, 463 U.S. at 361; *Vitek*, 445 U.S. at 492; *Blodgett*, 510 N.W.2d at 914. After applying the strict scrutiny standard, the Court concludes that Minnesota's civil commitment statutory scheme is not narrowly tailored and results in a punitive effect and application contrary to the purpose of civil commitment and that the MSOP, in implementing the statute, systematically continues to confine individuals in violation of constitutional principles.

Specifically, the Court concludes that section 253D is facially unconstitutional for the following six reasons: (1) section 253D indisputably fails to require periodic risk assessments and, as a result, authorizes prolonged commitment even after committed individuals no longer pose a danger to the public and need further inpatient treatment and supervision for a sexual disorder; (2) section 253D contains no judicial bypass mechanism and, as such, there is no way for Plaintiffs to timely and reasonably access the judicial process outside of the statutory discharge process to challenge their ongoing commitment; (3) section 253D renders discharge from the MSOP more onerous than admission to it because the statutory discharge criteria is more stringent than the statutory

commitment criteria; (4) section 253D authorizes the burden to petition for a reduction in custody to impermissibly shift from the state to committed individuals; (5) section 253D contemplates that less restrictive alternatives are available and requires that committed individuals show by clear and convincing evidence that a less restrictive alternative is appropriate, when there are no less restrictive alternatives available; and (6) section 253D does not require the state to take any affirmative action, such as petition for a reduction in custody, on behalf of individuals who no longer satisfy the criteria for continued commitment.

In addition, the Court further concludes that section 253D is unconstitutional as applied for the following six reasons: (1) Defendants do not conduct periodic, independent risk assessments or otherwise evaluate whether an individual continues to meet the initial commitment criteria or the discharge criteria if an individual does not file a petition; (2) those risk assessments that have been performed have not all been performed in a constitutional manner; (3) individuals have remained confined at the MSOP even though they have completed treatment or sufficiently reduced their risk; (4) discharge procedures are not working properly at the MSOP; (5) although section 253D expressly allows the referral of committed individuals to less restrictive alternatives, this is not occurring in practice because there are insufficient less restrictive alternatives available for transfer and no less restrictive alternatives available for initial commitment; and (6) although treatment has been made available, the treatment program's structure has been an institutional failure and there is no meaningful relationship between the treatment program and an end to indefinite detention.

The Fourteenth Amendment does not allow the state, DHS, or the MSOP to impose a life sentence, or confinement of indefinite duration, on individuals who have committed sexual offenses once they no longer pose a danger to society. The Court must emphasize that politics or political pressures[7] cannot trump the fundamental rights of Class Members who, pursuant to state law, have been civilly committed to receive treatment. The Constitution protects individual rights even when they are unpopular. As Justice Sandra Day O'Connor sagely observed, "[a] nation's success or failure in achieving democracy is judged in part by how well it responds to those at the bottom and the margins of the social order." *Third Annual William French Memorial Lecture: A Conversation with Retired Justice Sandra Day O'Connor*, 37 Pepp. L. Rev. 63, 65 (2009).

As a former Assistant County Attorney, the undersigned prosecuted sexual assault and child sexual abuse cases and, as a former Minnesota District Judge who handled many such cases, the undersigned then and now is sensitive to the interests of all individuals affected by this matter, as well as the fears and concerns of the public at large,

[7] Benson credibly testified that "the politics around the program are really thick" and that "politics guide the thinking of those involved in the [release] process," which Benson described as a "political crapshoot." Benson further credibly testified that "I think this is an area where people have got to rise above the politics and do the right thing or . . . this program is going to, I think, eventually be deemed unconstitutional, and in its current form probably should be." The Task Force Report corroborated these observations, stating that "the Task Force is deeply concerned about the influence of public opinion and political pressure on all levels of the commitment process."

including, of course, victims of these heinous and tragic crimes.[8] The undersigned accepts and acknowledges that it has an obligation to all citizens to not only honor their constitutional rights, but to do so without compromising public safety and the interests of justice. The balance is a delicate and important one, but it can and will be done. The Court observes that the parties and this Court are in the same position now as when this lawsuit was filed in 2011 in at least two ways. First, there are some individuals who indisputably should be discharged from the MSOP and who are being confined unconstitutionally at the MSOP. As stated by Grant Duwe, Director of Research at the DOC: "[M]any high-risk sex offenders can be managed successfully in the community. The cost of civil commitment in a high-security facility also implies that this type of commitment should be reserved only for those offenders who have an inordinately high risk to sexually reoffend." (Doc. No. 427 (February 20, 2014 Order") at 67 n.48 (citing Doc. No. 410 ("Nelson Decl.") ¶ 2, Ex. 1, at 9).) The confinement of the elderly, individuals with substantive physical or intellectual disabilities, and juveniles, who might never succeed in the MSOP's treatment program or who are otherwise unlikely to reoffend, is of serious concern for the Court and should be for the parties as well. Importantly, provisional discharge or discharge from the MSOP does not mean discharge or release without a meaningful support network, including a transition or release plan into the community with intensive supervised release conditions. Virtually all of these

[8] The Court has received numerous letters from not only victims and family members of victims of committed individuals, but also from family members of committed individuals at the MSOP as well as individuals who claim to have experienced the MSOP firsthand.

offenders have been institutionalized, as the reintegration component of Phase III of this program acknowledges. Second, there are others who are truly dangerous and should remain confined at the MSOP, but for whom constitutional procedures must be followed because "[s]ubstantive due process forecloses the substitution of preventative detention schemes for the criminal justice system, and the judiciary has a constitutional duty to intervene before civil commitment becomes the norm and criminal prosecution the exception." *In re Linehan*, 557 N.W.2d at 181.

Further, the Court must emphasize how truly systemic the state's problem has become. The record before this Court shows that a number of Class Members were allowed to plead to a lesser criminal sexual conduct charge and often received concurrent sentences even though there were multiple victims involved,[9] and, as defendants, were never advised of the "collateral consequence" of what being committed to the MSOP means.[10] In some cases, defendants were allowed to enter a guilty plea, even though they

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[9] For example, Steiner was convicted of several counts of criminal sexual conduct of varying degrees involving a number of victims, sentenced to the custody of the DOC Commissioner with his sentence stayed, and then stipulated to his civil commitment to the MSOP.

There are a number of cases where the plea agreement called for either a plea to a lesser charge or dismissal of other charges involving multiple victims. For two other such examples where a sex offender was allowed to plead to a lesser criminal sexual conduct charge or other counts of criminal sexual conduct were dismissed, see *Call v. Gomez*, 535 N.W.2d 312 (Minn. 1995) and *In re Ince*, 847 N.W.2d 13 (Minn. 2014).

[10] Terhaar, Bolte, and Steiner, among others, were never advised of what the MSOP entailed. At the time of his commitment to the MSOP, Steiner was told that he would be committed for three to four years, consistent with the representations made by the state to the Minnesota Supreme Court in *In re Linehan*, 557 N.W.2d 171, 188 (Minn. 1996). Steiner has been committed to the MSOP for twenty-three years.

proclaimed their innocence, by accepting the benefits of the plea bargain, more commonly known as an *Alford* plea.[11] It is difficult for this Court to understand why the criminal justice system so heavily relies on plea agreements in criminal sexual conduct cases. It appears to this Court that the civil commitment process—with lower burdens of proof—is being utilized instead. This reliance on the civil commitment process is especially troubling given the provisions of Minn. Stat. § 609, specifically Minn. Stat. § 609.3455, which authorizes a mandatory ten-year period of conditional release for a first-time offender and placing an offender with prior sex offense convictions on conditional release for the remainder of the offender's life. *See* Minn. Stat. § 609.3455, subds. 6, 7. In addition, Minn. Stat. § 609 authorizes mandatory life prison sentences for "egregious first-time offenders" and repeat offenders, as well as significant increases in the presumptive sentence under certain circumstances. *See* Minn. Stat. § 609.3455. Such plea negotiations, with few exceptions, have only proved to be a disservice to the entire system and have rarely served the interests of justice.

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[11] An *Alford* plea is "[a] guilty plea that a defendant enters as part of a plea bargain without admitting guilt." *Black's Law Dictionary* 71 (7th ed. 1999). The term "*Alford* plea" is named after the United States Supreme Court case of *North Carolina v. Alford*, 400 U.S. 25 (1970).

A number of committed individuals at the MSOP, including Karsjens, denied their guilt and entered an *Alford* plea, but are now having difficulty advancing past Phase I of the treatment program because they still proclaim their innocence and deny any wrongdoing.

There are circumstances under which an *Alford* plea may serve the interests of justice. However, as a former prosecutor and as a state and federal judge, the undersigned has never allowed or accepted an *Alford* plea.

Further, in a number of the civil commitment cases, the DOC referred the offender to the county attorney for commitment, even though the sentencing judge had imposed the mandatory ten-year conditional release to follow the prison sentence, which can be intensive supervised release and can include GPS monitoring, daily curfews, alcohol and drug testing, and other conditions of release while on supervision. *See, e.g.*, *In re Ince*, 847 N.W.2d 13 (Minn. 2014). Deferring to the mandatory conditional release imposed by the sentencing judge, especially for those individuals convicted of sex crimes who are not evaluated to be "the worst of the worst" (i.e., the most dangerous of sexual offenders), not only addresses public safety, but also considers the constitutionally-protected liberty interests of individuals with convictions. In the words of Justice John E. Simonett:

> At issue is not only the safety of the public on the one hand and, on the other, the liberty interests of the individual who acts destructively for reasons not fully understood by our medical, biological and social sciences. In the final analysis, it is the moral credibility of the criminal justice system that is at stake.

Blodgett, 510 N.W.2d at 918. Consequently, the Court observes that, in light of the current state of Minnesota's sex offender civil commitment scheme, it is not only the "moral credibility of the criminal justice system" that is at stake today, but the credibility of the entire system, including all stakeholders that work within the system, and those affected by the system, not forgetting those who have been convicted of sex crimes, their victims, and the families of both.

The Court concludes that the Constitution requires that substantial changes be made to Minnesota's sex offender civil commitment scheme. Accordingly, the Court will

hold a Remedies Phase pre-hearing conference where it will consider all remedies proposals, which could include, but would not be limited to the following:

- Requiring risk and phase placement reevaluation, with all deliberate speed, of all current patients, starting with the elderly, individuals with substantive physical or intellectual disabilities, and juveniles;

- Requiring periodic, independent risk assessments to determine whether the clients still satisfy the civil commitment requirements and whether the treatment phase placement is proper;

- Requiring and creating a variety of alternate less restrictive facilities;

- Revising the discharge process, including the possibility of using a specialized sex offender court with authority to request information, order transfer, provisional discharge, or discharge, and order appropriate conditions and supports for individuals transitioning to the community;

- Requiring the MSOP to promptly file petitions for any person the MSOP believes does not meet the criteria for civil commitment upon arrival, may no longer meet the criteria for civil commitment, or should be transferred to an alternative facility, including for individuals that cannot be well served at the MSOP (for example, due to an individual's physical or intellectual disability);

- Requiring the MSOP to proactively and continuously develop and adjust specific treatment and discharge plans, no matter which phase a person is in;

- Requiring the MSOP to provide annual notice to all clients of the right to petition and provide assistance with the petitioning process dependent upon the client's needs;

- Requiring the state to have the burden to prove that the committed individuals meet statutory and constitutional standards for continued commitment and placement;

- Requiring the statutory standards for discharge and commitment be the same;

- Requiring a judicial bypass mechanism;

- Requiring changes to the civil commitment process to correct systemic problems and to ensure that only those who need further inpatient treatment and supervision

for a sexual disorder and pose a danger to the public are civilly committed, taking into account an individual's age, adult convictions, severity of adult convictions, and physical or intellectual disability;

- Requiring the provision of qualified defense counsel and professional experts to all petitioners;

- Requiring ongoing external review and evaluation by experts to recommend changes to the MSOP treatment program processes, including an overview of the structure of the treatment program and phase progression processes;

- Requiring continued and specific training for all employees of the MSOP and for those people involved with the petitioning, commitment, or discharge process;

- Requiring a plan for educating the public on civil commitment, civil commitment alternative facilities, provisional discharge conditions, and risk of re-offense data, among other things, and requiring funding for such education; and

- Appointing a Special Master to monitor compliance with all of the remedies.[12]

The Court is hopeful that the stakeholders will fashion suitable remedies so that the Court need not consider closing the MSOP facilities or releasing a number of individuals from the MSOP with or without conditions. As the Court has stated in a number of previous orders[13] and will now say one last time, the time is now for all of the stakeholders in the criminal justice system and civil commitment system to come together and develop policies and pass laws that will not only protect the public safety and address

[12] As the Court noted in its February 20, 2014 Order, at least one court has taken strong remedial action against a state's sex offender program and has required court monitoring over a thirteen-year time period. (*See* Doc. No. 427 (citing *Turay v. Richards*, No. C91-0664RSM, 2007 WL 983132, at *5 (W.D. Wa. Mar. 23, 2007)).)

[13] (*See, e.g.*, Doc. No. 427 ("February 20, 2014 Order") at 68; Doc. No. 828 ("February 2, 2015 Order") at 42.)

the fears and concerns of all citizens, but will preserve the constitutional rights of the Class Members.

ORDER

Based upon not only the findings and conclusions of this Court, but also the entire record of this case, the Court hereby enters the following:

1. Plaintiffs' request for declaratory relief with respect to Counts I and II of their Third Amended Complaint (Doc. No. [635]) is **GRANTED**.

2. The parties shall participate in a Remedies Phase pre-hearing conference on **August 10, 2015,** at **9:00 a.m.,** to discuss the relief that they find appropriate with respect to both Counts I and II, in light of the above requirements and recommendations. In addition to counsel for the parties, the Court urges the following individuals to be present and participate in the pre-hearing conference: Governor Mark B. Dayton; Representative Kurt L. Daudt (Speaker of the House); Senator Thomas M. Bakk (Majority Leader of the Senate); Attorney General Lori Swanson; Commissioner Lucinda E. Jesson; Deputy Commissioner Anne M. Barry; Robin Vue Benson (DHS attorney); Jannine Hébert; Nancy Johnston; former Chief Justice Eric J. Magnuson (Chair of the Task Force); former Chief Judge James M. Rosenbaum (Vice Chair of the Task Force); the Honorable Joanne M. Smith (Task Force Member); Minnesota Commissioner of Corrections Tom Roy (Task Force Member); Eric S. Janus (Dean of William Mitchell College of Law and Task Force Member); Kelly Lyn Mitchell (Executive Director of the Sentencing Guidelines Commission and Task Force Member); Mark A. Ostrem (Olmstead County Attorney and Task Force Member); Ryan B. Magnus (defense attorney

and Task Force Member); John Kirwin (Assistant Hennepin County Attorney); and Donna Dunn (Executive Director of the Minnesota Coalition Against Sexual Assault and Task Force Member).[14] The conference will be presided over by the undersigned, along with United States Magistrate Judge Jeffrey J. Keyes. The conference will take place in the 7th Floor Conference Room, Warren E. Burger Federal Building and United States Courthouse, 316 North Robert Street, St. Paul, Minnesota.

3. Counts VIII, IX, and X, will be tried in the second phase of trial ("Phase Two"). Phase Two will be addressed at the Remedies Phase pre-hearing conference on August 10, 2015.

4. Counts IV, XI, XII, and XIII will be addressed under separate Order.

Dated: June 15, 2015

s/Donovan W. Frank
DONOVAN W. FRANK
United States District Judge

[14] Although the Court acknowledges that it cannot compel non-parties to attend the conference, the Court invites select non-parties to the conference to fashion suitable remedies to be presented to the Court.

United States Court of Appeals
For the Eighth Circuit

No. 15-3485

Kevin Scott Karsjens; David Leroy Gamble; 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 - Appellees

v.

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

Defendants - Appellants

Minnesota House of Representatives

Amicus on Behalf of Appellant(s)

Eric Steven Janus; American Civil Liberties Union of Minnesota

Amici on Behalf of Appellee(s)

Appeal from United States District Court
for the District of Minnesota - Minneapolis

Submitted: April 12, 2016
Filed: January 3, 2017

Before MURPHY, COLLOTON, and SHEPHERD, Circuit Judges.

SHEPHERD, Circuit Judge.

Class plaintiffs, civilly committed sex offenders, bring a facial and as applied challenge under 42 U.S.C. § 1983, claiming their substantive due process rights have been violated by Minnesota's Civil Commitment and Treatment Act and by the actions and practices of the managers of the Minnesota Sex Offender Program (MSOP). The Minnesota state defendants in this action are managers of MSOP—Emily Johnson Piper, Commissioner of the Minnesota Department of Human Services; Kevin Moser, MSOP Facilities Director at Moose Lake; Peter Puffer, MSOP Clinical Director; Nancy Johnston, MSOP Executive Director; Jannine Herbert, MSOP Executive Clinical Director; and Ann Zimmerman, MSOP Security Director (collectively "state defendants"). After several months of litigation, including a six-week bench trial, the district court found for plaintiffs and entered an expansive injunctive order. The district court applied incorrect standards of scrutiny when considering plaintiffs' claims, thus we reverse the finding of substantive due process violations and vacate the injunctive relief order. We remand to the district court for further proceedings to address the remaining claims.

I.

A. Minnesota Statutory Structure

In 1994, the Minnesota legislature enacted the Minnesota Civil Commitment and Treatment Act: Sexually Dangerous Persons and Sexual Psychopathic

Personalities (MCTA). MCTA is now codified at Minnesota Statute § 253D. Under the MCTA, a county attorney in Minnesota may petition a state district court to civilly commit a sexually dangerous person[1] or a person with a sexual psychopathic personality[2] to a secure treatment facility. Minn. Stat. Ann. § 253D.07(1)-(2). If the county attorney demonstrates by clear and convincing evidence that a person is a sexually dangerous person or has a sexual psychopathic personality, "the court shall order commitment for an indeterminate period of time and the committed person shall be transferred, provisionally discharged, or discharged, only as provided in this chapter." Minn. Stat. Ann. § 253D.07(3)-(4). A person subject to commitment under MCTA is entitled to be represented by counsel, and if the person does not provide counsel for himself, the court appoints a qualified attorney to represent the person. Minn. Stat. Ann. § 253D.20.

Once committed under MCTA, a committed person or the executive director of the Minnesota Sex Offender Program may petition for a reduction in custody, which includes "transfer out of a secure treatment facility,[3] a provisional discharge,[4]

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[1]MCTA defines "sexually dangerous person" as "a person who: (1) has engaged in a course of harmful sexual conduct . . . ; (2) has manifested a sexual, personality, or other mental disorder or dysfunction; and (3) as a result, is likely to engage in acts of harmful sexual conduct . . . ." Minn. Stat. Ann. § 253D.02(16).

[2]MCTA defines "sexual psychopathic personality" as "the existence in any person of such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of personal acts, or a combination of any of these conditions, which render the person irresponsible for personal conduct with respect to sexual matters, if the person has evidenced, by a habitual course of misconduct in sexual matters, an utter lack of power to control the person's sexual impulses and, as a result, is dangerous to other persons." Minn. Stat. Ann. § 253D.02(15).

[3]"The following factors must be considered in determining whether a transfer [out of a secure treatment facility] is appropriate: (1) the person's clinical progress and present treatment needs; (2) the need for security to accomplish continuing

or a discharge from commitment.[5]" Minn. Stat. Ann. § 253D.27. The petition is "filed with and considered by a panel of the special review board." Id. These panels consist of "members experienced in the field of mental illness," including at least one "psychiatrist or a doctoral level psychologist with forensic experience" and one attorney. Minn. Stat. Ann. § 253B.18(4c). The special review board must hold a hearing and "issue a report with written findings of fact and shall recommend denial or approval of the petition to the judicial appeal panel.[6]" Minn. Stat. Ann. § 253D.27(3), (4). An appeal of the recommendation of the special review board may be made by the committed person, the county attorney, or the commissioner of the Department of Human Services (DHS) to the judicial appeal panel. Minn. Stat. Ann. § 253D.28. At a hearing, the judicial appeal panel receives evidence and makes a de

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treatment; (3) the need for continued institutionalization; (4) which facility can best meet the person's needs; and (5) whether transfer can be accomplished with a reasonable degree of safety for the public." Minn. Stat. Ann. § 253D.29(1).

[4]"The following factors are to be considered in determining whether a provisional discharge shall be granted: (1) whether the committed person's course of treatment and present mental status indicate there is no longer a need for treatment and supervision in the committed person's current treatment setting; and (2) whether the conditions of the provisional discharge plan will provide a reasonable degree of protection to the public and will enable the committed person to adjust successfully to the community." Minn. Stat. Ann. § 253D.30(1).

[5]"A person who is committed as a sexually dangerous person or a person with a sexual psychopathic personality shall not be discharged unless it appears to the satisfaction of the judicial appeal panel, after a hearing and recommendation by a majority of the special review board, that the committed person is capable of making an acceptable adjustment to open society, is no longer dangerous to the public, and is no longer in need of inpatient treatment and supervision." Minn. Stat. Ann. § 253D.31.

[6]"The Supreme Court shall establish an appeal panel composed of three judges and four alternate judges appointed from among the acting judges of the state." Minn. Stat. Ann. § 253B.19(1).

novo consideration of the recommendation of the special review board. Id. Appeals of the decision of the judicial appeal panel may be made to the Minnesota Court of Appeals. Id.; Minn. Stat. Ann. § 253B.19(5).

"A committed person may not petition the special review board any sooner than six months following either" the entry of the initial commitment order by the district court or appeal therefrom or resolution of a prior petition including exhaustion of any appeal rights. Minn. Stat. Ann. § 253D.27(2). The MSOP executive director may, however, petition for reduction in custody at any time. Id.

B. Minnesota Sex Offender Program (MSOP)

The State of Minnesota established, under the vested authority of the Commissioner of DHS, the MSOP. Under law, MSOP is to "provide specialized sex offender assessment, diagnosis, care, treatment, supervision, and other services to civilly committed sex offenders . . . [which] may include specialized programs at secure treatment facilities . . . , consultative services, aftercare services, community-based services and programs, transition services, or other services consistent with the mission of the Department of Human Services." Minn. Stat. Ann. § 246B.02. MSOP maintains three main facilities to treat persons committed under MCTA. The largest facility is a secure facility located in Moose Lake, Minnesota, and it houses persons who are in the earliest stages of treatment. The second, secure facility is located in St. Peter, Minnesota, and it houses inmates who have progressed beyond the initial phase of treatment. A third facility known as Community Preparation Services (CPS) is located outside the secure perimeter in St. Peter. CPS is designed for persons in the final stages of treatment who are preparing for reintegration into the community.

Beginning in 2008, MSOP adopted a three-phase treatment program. Phase I focuses on rule compliance, emotional regulation, and treatment engagement, but

individuals do not receive any specific sex offense therapy. In Phase II, MSOP provides therapy that focuses on identifying and addressing patterns of sexually abusive behaviors. MSOP emphasizes discussion and exploration of the committed individual's history of sexually offensive behaviors along with the motivations of those behaviors. When a committed person reaches Phase III, MSOP builds on the skills learned in Phase II and focuses on reintegration into the community. Advancement through the phases is based on a Goal Matrix where the individual's treatment process is scored using various factors. Although the MSOP Treatment Manual states that a committed person could be initially assigned to any phase of the program, no MSOP official could recall a person being assigned to anything but Phase I at the Moose Lake facility.

The district court found that since its inception in 1994, MSOP has accepted approximately 714 committed individuals, but no committed individual has been fully discharged from MSOP and only three people have been provisionally discharged from the program. The committed individuals represent about 4% of Minnesota's registered sex offenders. Minnesota officials project that the number of civilly committed sex offenders will grow to 1,215 by 2022. Minnesota has the highest per-capita population of civilly committed sex offenders in the nation.

C. Claims

In December 2011, plaintiffs filed a pro se suit, pursuant to 42 U.S.C. § 1983, challenging the conditions of their confinement and certain MSOP policies and practices. The focus of the initial complaint concerned housing conditions, property possession, searches, visitation rights, disciplinary procedures, vendor choices, vocational training, and access to electronic devices. The complaint also claimed that MSOP did not provide constitutionally adequate treatment and thus violated plaintiffs' due process rights. After obtaining counsel in January 2012, plaintiffs filed a First Amended Complaint raising generally the same claims as in the original

complaint and seeking class certification. The district court granted class certification.

As litigation progressed, including discovery, the district court, in an effort to reach a settlement agreement, ordered the DHS commissioner to create a fifteen-member "Sex Offender Civil Commitment Advisory Task Force" to "examine and provide recommended legislative proposals to the Commissioner on the following topics:

A. The civil commitment and referral process for sex offenders;

B. Sex offender civil commitment options that are less restrictive than placement in a secure treatment facility; and

C. The standards and processes for the reduction in custody for civilly committed sex offenders."

The court later ordered the creation of a MSOP Program Evaluation Team to evaluate the class plaintiffs' treatment placement and phase progression.

In August 2013, plaintiffs moved for a declaratory judgment finding the MCTA unconstitutional on its face and as applied to plaintiffs. The plaintiffs argued that the statute is unconstitutional on its face because the statutory discharge standards are more difficult to overcome than the initial statutory commitment standards. For a person to be committed, the state has to show the person is a sexually dangerous person or a person with a sexual psychopathic personality and that the person is highly likely to reoffend. However, discharge under MCTA requires a showing that the person is "no longer dangerous." In comparison to the commitment criteria, the plaintiffs argued the discharge standard is more stringent. The plaintiffs also claimed the statute is unconstitutional as applied because no person committed has ever been fully discharged from MSOP and because there is no automatic, independent, periodic review of an individual's need for continuing commitment. In February 2014, the court denied plaintiffs' motion for declaratory judgment and issued detailed

instructions to the four Rule 706 experts it had appointed to assist the court in understanding the complexities of the case.[7]

D. Bench Trial

The district court proposed hearing the matter in a bench trial. The state defendants objected, arguing that they had preserved the right to a jury trial. In response, plaintiffs moved to again amend their complaint to clarify their allegations and to remove any damages claim from the complaint. The magistrate judge granted the motion to file the Third Amended Complaint that clearly set forth facial and as applied claims based on due process violations and removed any damages claim. Because there were no longer damages claims and plaintiffs were only seeking injunctive relief, the district court ordered that the case be submitted at a bench trial.

Phase I of the bench trial occurred from February 9, 2015 to March 18, 2015. During the six-week trial, the district court heard testimony from all four Rule 706 experts, several named plaintiffs, and MSOP employees and staff. Following the trial, the district court entered a broad order finding MCTA unconstitutional facially and as applied. 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." Specifically, the district court concluded:

> section 253D is facially unconstitutional for the following six reasons: (1) section 253D indisputably fails to require periodic risk assessments

[7]Federal Rules of Evidence permit district courts to appoint independent experts to assist the court understand complex and difficult issues. Fed. R. Evid. 706 (court may "[o]n a party's motion or on its own" appoint an expert to serve on behalf of the court).

> and, as a result, authorizes prolonged commitment even after committed individuals no longer pose a danger to the public and need further inpatient treatment and supervision for a sexual disorder; (2) section 253D contains no judicial bypass mechanism and, as such, there is no way for Plaintiffs to timely and reasonably access the judicial process outside of the statutory discharge process to challenge their ongoing commitment; (3) section 253D renders discharge from the MSOP more onerous than admission to it because the statutory discharge criteria is more stringent than the statutory commitment criteria; (4) section 253D authorizes the burden to petition for a reduction in custody to impermissibly shift from the state to committed individuals; (5) section 253D contemplates that less restrictive alternatives are available and requires that committed individuals show by clear and convincing evidence that a less restrictive alternative is appropriate, when there are no less restrictive alternatives available; and (6) section 253D does not require the state to take an affirmative action, such as petition for a reduction in custody, on behalf of individuals who no longer satisfy the criteria for continued commitment.

The district court also determined MCTA was unconstitutional as applied for six reasons:

> (1) Defendants do not conduct periodic independent risk assessments or otherwise evaluate whether an individual continues to meet the initial commitment criteria or the discharge criteria if an individual does not file a petition; (2) those risk assessments that have been performed have not all been performed in a constitutional manner; (3) individuals have remained confined at the MSOP even though they have completed treatment or sufficiently reduced their risk; (4) discharge procedures are not working properly at the MSOP; (5) although section 253D expressly allows the referral of committed individuals to less restrictive alternatives, this is not occurring in practice because there are insufficient less restrictive alternatives available for transfer and no less restrictive alternatives available for initial commitment; and (6) although treatment has been made available, the treatment program's structure has

been an institutional failure and there is no meaningful relationship between the treatment program and an end to indefinite detention.

In reaching its conclusions as to both Counts 1 and 2, the facial and as-applied challenges, the district court applied "strict scrutiny, placing the burden on the state to show that the law is narrowly tailored to serve a compelling state interest" because "Plaintiffs' fundamental right to live free of physical restraint is constrained by the curtailment of their liberty." The court noted it would address the remaining claims in the Third Amended Complaint in a second phase of the trial and in a separate order.

E. Injunctive Relief

In a subsequent order, the district court directed MSOP to "conduct independent risk and phase placement reevaluation of all current patients at MSOP." The court provided detailed directions as to how and when the reviews were to be conducted, including identifying certain individuals to be evaluated first, and directed MSOP officials to file petitions for reduction in custody for all persons found eligible for such relief through the reevaluation. Defendants' compliance with the court's directives are to be monitored by a special master who has "authority to monitor compliance with the remedies" and "authority to implement and enforce the injunctive relief imposed by the Court and to mediate any dispute between the parties with regard to the implementation of the remedies." The order further noted that the court "contemplates" entering "further specific relief against Defendants" in subsequent orders, foreseeing directions as to MSOP's treatment structure and discharge process, training for MSOP employees, periodic evaluation of MSOP by external experts, and the development of a statewide public education campaign.

II.

The state defendants appeal the district court's entry of declaratory judgment and the district court's grant of injunctive relief. First, they allege structural due

process error based on the district judge's bias against them. Second, the state defendants argue three jurisdictional defects. Lastly, the state defendants dispute the district court's determinations on the merits, focusing specifically on whether the district court applied the proper standards of scrutiny to the plaintiffs' due process claims. All issues raised by the state defendants concern questions of law, which we review de novo. See Highmark Inc. v. Allcare Health Mgmt. Sys., Inc., 134 S. Ct. 1744, 1748 (2014) (recognizing that questions of law are reviewed under de novo standard of review).

A. Judicial Bias

The state defendants claim that the district court pre-judged the case against them, violating their due process rights to a neutral decisionmaker. In support of this argument, state defendants first point to various comments made by the district court that are critical of MSOP and remarks suggesting that state officials should make drastic changes to the program. For instance, in one order, the district court concluded with the statement, "The program's systemic problems will only worsen as hundreds of additional detainees are driven into MSOP over the next few years. The politicians of this great State must now ask themselves if they will act to revise a system that is clearly broken, or stand idly by and do nothing, simply awaiting Court intervention." (Doc. 427 at 69 (footnote omitted).) Just prior to the bench trial, the court denied the state defendants' motion to dismiss the Third Amended Complaint and for summary judgment. In that order, it stated, again in conclusion, "It is difficult for the Court to understand why the parties have not resolved this case in a manner that would address clients' concerns, serve the public interest, promote public safety, and serve the interests of justice for all concerned. Justice requires no less." (Doc. 828 at 43.)

Second, the state defendants argue that the Rule 706 experts were improperly used by the court to aid the plaintiffs in preparing and presenting their case.

Although not appealing the court's appointment of the Rule 706 experts, the state defendants argue that the court used those experts to prosecute the plaintiffs' case and this demonstrates that the court had assumed the mantle of an advocate.

Third, the state defendants note that the Third Amended Complaint was filed almost three years after the commencement of the case and matched the court's September 9, 2014 order as to the issues the court wished to address in the bench trial. Again, the state defendants are not challenging the district court's order allowing the plaintiffs to file the Third Amended complaint; rather, the state defendants argue that it was improper for the court to counsel the plaintiffs on the claims it should present to the court. This Third Amended Complaint also had the effect of forcing a bench trial as the three previous versions of the complaint contained damages claims but the Third Amended Complaint only sought equitable relief.

Finally, the state defendants argue that the district court ordered the creation of a task force to provide legislative proposals for settlement purposes. The state defendants claim that the district court's order providing for the creation of the task force provided that the report prepared by the task force would not be admissible at trial, but the court admitted the report at the bench trial and then considered and relied upon the report in deciding the case. The state defendants also claim the district court influenced who would be appointed to that task force. This process, the state defendants claim, also demonstrates improper judicial advocacy.

The state defendants argue the result of these various district court actions was obviously biased fact-finding by the court. According to the state defendants, the court assumed the role of an advocate instead of a neutral magistrate. Based on this alleged bias, the state defendants request that this court overturn the decisions of the district court as the bias constitutes a structural error requiring "automatic reversal."

Parties to litigation are "entitled to due process, the essence of which is a fair trial before a tribunal free from bias or prejudice." Gardiner v. A.H. Robins Co., 747 F.2d 1180, 1191 (8th Cir. 1984) (citing In re Murchison, 349 U.S. 133, 136-37 (1955)). "Ordinarily, when unfair judicial procedures result in a denial of due process, this court could simply find error, reverse and remand the matter." Reserve Mining Co. v. Lord, 529 F.2d 181, 185 (8th Cir. 1976). In those cases where the court has found a biased or prejudiced district judge resulted in a due process violation, the evidence of bias was overwhelming. For instance, in Gardiner, the district judge "stated that he believed the truth of plaintiffs' allegations, adding that he had become an advocate for plaintiffs and that he was, in fact, prejudiced." 747 F.2d at 1192.

In this matter, the state defendants point to a handful of remarks made over the course of months of litigation. These comments do give some cause for concern; if they are not premature remarks on the merits of the litigation, then they could in some instances be construed as policy pronouncements that risk straying beyond the judicial role. We are not convinced, however, that the actions and statements complained of, individually or collectively, establish that the district court was biased. Instead, the decisions of the district court in appointing the Rule 706 experts, allowing for a late amendment to the complaint, and appointing the task force were arguably done in an effort to streamline the complicated case and attempt to reach an amicable settlement between the parties.[8] Further, unlike cases such as Gardiner, where one party was not allowed to present their case to the court, the district court did not prevent the state defendants from presenting their case to the district court in a six-week bench trial, and the district court gave due consideration to all arguments. In further proceedings, moreover, we are confident that the district court will be sensitive to avoiding even the appearance of bias or prejudgment of the merits.

[8]Neither the class plaintiffs nor the state defendants objected to the creation of the Task Force.

B. Jurisdiction

The state defendants raise three challenges to the jurisdiction of the district court in this matter. First, the state defendants argue the plaintiffs lacked standing to challenge MCTA. The state defendants argue the latest version of the complaint alleges violations of the plaintiffs' liberty interests, but the plaintiffs have not identified a named plaintiff or a member of the class who would be entitled to discharge if reevaluated. Instead, the plaintiffs merely speculate that some of them or some of the members of the class would be subject to discharge upon completion of a risk assessment. According to the state defendants, because the alleged harm is speculative, the plaintiffs have not shown an actual deprivation of their liberty, and thus they lack standing to bring this action.

We reject this argument. "Article III establishes three elements as a constitutional minimum for a party to have standing: (1) 'an injury in fact,' meaning 'the actual or imminent invasion of a concrete and particularized legal interest'; (2) a causal connection between the alleged injury and the challenged action of the defendant; and (3) a likelihood that the injury will be redressed by a favorable decision of the court." Sierra Club v. U.S. Army Corps of Eng'rs, 645 F.3d 978, 985-86 (8th Cir. 2011) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). "This means that, throughout the litigation, the plaintiff 'must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.'" Spencer v. Kemna, 523 U.S. 1, 7 (1998) (quoting Lewis v. Cont'l Bank Corp., 494 U.S. 472, 477 (1990)). Here, we agree with the class plaintiffs that they have standing because their claim is not that they are all entitled to release but rather that their constitutional rights are being violated because MCTA and MSOP's implementation of MCTA violates the due process clause. The class plaintiffs are seeking certain procedural protections such as periodic reviews of their confinement and placement in appropriate facilities. All plaintiffs are committed under MCTA and detained in MSOP. Thus, if their

allegations are true, the plaintiffs have suffered a concrete injury caused by the challenged action that could be redressed by appropriate injunctive relief.

Next, the state defendants argue that this action is barred under Heck v. Humphrey, 512 U.S. 477 (1994), and Preiser v. Rodriguez, 411 U.S. 475 (1973), because it is an attempt to use 42 U.S.C. § 1983 to challenge the fact or duration of their confinement and such claims can be brought only in a habeas petition under 28 U.S.C. § 2254. "[A] state prisoner's claim for damages is not cognizable under 42 U.S.C. § 1983 if 'a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence,' unless the prisoner can demonstrate that the conviction or sentence has previously been invalidated." Edwards v. Balisok, 520 U.S. 641, 643 (1997) (quoting Heck, 512 U.S. at 487). This action, however, would not necessarily imply the invalidity of any of the plaintiffs' commitment. See Huftile v. Miccio-Fonseca, 410 F.3d 1136, 1140 (9th Cir. 2005) (noting Heck applies to civilly committed persons as well as prisoners). They do not allege that their initial commitment was invalid. Nor is it alleged that any specific class members should be immediately released. Instead, the plaintiffs claim that they should receive relief including regular, periodic assessment reviews to determine if they continue to meet the standards for civil commitment. It is conceivable that upon receiving an assessment none of the plaintiffs would be eligible for release, despite the district court's finding otherwise. Because the injunctive relief sought would not necessarily imply the invalidity of the plaintiffs' commitment, this action is not barred under Heck or Preiser.

Finally, the state defendants challenge the subject matter jurisdiction of the federal courts under the Rooker-Feldman doctrine. The defendants claim plaintiffs are seeking through this action to reverse "hundreds" of state-court judgments that have held MCTA to be constitutional when raised by individual defendants challenging the application of MCTA to them. "The Rooker-Feldman doctrine is narrow; it applies only to 'cases brought by state-court losers complaining of injuries

caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.'" Edwards v. City of Jonesboro, 645 F.3d 1014, 1018 (8th Cir. 2011) (quoting Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284 (2005)). "The doctrine thus occupies a 'narrow ground' and does not 'stop a district court from exercising subject-matter jurisdiction simply because a party attempts to litigate in federal court a matter previously litigated in state court.'" Banks v. Slay, 789 F.3d 919, 922 (8th Cir. 2015) (quoting Exxon Mobil Corp., 544 U.S. at 284, 293). As previously discussed, the class plaintiffs are not seeking review and rejection of state court judgments nor are the plaintiffs claiming to have suffered harm because of prior state court judgments which have held MCTA constitutional. Through this action, plaintiffs are seeking prospective injunctive relief based on a theory that the MCTA violates their fundamental liberty rights. Therefore the narrow Rooker-Feldman bar does not apply to this action.

C. Standards of Scrutiny

The district court held that, because the committed individuals have a fundamental right to liberty, strict scrutiny was the proper standard of scrutiny to apply to plaintiffs' facial and as-applied due process claims. The district court therefore determined MCTA had to be narrowly tailored to achieve a compelling governmental purpose and that it failed to meet this narrow tailoring both facially and as applied. We disagree with application of the strict scrutiny standard.

i. Facial Due Process

The United States Constitution guarantees that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "The Supreme Court has not expressly identified the proper level of scrutiny to apply when reviewing constitutional challenges to civil commitment

statutes." United States v. Timms, 664 F.3d 436, 445 (4th Cir.), cert. denied, 133 S. Ct. 189 (2012). However, to date, the strict scrutiny standard applied by the district court is reserved for claims of infringements on "fundamental" liberty interests upon which the government may not infringe "unless the infringement is narrowly tailored to serve a compelling state interest." Reno v. Flores, 507 U.S. 292, 302 (1993). According to the Supreme Court, "fundamental rights and liberties" are those "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (internal citations and quotation marks omitted).

Although the Supreme Court has characterized civil commitment as a "significant deprivation of liberty," Addington v. Texas, 441 U.S. 418, 425 (1979), it has never declared that persons who pose a significant danger to themselves or others possess a fundamental liberty interest in freedom from physical restraint. See Foucha v. Louisiana, 504 U.S. 71, 116 (1992) (Thomas, J., dissenting) (criticizing the majority's analysis of a due process challenge to a civil commitment statute because, "[f]irst, the Court never explains whether we are dealing here with a fundamental right, and . . . [s]econd, the Court never discloses what standard of review applies"). Rather, when considering the constitutionality of Kansas's Sexually Violent Predator Act, the Court stated "[a]lthough freedom from physical restraint 'has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action,' that liberty interest is not absolute." Kansas v. Hendricks, 521 U.S. 346, 356 (1997) (quoting Foucha, 504 U.S. at 80). The Court noted that many states provide for the involuntary civil commitment of people who are unable to control their behavior and pose a threat to public health and safety, and "[i]t thus cannot be said that the involuntary civil confinement of a limited subclass of dangerous persons is contrary to our understanding of ordered liberty." Id. at 357 (citing Addington, 441 U.S. at 426). When considering the due process implications of a civil commitment case, the Supreme Court stated "[a]t the least, due process

requires that the nature and duration of commitment bear some *reasonable relation* to the purpose for which the individual is committed." Jackson v. Indiana, 406 U.S. 715, 738 (1972) (emphasis added).

Accordingly, the proper standard of scrutiny to be applied to plaintiffs' facial due process challenge is whether MCTA bears a rational relationship to a legitimate government purpose. See id.

ii. As-Applied Due Process

When it considered the proper standard to apply, the district court stated substantive due process protected against two types of government action: action that shocks the conscience or action that interferes with rights implicit in the concept of ordered liberty. The district court then proceeded to discuss how the state defendants' actions interfered with the class plaintiffs' liberty interests to be free from restraint and thus was subject to a strict scrutiny analysis. The district court applied the improper standard to consider an as-applied challenge when it determined there were two types of government action that could violate the class plaintiffs' substantive due process rights.

Following the Supreme Court's decision in County of Sacramento v. Lewis, 523 U.S. 833 (1998), this court held to prevail on an as-applied due process claim, that the state defendants' actions violated the plaintiffs' substantive due process rights, the plaintiffs "must demonstrate *both* that the [state defendants'] conduct was conscience-shocking, *and* that the [state defendants] violated one or more fundamental rights that are 'deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.'" Moran v. Clarke, 296 F.3d 638, 651 (8th Cir. 2002) (en banc) (Bye, J., concurring and writing for a majority on this issue) (emphasis in original) (quoting Glucksberg, 521 U.S. at 720-21 (1997)). The district court, citing

to a pre-Lewis decision of United States v. Salerno, 481 U.S. 739, 746 (1987), used the former disjunctive standard and focused only on whether there was a fundamental right at issue, and having determined that there was a fundamental right at issue, the district court applied a strict scrutiny test to both the facial and as-applied challenges.

As indicated above, however, the court should determine both whether the state defendants' actions were conscience-shocking and if those actions violated a fundamental liberty interest. To determine if the actions were conscience-shocking, the district court should consider whether the state defendants' actions were "egregious or outrageous." See Montin v. Gibson, 718 F.3d 752, 755 (8th Cir. 2013) (quoting Burton v. Richmond, 370 F.3d 723, 729 (8th Cir. 2004)). To meet this high standard, we have explained that the alleged substantive due process violations must involve conduct "so severe . . . so disproportionate to the need presented, and . . . so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience." Moran, 296 F.3d at 647 (quoting In re Scott Cnty. Master Docket, 672 F. Supp. 1152, 1166 (D. Minn. 1987)). Accordingly, the district court applied an incorrect standard in considering the class plaintiffs' as-applied substantive due process claims.

D. Substantive Due Process

i. Facial Challenge

The district court announced six grounds upon which MCTA was facially unconstitutional under the strict scrutiny standard—(1) MCTA did not require periodic risk assessments of all committed persons, (2) MCTA did not provide for a judicial bypass mechanism, (3) MCTA rendered discharge from MSOP more onerous than admission because discharge criteria was more stringent than admission criteria, (4) MCTA impermissibly shifted the burden to petition for a reduction in custody to

the committed person, (5) MCTA did not provide less restrictive alternatives although the statute indicated such would be available, and (6) MCTA did not require state officials to petition for a reduction in custody on behalf of committed individuals who might qualify for a reduction. As we held above, the appropriate standard is whether MCTA bears a reasonable relationship to a legitimate government purpose. To prevail in a facial challenge, the class plaintiffs bear the burden of "establish[ing] that no set of circumstances exists under which [MCTA] would be valid." See United States v. Salerno, 481 U.S. 739, 745 (1987). None of the six reasons the district court found MCTA facially unconstitutional under the strict scrutiny review survives the reasonable relationship review.

Reasonable relationship review is highly deferential to the legislature. No one can reasonably dispute that Minnesota has a real, legitimate interest in protecting its citizens from harm caused by sexually dangerous persons or persons who have a sexual psychopathic personality. See Addington, 441 U.S. at 426 ("[T]he state . . . has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill."). The question then is whether MCTA is reasonably related to this interest. The burden to prove the statute is not rationally related to a legitimate government interest is borne by the class plaintiffs, whereas the burden to show that a statute is narrowly tailored to serve a compelling government interest is borne by the state. See FCC v. Beach Comm'ns, Inc., 508 U.S. 307, 314-15 (1993) ("On rational-basis review, . . . those attacking the rationality of the legislative classification have the burden 'to negate every conceivable basis which might support it.'" (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)); Republican Party of Minn. v. White, 416 F.3d 738, 749 (8th Cir. 2005) ("The strict scrutiny test requires the state to show that the law that burdens the protected right advances a compelling state interest and is narrowly tailored to serve that interest." (citations omitted)).

The Minnesota Supreme Court has had opportunity to consider whether the then-applicable Minnesota commitment statute violated due process. In In re Blodgett, 510 N.W.2d 910, 916 (Minn. 1994), that court held, "[s]o long as civil commitment is programmed to provide treatment and periodic review, due process is provided. Minnesota's commitment system provides for periodic review and reevaluation of the need for continued confinement." The next year, the Minnesota Supreme Court heard Call v. Gomez, 535 N.W.2d 312 (Minn. 1995), and considered a due process challenge to MCTA. Referring back to Blodgett, the court held, "once a person is committed, his or her due process rights are protected through procedural safeguards that include periodic review and re-evaluation, the opportunity to petition for transfer to an open hospital, the opportunity to petition for full discharge, and the right to competent medical care and treatment." Id. at 318-19.

MCTA is facially constitutional because it is rationally related to Minnesota's legitimate interests. The district court expressed concerns about the lack of periodic risk assessments, the availability of less restrictive alternatives, and the processes for seeking a custody reduction or a release. MCTA provides "proper procedures and evidentiary standards" for a committed person to petition for a reduction in his custody or his release from confinement. See Hendricks, 521 U.S. at 357. Any committed person can file a petition for reduction in custody. Minn. Stat. Ann. § 253D.27(2). The petition is considered by a special review board consisting of experts in mental illness and at least one attorney. Minn. Stat. Ann. § 253B.18(4c)(a). That panel conducts a hearing and issues a report with recommendations to a judicial appeal panel consisting of Minnesota district judges appointed to the judicial appeal panel by the Chief Justice of the Supreme Court. Minn. Stat. Ann. §§ 253D.27(3)-(4), 253B.19(1). Through this process, the committed person "has the right to be represented by counsel" and the court "shall appoint a qualified attorney to represent the committed person if neither the committed person nor other provide counsel." Minn. Stat. Ann. § 253D.20. Appeal of the decision of the special judicial panel may be taken the Minnesota Court of Appeals. Minn. Stat. Ann. §§ 253D.28, 253B.19(5).

Finally, a committed person is entitled to initiate a new petition six months after the prior petition is concluded. Minn. Stat. Ann. § 253D.27(2).

We conclude that this extensive process and the protections to persons committed under MCTA are rationally related to the State's legitimate interest of protecting its citizens from sexually dangerous persons or persons who have a sexual psychopathic personality. Those protections allow committed individuals to petition for a reduction in custody, including release; therefore, the statute is facially constitutional.

ii. As-Applied Challenge

We agree with the state defendants that much of the district court's "as-applied" analysis is not a consideration of the application of MCTA to the class plaintiffs but is a criticism of the statutory scheme itself. For instance, the court found that the statute was unconstitutional as applied to the plaintiffs because the state defendants do not conduct periodic risk assessments. However, the class plaintiffs acknowledge that MCTA does not require periodic risk assessments but those assessments are performed whenever a committed person seeks a reduction in custody. The district court also found as-applied violations in aspects of the treatment received by the committed persons, specifically concluding that the treatment program's structure has been an "institutional failure" and lacks a meaningful relationship between the program and an end to indefinite detention. However, we have previously held that although "the Supreme Court has recognized a substantive due process right to reasonably safe custodial conditions, [it has not recognized] a broader due process right to appropriate or effective or reasonable treatment of the illness or disability that triggered the patient's involuntary confinement." See Strutton v. Meade, 668 F.3d 549, 557 (8th Cir. 2012) (alteration in original) (quoting Elizabeth M. v. Montenez, 458 F.3d 779, 788 (8th Cir. 2006)). Further, as the Supreme Court recognized, the Constitution does not prevent "a State

from civilly detaining those for whom no treatment is available." Hendricks, 521 U.S. at 366. Nevertheless, as discussed previously, to maintain an as-applied due process challenge, the class plaintiffs have the burden of showing the state actors' actions were conscience-shocking and violate a fundamental liberty interest. See Moran, 296 F.3d at 651.

None of the six grounds upon which the district court determined the state defendants violated the class plaintiffs' substantive due process rights in an as-applied context satisfy the conscience-shocking standard. Having 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. Accordingly, we deny the claims of an as-applied due process violation.

III.

Accordingly, we reverse the district court's finding of a constitutional violation and vacate the injunctive order. We remand this matter to the district court for further proceedings on the remaining claims in the Third Amended Complaint.
