professional consensus concerning standards for assessment and treatment. States vary widely with respect to their diagnostic approaches, treatment protocols, and methods for identifying progression in the program (Deming A: Sex offender civil commitment programs: current practices, characteristics, and resident demographics. *J Psychiatry & L* 36: 439–61, 2008). Presumably, this variation results in a corresponding variation in the level of prejudice attributed to a defendant's pretrial detention. Nonetheless, pretrial detention is considered prejudicial, even without the opportunity for treatment or release, as is the case in criminal trials. With critics in many fields, SVP laws will continue to be a hotbed of legal, ethics-related, and pragmatic challenges for the foreseeable future.

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Constitutionality of Involuntary Commitment of Sex Offenders to State Offender Programs

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The Eighth Circuit Court of Appeals Rules that the State's Conduct Must Be "Conscience Shocking" for the Minnesota Civil Commitment and Treatment Act for Sexually Dangerous Persons and Sexual Psychopathic Personalities to Be Unconstitutional

In *Karsjens v. Piper*, 845 F.3d 394 (8th Cir. 2017), the Eight Circuit Court of Appeals agreed with a lower court decision that individuals committed to the Minnesota Sex Offender Program (MSOP) had standing to challenge the constitutionality of the Minnesota Civil Commitment and Treatment Act (MCTA) for Sexually Dangerous Persons and Sexual Psychopathic Personalities Act (then Minn. Stat. § 246B and 253B (2011)). It also concluded the lower court erred in determining that these offenders had a fundamental right to liberty and therefore could rely on the strict scrutiny test (the highest standard of review, used to test the validity of government action in the context of individual constitutional rights) as the standard for judicial review; rather, the court found that this class failed to demonstrate that the MSOP deficits were "egregious, malicious, or sadistic as is necessary to meet the conscience-shocking standard" (*Karsjens*, p 411). The Eighth Circuit also held that the services and protections provided to those committed under the MCTA were rationally related to the state's interest of protecting its citizens.

Facts of the Case

Kevin Scott Karsjens was the lead plaintiff in a class of individuals who were involuntarily enrolled in the MSOP. Mr. Karsjens had a long criminal history dating back to his teens that included convictions for first degree criminal sexual conduct, terroristic threats, kidnapping, felony theft, and fleeing a police officer, among others. Just before his commitment to the MSOP, Mr. Karsjens was sentenced to 41 months' imprisonment after pleading guilty to domestic assault and terroristic threats. His incarceration was extended by 540 days because of his refusal to participate in sex offender treatment. After his incarceration, he was committed to the MSOP in 2008 as a sexually dangerous person because of his likelihood to reoffend, extensive legal history, and prior refusals to participate in treatment. He declined to participate in treatment during his initial 6-month evaluation period at the MSOP and was subsequently ordered for indeterminate commitment to the MSOP.

The class of plaintiffs who joined with Mr. Karsjens had also been convicted of sex crimes, served the entirety of their prison sentences, and, upon release from the Department of Corrections, were committed to the MSOP under the MCTA. They filed suit against the Commissioner of the Minnesota Department of Human Services and other MSOP managers alleging that their right to due process (42 U.S.C. §1983 (2008)) was violated by the managers of the MSOP. Among the concerns raised was that the treatment provided was not consistent with the reason for their commitment; indeed the MSOP did not even employ a full-time psychiatrist to treat its 726 clients. In addition, there were no less restrictive alternatives for treatment or periodic independent risk assessments to determine whether offenders continued to meet criteria for commitment,

and the burden to petition for release was shifted to the committed individuals. Most striking was that, although, in theory, all individuals in the MSOP were to have had the opportunity to work through a three-phase treatment program to progress from maximum to lower security facilities and ultimately the community, in practice this never occurred. The MCTA was passed in 1994, and, by the time this case began, Minnesota had the largest population of committed sex offenders *per capita* in the country, having never fully discharged an individual since the MSOP's inception.

The district court held that those committed to the MSOP did have a fundamental right to liberty and, therefore, the government had to show that it had a compelling interest justifying the law under a strict scrutiny standard of judicial review. It concluded that the MCTA did not withstand constitutional review under this standard. The court ordered that a remedies phase begin to discuss and implement changes to the MSOP to address the court's and plaintiffs' concerns. These hearings ceased with the petition for appeal filed by the state defendants. The Eighth Circuit Court of Appeals heard the case with a three-judge panel.

Ruling and Reasoning

In the ruling, the Eighth Circuit concluded that the district court applied too strict a level of scrutiny to the claims of due process violation and reversed the district court's decision. The Eighth Circuit concluded that the plaintiffs did not have a "fundamental" right to liberty and stated, "the Supreme Court has characterized civil commitment as a significant deprivation of liberty [but] has never declared that persons who pose a significant danger to themselves or others possess a fundamental liberty interest in freedom from physical restraint" (*Karsjens*, p 407). In the absence of this fundamental liberty right, the appropriate level of review therefore was a reasonable relationship test as set forth in *Jackson v. Indiana*, 406 U.S. 715 (1972). Using the reasonable relationship test, the Eighth Circuit found that none of the concerns cited by the lower court survived the review, citing *In re Blodgett*, 510 N.W.2d 910, 916 (Minn. 1994): "so long as civil commitment is programmed to provide treatment and periodic review, due process is provided."

For the plaintiffs to prevail on a due process claim, they had to show that the conduct of the state was "conscience-shocking" and that it violated a fundamental right "deeply rooted in this Nation's history and tradition" (*Karsjens*, p 408, internal quotation marks omitted). The court held that the plaintiffs did not show this and therefore their claim was denied. Finally, it ruled that the "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" (*Karsjens*, p 410). Hence, it reversed the district court's ruling, vacated the injunctive order, and remanded the case to the district court for further proceedings on the remaining claims in the complaint.

Following this appeal, a request for rehearing *en banc* was denied. Also after the decision by the Eighth Circuit, that court issued a stay on the case in its entirety pending further meetings and discussions between the two parties and until the Supreme Court rules on the application for *certiorari*.

Discussion

SVP laws similar to the one in Minnesota currently exist in 20 states, and constitutional challenges have been brought in multiple states. In *Kansas v. Hendricks*, 521 U.S. 346 (1997), the Supreme Court held that the Kansas SVP law was constitutional on its face and as applied. The district court ruling in *Karsjens* at first seemed to create a basis for findings against similarly situated programs in other states. Six months after the ruling by the district court in Minnesota that the MCTA was unconstitutional, a district court in Missouri came to a similar finding in a constitutional challenge of its own SVP law (*Van Orden v. Schafer*, No. 4:09CV00971 AGF (E.D. Mo. 2015)). As in *Karsjens*, the finding in Missouri prompted a remedies phase to address the problems within the Missouri Sex Offenders Rehabilitation and Treatment Services (SORTS) program. In the Missouri challenge, the remedies phase was also halted when the Minnesota appeal began. After the Eighth Circuit's ruling, the Missouri court found, with some apparent reluctance, that the Missouri SVP law is constitutional. In the Missouri opinion written by Judge Fleissig, the court recognizes that the Eighth Circuit's ruling is binding on the court but notes ". . . these holdings raise troubling questions as to whether civil commitment statutes can ever be challenged on as-applied substantive due pro-

cess grounds" (*Orden v. Stringer, 262 F. Supp. 3d 887 (E.D. Mo. 2017)*).

The *Karsjens* case remains in litigation. At the time of this writing, the plaintiffs have filed a petition for *certiorari* with the Supreme Court for review, and briefs from the state, petitioners, and *amicus curiae* have been submitted. The legal point for the Supreme Court's consideration will be the standard of review that should apply to substantive due process claims brought by civilly committed sex offenders. It is unclear whether the Supreme Court will change its stance from *Hendricks* or pursue more zealous protection of sex offenders' rights.

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Unconditional Discharge of a Sexually Violent Person From Civil Commitment

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What Is the Duty of the State to Manage Dangerousness of Persons Released From Sexually Violent Person Civil Commitment After Onset of Dementia and Failure to Benefit From Program?

In *Estate of Gottschalk v. Pomeroy Dev., Inc.,* 893 N.W. 2d 579 (Iowa 2017), the Supreme Court of Iowa affirmed the ruling of the Court of Appeals of Iowa and the judgment of a district court that the state owed no duty to supervise, and thus incurred no liability for, the behavior of a sexually violent person after release from civil commitment as a sexual offender secondary to the onset of dementia and failure to participate in and benefit from the program, despite civil commitment under the mental illness statute to a nursing home.

Facts of the Case

Mr. William Cubbage was a four-time convicted sex offender for sexual misconduct against children. Adjudicated a sexually violent person (SVP) in May 2002 pursuant to Iowa Code § 229A.1 (2002), based on his diagnoses of pedophilia and personality disorder not otherwise specified with antisocial and narcissistic features, he was committed to the state of Iowa's Civil Commitment Unit for Sexual Offenders (CCUSO).

In 2006, Mr. Cubbage was diagnosed with Alzheimer's dementia with a decline in function. In 2010, CCUSO team opined that Mr. Cubbage was no longer benefitting from SVP treatment because he had not participated in treatment since 2005 and he required full-time custody because of serious mental impairment. In an annual report in July 2010, a psychologist at CCUSO determined that Mr. Cubbage no longer met the statutory definition of an SVP and that he did not meet criteria for a transitional release program. Based on this report, the district court deemed Mr. Cubbage a danger to himself and others and civilly committed him to the Pomeroy Care Center pursuant to Iowa Code § 229.13 (2010) in November 2010. The district court also granted Mr. Cubbage's motion for unconditional discharge from the SVP civil commitment pursuant to Iowa Code § 229A.10 (2010). Mr. Cubbage was transferred to the Pomeroy Care Center in December 2010.

Before the transfer, CCUSO staff met with Pomeroy Care Center staff to present Mr. Cubbage's criminal and medical history. CCUSO staff focused on his decline in function and told Pomeroy staff that "it was not likely [he] would be a risk" (*Estate of Gottschalk*, p 583). They discussed monitoring him when children were present. In August 2011, Mr. Cubbage sexually assaulted Mercedes Gottschalk, a resident of the Pomeroy Care Center. An eight-year-old child of a staff member witnessed the assault.

Mrs. Gottschalk (and later, her estate) filed a negligence suit against Pomeroy and the state of Iowa. Pomeroy asserted a cross-claim against the state for negligence and failure to represent Mr. Cubbage's accurate level of risk. The specific claim by the estate was that the state failed to prepare a safety plan for Mr. Cubbage when he was in the Pomeroy Care Center and failed to inspect and monitor the safety of his placement. The claim did not challenge the basis for his release from CCUSO.

In May 2014, the state filed a motion for summary judgment against these claims. In its ruling, the district court granted summary judgment to the state, agreeing that the state owed no duty for monitoring or supervising Mr. Cubbage after he was uncondi-