

Appellate Cases no. A10-1269, A10-1270

STATE OF MINNESOTA

IN SUPREME COURT

In re:

Peter G. Lonergan (A10-1269) and
Robert A. Kunshier (A10-1270),

Appellants.

BRIEF OF APPELLANTS AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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II. STATEMENT OF ISSUE

May a person indeterminately civilly committed as a sexually dangerous person or as a sexual psychopathic personality petition the committing court for relief from the judgment of commitment under Minn. R. Civ. P. 60.02?

The Court of Appeals held in the negative.

Case references:

In re Bowers, 456 N.W.2d 734 (Minn. App. 1990)

Cf. In re Basic Resolution, 772 N.W.2d 488 (Minn. 2009)

Cf. Bode v. Minnesota Dept. of Natural Resources, 612 N.W.2d 862 (Minn. 2000)

Cf. Thunderbird Motel Corporation v. County of Hennepin, 183 N.W.2d 569, 289 Minn. 239 (Minn. 1971)

III. STATEMENT OF THE CASE

A. HISTORY OF CASE

Peter Lonergan and Robert Kunshier are both indeterminately committed to the Minnesota Sex Offender Program (MSOP) facility in Moose Lake, Minnesota. Mr. Lonergan is categorized as a sexually dangerous person (SDP), and Mr. Kunshier as having a sexual psychopathic personality (SPP). Both categories are addressed in uniform fashion by Minn. Stat. § 253B.185. They appeal from denials of their separate motions under Minn. R. Civ. P. 60.02 for relief from their judgments of commitment.

Lonergan

On July 7, 2010,¹ Mr. Lonergan filed a *pro se* motion in Dakota County District Court seeking relief from his judgment of commitment, under Rule 60.02 (App. L 1). He alleged that in his initial commitment proceedings, the trial court was misled “to believe that Lonergan would receive sex offender treatment at an accredited program to correct specific mental illness or severe personality disorder alleged as part of his civil commitment.” (App. L 4-5). He also alleged that in two years of confinement the state had failed to identify any mental illness that would justify his commitment (App. L 6).

The Dakota County Attorney filed no opposition to Mr. Lonergan’s motion.

District Judge Robert Carolan held that various grounds for relief under Rule 60.02 were not present in Mr. Lonergan’s case (App. L 31-32). Mr. Lonergan filed a timely appeal (App. L 33). Writing for the panel, Court of Appeals Judge Natalie Hudson first framed the issue as whether a committed SDP could raise discharge or treatment issues via Rule 60.02 (App. L 38). However the Court ultimately held, with some ambiguity, that Rule 60.02 was unavailable to SDPs (App. L 42). Mr. Lonergan then filed a petition for review with this Court.

¹ The trial court record as to the *Lonergan* dates is difficult to follow. The motion papers contain a July 7 date stamp, which is the same date stamp as the trial court order denying the motion. However, the trial court order recites that “The moving papers were mailed to the court on June 3, 2010 and received by the court June 30, 2010.” App. L 31-32. Oddly, the same order also recites the matter came before the court in some fashion, with no appearances, on June 24. App. L 31. The trial court order was signed on June 30. App. L 32. Apparently all of the Rule 60.02 documents were simultaneously date stamped on July 7.

Kunshier

On December 22, 2009, Mr. Kunshier filed a *pro se* motion in Dakota County District Court seeking relief from his judgment of commitment, under Rule 60.02 (App. K 43). He alleged that his initial commitment violated his constitutional rights; that he was unconstitutionally denied a release from commitment despite completing treatment; and that he was denied effective assistance of counsel at his commitment trial. (App. K 44-45).

Attorney David Jaehne represented Mr. Kunshier in the trial court proceedings, and Mr. Kunshier appeared via closed circuit television at a hearing. In an order entered May 25, 2010, District Judge Patrice Sutherland made six combined findings of fact and conclusions of law and then concluded that Mr. Kunshier's Rule 60.02 motion was untimely and that the rule was "ultimately an improper authority for review." (App. K 75). In an accompanying memorandum, Judge Sutherland noted the availability of review and appeal panel procedures by statute, and that in any event Mr. Kunshier would not succeed under Rule 60.02 criteria (App. K 76-79).

Mr. Jaehne continued to represent Mr. Kunshier on appeal to the Court of Appeals. In a relatively brief opinion authored by Judge Kevin Ross, the court cited its previous *Lonergan* opinion as authority that Rule 60.02 relief was categorically unavailable to Mr. Kunshier, and it affirmed the trial court (App. K 81-84). Mr. Kunshier filed a petition for review with this Court.

B. FACTS

In light of the precise question the Court specified when granting review, few facts beyond the commitments themselves are likely to be relevant to its decision. To the extent that additional facts may be relevant, it is necessary to look to court records, trial court findings, and the allegations of pleadings that were rejected without hearing for failing to state grounds for relief.

As far as the public record is concerned, for the limited purposes of this review the Court may assume that the Court of Appeals correctly stated the criminal and commitment histories that preceded the present motions:

In 1984, appellant Peter Gerard Lonergan pleaded guilty to second-degree criminal sexual conduct in connection with an incident involving the eight-year-old daughter of his sister-in-law. In 1992, he was convicted of first-degree criminal sexual conduct involving the eight-year-old son of appellant's cousin; as a result of that conviction, he was sentenced to 268 months in prison.

In 2006, a petition was filed in Dakota County District Court seeking [Mr. Lonergan]'s commitment as a sexual psychopathic personality (SPP) as defined by Minn. Stat. § 253B.02, subd. 18b (2006), and/or an SDP as defined by Minn. Stat. § 253B.02, subd. 18c (2006). After a five-day hearing, the district court ordered appellant's initial commitment as an SDP to the MSOP at St. Peter and Moose Lake

(App. L 35, 36).

In 1979, Kunshier was incarcerated for two sexually violent kidnappings. One month after he was released in 1986, he tried to kidnap a woman and her infant child at knife point so he could rape the woman. He soon avoided being evaluated in an intensive treatment program at the Minnesota Security Hospital in St. Peter because he escaped, stole a car, and, interrupting his high-speed chase, broke into a house and raped a woman inside. He was convicted of first-degree criminal sexual conduct and faced civil commitment.

In 1993, the district court committed Kunshier as an SPP, and in 1994, his commitment became indeterminate.

(App. K 81).

Applying the usual standards of review, to the extent they may be relevant the Court must accept as true the *Kunshier* trial court findings of fact 2-5 (App. K 74-75). These indicate that in 2003, Mr. Kunshier completed all four phases of the Minnesota Sex Offender Program and began participation in the transitional stage.² However, in 2004 he was removed from the transitional program for violating institutional rules and was returned to treatment. In 2005, he filed an unsuccessful petition seeking full or provisional discharge from commitment. In 2007, the Court of Appeals affirmed the denial of this petition, finding that Mr. Kunshier failed to provide sufficient evidence that he no longer posed a threat to the public and was no longer in need of treatment at a secure facility. The Court of Appeals noted his extensive history of committing violent sexual offenses, his recent rule violations in the transitional and treatment programs, and the fact that his doctors and treatment team did not support his petition for discharge. Thereafter, Mr. Kunshier petitioned for habeas corpus, which was denied in 2009 for lack of a prima facie case.

The trial court summarily denied the *Lonergan* motion without hearing, on purely legal grounds without any findings of fact beyond the previously established record. In effect Mr. Lonergan lost a Rule 12-type issue, having his motion denied for failure to state a basis for relief. Therefore, to the extent that they may be relevant the Court also

² In contrast to Mr. Lonergan's allegations, Mr. Kunshier wishes to emphasize that he *did* receive treatment, and successfully completed it. This occurred under a previous MSOP administration, headed by Dr. Michael Farnsworth. His psychiatrist was Dr. Anita Schlank. Both have since left the MSOP.

should accept as true – again, for review purposes only – the facts alleged in his motion documents. His factual assertions are wide-ranging and some of them may have been (but in this instance were not) rebutted at an evidentiary hearing. His 15 pages of mixed factual and legal arguments may be distilled into the following allegations of fact.

In his 20-month participation in MSOP, Mr. Lonergan has not received any significant sex offender treatment (App. L 4-5). He objects to being charged money for services he is not receiving (App. L 5-6). While he has been in the MSOP he has shown neither a mental illness nor a severe personality disorder (App. L 6). Due to this lack of a diagnosis, he has been discouraged from trying to participate in sex offender programming (*id.*). The MSOP is not accredited, frequently changes its programs, and has no treatment plan for Mr. Lonergan (App. L 8). Its only guidelines are Department of Corrections policies designed for the purposes of punishment (App. L 8-9). Those rules are petty, abusive, and designed to prevent persons from succeeding in treatment (App. L 9-10). The MSOP is not minimally adequate to provide him a reasonable opportunity to be cured of whatever mental condition he may have (App. L 11-13).³ MSOP staff person(s) admit to him that they do not believe he is mentally ill (App. L 13). Mr. Lonergan has not been under direct treatment by a psychiatrist (*id.*) No one has ever been released from the MSOP (App. L 13-14). The MSOP security staff personnel wear

³ Mr. Lonergan also made the legal assertion that Justice Tomljanovich's prediction has been fulfilled, and based on its track record the SDP regime must be held unconstitutional. App. L 12, *citing In re Linehan (Linehan III)*, 557 N.W.2d 171, 200-01 (Minn. 1996), *vacated and remanded*, 522 U.S. 1011 (1997). (Tomljanovich, J., dissenting).

police or military style uniforms reminiscent of prison guards, complete with arm patches and military type insignia (App. L 15). The MSOP director is an ex-prison guard with no qualifications to run a treatment program (App. L 16). Reasonable alternatives to the MSOP exist, including Alpha Human Services in Minneapolis and Path Finders of Saint Paul (App. L 18). Mr. Lonergan would still be under intensive Department of Corrections supervision for more than two years if he were released to such a program (*id.*).

IV. ARGUMENT

A. STANDARD OF REVIEW

This case presents a legal issue, which the Court reviews *de novo*. *Harms v. Oak Meadows*, 619 N.W.2d 201, 202 (Minn. 2000).

B. BACKGROUND

The question of whether Rule 60.02 applies to indeterminate commitments may be resolved by a free-standing technical legal analysis indicating, as detailed in Part C of this Argument, that the rule applies. That analysis begins on page 18, *post*. However, the Court's inundation with several dozen petitions for review on the subject suggests that under the cover of this relatively dry legal analysis, a jurisprudential cauldron is boiling. With deference to the Court's own greater expertise on the subject, this Part B offers an historical perspective on the events leading to this turbulence, and suggests options the

Court has to apply some ancient and time-honored judicial checks and balances to this problem.

The common law roots of civil commitment cases

As far back as the early sixteenth century, in striking parallels both to modern preliminary injunction practice and to Minn. Stat. § 253B.18 subd. 1 and 2, civil commitments were bifurcated into a preliminary phase dealing with the immediate need for confinement, and a trial phase on the question of long term commitment.⁴ The preliminary phase was referred to courts of equity but the ultimate trial phase was a common law proceeding including the jury trial right guaranteed by the Magna Carta whenever personal liberty was at issue. Erlinder at 1270-71. “At common law it was the practice to inquire whether a man was an idiot, or not, by the writ de idiota inquirendo, in which proceeding there was the trial by Jury. The method of proving a man non compos was quite the same. 1 Black. Com. p. 303.” *In re McLaughlin*, 102 A. 439, 439, 87 N.J.Eq. 138 (N.J. Misc. 1917). Because the New Jersey Constitution, like Minnesota’s, guaranteed jury trials in common law cases the court upheld that right for the proposed

⁴ Erlinder, *Rights Lost and Rights Found*, 29 WM. MITCHELL L. REV. 1269, 1272 (2003), available online at [http://open.wmitchell.edu/cgi/viewcontent.cgi?article=1040&context=facsch&sei-redir=1#search="erlinder+mitchell+law+review+jury+trial+commitment"](http://open.wmitchell.edu/cgi/viewcontent.cgi?article=1040&context=facsch&sei-redir=1#search=) and posted by counsel at <http://www.4shared.com/folder/NZ-gMkBO/Lonergan-Kunshier.html>.

patient. *Id.* at 440, citing *Sporza v. German Savings Bank*, 102 N.Y. 8, 84 N.E. 406 (1908).⁵

Jury trials in Minnesota: Death by Dictum?

True to their common law roots, Minnesota's first statutes on civil commitment provided for jury trials in commitment cases. Minnesota Territorial Statutes 1851, Ch. 69, Art. III, §§ 17-27.⁶ Six years later, in language unchanged since except for a conjunction and a period, the Minnesota Constitution provided that, "The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy, but a jury trial may be waived by the parties in all cases in the manner prescribed by law."⁷ In most instances, this Court has zealously upheld the right to a civil jury trial, as it existed in 1858. *See, e.g., Abraham v. County of Hennepin*, 639 N.W.2d 342, 348 (Minn. 2002).

⁵ A later New Jersey decision held to the contrary without citing *McLaughlin*. *In re Civil Commitment of JHM*, 845 A.2d 139, 367 N.J. Super. 599 (2003).

⁶ *See also* Erlinder, *supra* at 1277-78. Historical Minnesota Statutes are accessible online via the Revisor's web page, at <https://www.revisor.mn.gov/statutes/?view=archive>. For example, the 1851 commitment statute is available at <https://www.revisor.mn.gov/statutes/?id=69&year=1851>.

⁷ Minn. Const. 1857, Art. 1 § 4. Available online at <http://www.mnhs.org/library/constitution/transcriptpages/dt.html> or <http://www.mnhs.org/library/constitution/transcriptpages/rt.html>. The "but" has been replaced by a period and a new sentence, and additional language has been added regarding jury size and non-unanimous verdicts.

After statehood, Minnesota's commitment law was substantially identical to the 1851 territorial version, providing for jury trials.⁸ However, by 1889 the commitment jury had been reduced to two persons plus the probate judge.⁹ By 1905 the jury trial had disappeared from the commitment statute, although at the court's discretion a jury could be empaneled on a de novo appeal to the district court.¹⁰

Judicial abandonment of jury trials in commitment cases may be traced back to *In re Vinstad*, 169 Minn. 264, 211 N.W. 12 (1926). Erlinder, *supra* at 1279. *Vinstad* was a guardianship case in which, ironically, the probate court actually empaneled a jury. The appellant State Board of Control alleged error on that basis. Ms. Vinstad had been placed under guardianship several years before as a result of a judgment of feeble-mindedness, and successfully petitioned for a restoration to capacity. While affirming the use of a jury as within the probate court's discretion, this Court opined that guardianships are heard by probate courts, which are "not equipped with jurors, and as to which the constitutional guaranty of trial by jury does not apply." 169 Minn. at 266, 211 N.W. at 13. The Court either may have been unaware of the use of juries in probate court commitment cases at the time of statehood, or may have been stating the law as to what we now refer to as guardianships or conservatorships without considering the jury trial rights of civil commitment respondents. Presumably, it was aware that a jury may have been available

⁸ Minn. Stat. 1858, Ch. 58, § 17-27.

⁹ Minn. Stat. 1889, Ch. 46 § 267.

¹⁰ Rev. L. 1905, Ch. 74 §§ 3851-71 and 3878.

on a de novo appeal from the probate to the district court. Minn. Stat. 1923, Ch. 74, §§ 8983-89. The fact that the case was a restoration proceeding instead of an original commitment also may have affected the Court's view of the case.

Thirteen years later, this Court considered a writ of prohibition requested by a commitment respondent in *State ex rel Pearson v. Probate Court of Ramsey County*, 287 N.W. 297, 205 Minn. 545 (1939), *aff'd*, 309 U.S. 270 (1940). The relator challenged a recently enacted law to commit persons with "psychopathic personalities." The relator's main contentions were that the law unconstitutionally expanded the jurisdiction of the probate courts; that the legislation violated the single-subject rule, and that it was void because it was uncertain and indefinite. 205 Minn. at 547, 287 N.W. at 298-99.

In addition to those issues, however, the relator contended that he had a jury trial right because the proceeding in effect was a criminal proceeding. 205 Minn. at 556-57, 287 N.W. at 303. In his brief,¹¹ he also cited Minn. Const. 1857, Art. 1 § 4 once in passing, without relating the above history of the commitment process. Relator's brief at 3. Defending the law, the Attorney General asserted that a jury trial *was* available to the relator, observing that appeal de novo to district court was available, including a jury at the district court's discretion. Brief of Respondents at 19, *citing* Minn. Stat. 1927, 1938 Supp. Ch. 74, § 8992-169. As the Attorney General's argument indicated, this Court

¹¹ For anyone's convenient reference, counsel has posted copies of the Pearson briefs at <http://www.4shared.com/folder/NZ-gMkBO/Lonergan-Kunshier.html> .

could have rejected Pearson's jury trial argument because he had not (yet) requested a jury in the District Court.

This Court rejected the arguments regarding criminal proceedings and then addressed whether a jury trial right attached in the civil proceeding before it. The Court acknowledged a split in decisions from other states as to whether persons in civil commitment proceedings were entitled to jury trials. It then made the facially erroneous statement that in Minnesota, "if such ever was the case, the practice had been abandoned before our constitution was adopted," and went on to cite the "unequivocal" language of *Vinstad* that commitment respondents are not entitled to jury trials. *Id.*

Perhaps as a result of *Pearson*, beginning in 1940 appeals from probate to district court no longer included jury proceedings.¹² Whether or not it was correctly decided, *Pearson* is cited as binding authority for the proposition that there is no right to a jury trial in commitment cases. *See, e.g., Joelson v. O'Keefe*, 594 N.W.2d 905, 910 (Minn. App. 1999).

From examiner panels to judicial panels to administrative panels, 1905-present

After the demise of the probate jury trial, the 1905 law directed the probate judge to refer insanity¹³ cases to a panel of examiners. Minn. Stat. 1905, Ch. 74 §§ 3852-58. The findings of the panel, which included the probate judge, determined the outcome of

¹² Minn. Stat. 1940, Ch. 74 § 8992-184.

¹³ Defined in the terminology of the day as "includ[ing] every species of insanity except idiocy and imbecility." Rev.L. 1905, Ch. 74 § 3851.

the case. *Id.* § 3860. By 1927, the law distinguished between the “dangerous insane” and the merely feeble-minded, but in either case the findings of a panel of examiners determined the disposition of the case. Minn. Stat. 1927, Ch. 74 §§ 8958-60; *id.*, 1938 Supplement, Ch. 74 §§ 8992-175-176. By 1938, however, the probate judge was no longer a part of the examiner’s panel, and the court conducted a separate hearing after receiving the report. *Id.* § 8992-175.

Pearson resulted from the Legislature’s first attempt to deal specifically with sex offenders, defining them as “psychopathic personalities.” Minn. Sess. Laws 1939, ch. 369.¹⁴ This new category of commitment cases was grafted onto the existing probate examination system, except that a psychopathic personality allegation only could be brought by a county attorney.

With the advent of our current statutory numbering system in 1941, the commitment laws were placed in Chapter 525 as a part of the Minnesota Probate Code. Minn. Stat. 1941, §§ 525.75 et seq. The psychopathic personality provisions were codified among general probate provisions, at §§ 526.09-.10. The first version of a Hospitalization and Commitment Act, Minn. Stat. Ch. 253A, was enacted in 1967.¹⁵ It provided that a person dangerous to the public or having a psychopathic personality could not be discharged from a hospital except on order of a court of three probate judges

¹⁴ Session laws are located on the Revisor’s web page, at <https://www.revisor.mn.gov/laws/>.

¹⁵ Laws 1967, Ch. 638.

appointed by this Court. *Id.* § 253A.15 subd. 2 (1967). All other provisions regarding persons with psychopathic personalities remained in Chapter 526 until 1994.

On August 15, 1994, this Court denied rehearing of its previous decision in *In re Linehan (Linehan I)*, 518 N.W.2d 609 (Minn. 1994), that Linehan was capable of controlling his sexual impulses and therefore was not a psychopathic personality as the law was construed in *Pearson*. In response, the Governor called a special session of the Legislature, which passed Minn. Sess. Laws 1994, Chapter 1 (August 31, 1994). The 1994 legislation moved all of the indeterminate commitment law into the current commitment act, Minn. Stat. Ch. 253B; redefined a “psychopathic personality” as “sexual psychopathic personality,” § 253B.02 subd. 18a (now subd. 18b), incorporating the *Pearson* construction of preexisting law; and created a new category of commitment case for a “sexually dangerous person,” § 253B.02 subd. 18b (now subd. 18c). The Court later upheld these changes with a limiting construction and affirmed Linehan’s commitment under them. *In re Linehan (Linehan IV)*, 594 N.W.2d 867 (Minn. 1999).

This history also is related in *Hince v. O’Keefe*, 632 N.W.2d 577 (Minn. 2001). Reversing the trial court and court of appeals, *Hince* mandated the MSOP to provide review panels to review conditions of confinement within its program.

Executive Orders

As both appellants point out, on July 10, 2003, Governor Pawlenty signed Executive Order 03-10, 28 S.R. 57 (App. L 13-14, 22, and 29; App. K 48-49, 52-53, 55-

57, 62, and 69). Governor Dayton continued the order in effect, by reference in his Executive Order 11-08 (filed April 4, 2011).

On its face, Executive Order 03-10 changes no legal or administrative standards. Its two operative paragraphs state that certain events will not happen “unless required by law or ordered by a court of competent jurisdiction” (App. L 29 and K 69). “Court[s] of competent jurisdiction” determine what is “required by law.” Prior to a case going to court, the executive department administering a program has the obligation to comply with legal requirements.¹⁶ Thus at least on the surface, procedures and substantive legal standards for discharge, temporary release, etc., were the same before and after the effective date of the order.

Nevertheless, both Appellants allege that since Executive Order 03-10 was promulgated, no one has been released from the MSOP (App. L 13-14 and K 44-45). One must acknowledge that as inmates of the small but growing MSOP facility, they are in a good position to observe whether this is true.

Additional loss of rights

Neither the cases below nor *Hince, supra*, are isolated instances of commitment case issues getting an unfriendly reception in the lower courts. The following are three recent examples of legal rulings that have further raised the temperature:

¹⁶ This includes the obligation to exercise discretion where discretion is legally vested in the agency. A complete failure to exercise discretion is an abuse of discretion. *See, e.g., Allison v. Block*, 723 F.2d 631, 637 (8th Cir. 1983), holding that an agency’s discretion to deny relief in individual cases does not authorize it to categorically deny relief in all cases.

1. The Court of Appeals completely abrogated the hearsay rule in commitment cases, in *In re Williams*, 735 N.W.2d 727, 730-33 (Minn. App. 2007). The court gave the broadest possible reading of Minn. Stat. § 253B.08 subd. 7, adversely to commitment respondents, despite that provision's general invocation of the Rules of Evidence.

2. Very recently the Court of Appeals categorically abolished non-constitutional habeas corpus challenges to commitments. *Beaulieu v. Minn. Dep't of Human Serv.*, ___ N.W.2d ____, No. A10-1350 (Minn. App. April 26, 2011).

3. Perhaps unwittingly, the Court of Appeals overruled *sub silentio* this Court's precedent indicating that treatment issues may be raised in an initial commitment proceeding. *In re Travis*, 767 N.W.2d 52 (Minn. App. 2009); compare *In re Joelson*, 344 N.W.2d 613 (Minn. 1984), *on further review*, 385 N.W.2d 810 (Minn. 1986) For unknown reasons, neither respondent's (patient's) counsel nor an amicus curiae in *Travis* cited *In re Joelson* in their briefs.¹⁷ The appellant county attorney cited it for the opposite proposition and, as did the Attorney General, for other points.¹⁸

¹⁷ Counsel has posted excerpts from the *Travis* briefs, along with the complete *Pearson* briefs and Erlinder article, at <http://www.4shared.com/folder/NZ-gMkBO/Lonergan-Kunshier.html>.

¹⁸ Although it may not have contributed to the current wave of petitions for review, the lower courts also appear to have a Fourth Amendment blind spot when presented with initial hold order applications not supported by oaths or affirmations. See also Minn. Const. Art. 1 § 10. In Hennepin County, fortunately, informal discussions between defense counsel and the County Attorney's office have mitigated this problem to a significant extent.

A 160-year perspective

In his *Pearson* brief 72 years ago, Attorney General Burnquist expressed an optimism that (so far) has failed the test of time:

Relator's brief contends that once adjudged a psychopathic personality he would be incarcerated for life with little or no chance of being returned to society. This, of course, is not correct. Psychopaths are extremely amenable to treatment and cure. Scientific treatment by psychiatrists have [*sic*] redeemed many such persons to a normal and useful life. Our psychopathic hospital, the subject of recent legislation, has returned many of these people, who are more to be pitied than condemned, to their families and occupations within a comparatively short period of time.

Pearson, Resp. brief at 19. Whether as a result of this optimism, denial, or our determined adherence to the treatment paradigm, persons under indeterminate commitment have fallen through a metaphysical warp in the due process shield. A person charged with a serious crime is guaranteed a jury trial and the right of confrontation. A civil litigant "who had sold fish and sought to collect the price"¹⁹ is guaranteed a jury trial and the full benefit of the hearsay rule. A person facing a lifetime of confinement, in the theoretically benevolent commitment system, has none of these rights under current precedent.

This Court cannot alter the laws of the human mind that psychiatrists and other professionals struggle to discover and deal with. However, it must remain vigilant in upholding the rights of persons who have paid their full debt under the criminal statutes, but who nevertheless face further loss of liberty in the commitment system.

¹⁹ Otis H. Godfrey, Sr., writing as *Pearson*'s attorney. *Pearson* Relator's brief at 25.

C. A PERSON INDETERMINATELY CIVILLY COMMITTED AS A SEXUALLY DANGEROUS PERSON OR AS A SEXUAL PSYCHOPATHIC PERSONALITY MAY PETITION THE COMMITTING COURT FOR RELIEF FROM THE JUDGMENT OF COMMITMENT UNDER MINN. R. CIV. P. 60.02.

The holdings below were broader than justified by the issues presented to the Court of Appeals

As the Court of Appeals has acknowledged, “Rule 60.02 reflects a balance between the need for finality in judgments and the need for relief from judgments under very specific circumstances. The drafters of Rule 60.02 accordingly provided exceptions to the finality of judgments under narrowly defined circumstances. Rule 60.02 can be utilized only if one of the grounds specified in the rule exists. *Anderson v. Anderson*, 288 Minn. 514, 518, 179 N.W.2d 718, 721-22 (1970).” *Carter v. Anderson*, 554 N.W.2d 110, 113 (Minn. App. 1996).

Given the narrow scope of Rule 60.02 relief, the Court of Appeals should have focused its analysis on whether Appellants’ motions fell within any of the rule’s specific provisions, before considering the broader question of whether the rule or any part of it was in conflict with statutory SDP or SPP provisions. In its first decision, *Loneragan*, it recognized the narrowness of the rule and framed the issue as whether the movant could “seek discharge or make a constitutional challenge to the adequacy of treatment by moving to vacate the commitment order.” Slip op. at 5, App. L 38. In so framing the issue, the court appeared to follow the logical path of the trial court, which examined whether each of the grounds for Rule 60.02 relief existed in the case. *Id.* Because almost all of the Rule 60.02 grounds for relief challenge a prior order or judgment *ab initio*, the

trial court's denial of a motion raising post-judgment commitment issues such as treatment or discharge might have been affirmed on narrower grounds.²⁰

Unfortunately the Court of Appeals departed from its initially narrow approach, and arbitrarily read § 253B.17's categorical exclusion of indeterminate commitment cases into Rule 60.02. *Loneragan*, slip op. at 6, App. L 39. It therefore concluded that Rule 60.02 was unavailable to challenge an SDP or SPP commitment order or judgment. It then cited *Loneragan* as authority for that exclusion, without further analysis, in its later *Kunshier* decision.

An elementary principle of jurisprudence – perhaps derived from Hippocrates²¹ -- is that a court should avoid a broad holding when a case can be decided on narrower grounds. *See, e.g., Zutz v. Nelson*, 788 N.W.2d 58, 63 (Minn. 2010). In black letter law, “Courts will only decide necessary legal questions, and will rely on the narrowest legal grounds available.” 21 CJS Courts § 189 (2006).

Rather than allowing the broad Rule 60.02 exclusion to stand, this Court should remand the cases for consideration of whether any statute's specific provisions are

²⁰ Provisions addressing subsequent facts and circumstances, such as Rule 60.02(e) (“... it is no longer equitable that the judgment should have prospective application ...”) present some interesting hypotheticals in the context of these cases. A motion raising only whether a patient is cured and safe for release may be trumped by Minn. Stat. § 253B.185 subd. 18 and related procedural subdivisions of that section. However, a motion based on the same clause, alleging that a retrial is appropriate because the rules for release or discharge have fundamentally changed since the initial commitment, may not be so trumped. In view of the broad question posed by the Court in this appeal, this brief does not address those hypotheticals.

²¹ *Cf.* <http://ancienthistory.about.com/od/greekmedicine/f/HippocraticOath.htm>.

inconsistent with the relief sought under the rule. If a possible inconsistency is identified, the courts may then embark on a better focused analysis under Minn. R. Civ. P. 81.01 and Appendix A.

As a general proposition, Rule 60.02 applies in SDP and SPP proceedings.

The Rules of Civil Procedure apply “in the district courts of the State of Minnesota in all suits of a civil nature, with the exceptions stated in Rule 81.” Minn. R. Civ. P. 1. Where the rules conflict or are inconsistent with statutory procedures, in some instances the statutory procedures give way to the rules, M.R.Civ.P 81.01(c); in other instances, the rules yield to the statute, *id.* 81.01(a). In its decisions in the present cases, while completely ignoring Rule 81.01(a) and its Appendix A, the Court of Appeals held that Minn. R. Civ. P. 60.02 does not apply in civil commitment cases.

The Court of Appeals analysis is not only incorrect and incomplete, but also inconsistent with its own precedent. Long ago, it recognized the general proposition that Rule 60.02 applies in civil commitment cases. *In re Bowers*, 456 N.W.2d 734 (Minn. App. 1990). The court did not consider *Bowers* in either of its decisions below, nor in several more cases it later decided on the basis of its *Lonergan* holding. In five of those later cases, it acknowledged that a Rule 60.02 motion is an appropriate vehicle for raising issues as to the adequacy of trial counsel.²² In at least three decisions issued after this

²² *In re Beals*, No. A10-1753 (Minn. App. May 31, 2011); *In re Lindsey*, No. A10-2123 (Minn. App. May 23, 2011); *In re Whipple*, No. A10-2098 (same); *In re Conner*, No. A10-2281 (same); *In re Guy*, No. A10-1392 (Minn. App. Feb. 22, 2011).

Court's April 19, 2011, order granting review of the present cases, the court has prudently considered whether various movants were entitled to relief under the terms of the rule, sometimes finding a specific conflict with the statute, and sometimes denying relief on other grounds within the rule itself.²³ These cases demonstrate that it is possible to give Rule 60.02 motions more specific and focused consideration in SDP and SPP cases, without frustrating the purposes of Chapter 253B.

Rule 81.01 Appendix A is not a list of categorical carve-outs from the Rules of Civil Procedure. Nor does that rule or appendix articulate the type of preemption standard that one finds in some federal-state or state-municipal statutory or ordinance conflict cases. Those notions are rebutted by legions of Minnesota appellate court decisions that, although many of them ultimately deny relief, recognize that Rule 60.02 generally applies under the listed statutes:

**Minnesota Rules of Civil Procedure
Appendix A--Special Proceedings Under
Rule 81.01**

**Cases recognizing applicability of
Minn. R. Civ. P. 60.02 (examples)**

Chapters 103A-110A Drainage

Bode v. Minnesota Dept. of Natural Resources, 612 N.W.2d 862 (Minn. 2000)

Chapter 117 Eminent domain
proceedings (see also Gen. R. Prac. 141)

Enbridge Energy v. Dyrdal, No. A09-1866 (Minn. App. 2010) at FN2, noting trial court denial of R.60.02 motion

Copies of all unreported decisions cited in this brief are contained in an addendum. Perhaps the Legislature should amend Minn. Stat. § 480A.08, subd. 3 to permit the use of internet addresses instead of paper copies. For example, *Beals* is available at <http://www.lawlibrary.state.mn.us/archive/ctapun/1105/opa101753-0531.pdf>.

²³ *Beals, Lindsey, and Whipple*, all *supra* note 22.

**Minnesota Rules of Civil Procedure
Appendix A--Special Proceedings Under
Rule 81.01**

**Cases recognizing applicability of
Minn. R. Civ. P. 60.02 (examples)**

Chapter 253B	Civil commitment	(matter at issue in present cases); <i>see also In re Bowers</i> , 456 N.W.2d 734 (Minn. App. 1990)
Chapter 259 name	Adoption; change of	<i>Compare, In re Welfare of Children of M.N.</i> , No. A04-600 (Minn. App. November 2, 2004) (noting specific inconsistencies between rule and statute)
Chapter 278 defenses to taxes on real estate	Objections and	<i>Thunderbird Motel Corporation v. County of Hennepin</i> , 183 N.W.2d 569, 289 Minn. 239 (Minn. 1971)
501.33 to 501.38 trusts	Proceedings relating to	<i>In re Basic Resolution</i> , 772 N.W.2d 488 (Minn. 2009)
Chapter 508 lands (see also Gen. R. Prac. 201-216)	Registration of title to	<i>Compare, Petition of Brainerd Nat. Bank</i> , 383 N.W.2d 284 (Minn. 1986) (rule is specifically overruled by finality provisions of Minn. Stat. § 508.22)
514.01 to 514.17	Mechanics liens	<i>Zetah v. Isaacs</i> , 428 N.W.2d 96 (Minn. App. 1988)
Chapter 518 marriage	Dissolution of	Specifically excluded by language of Rule 60.02; nevertheless, the courts have inherent authority to vacate decrees obtained by a fraud on the court. <i>Maranda v. Maranda</i> , 449 N.W.2d 158 (Minn. 1989)
540.08 (see also Gen. R. Prac. 145)	Insofar as it provides for action by parent for injury to minor child	<i>Cf. Eliseuson v. Frayseth</i> , 290 Minn. 282, 187 N.W.2d 685 (Minn. 1971) (noting that Rule 60.02 preserves the possibility of an independent action to challenge the previous order or judgment); <i>see also Cook v. Connolly</i> , 353 N.W.2d 184 (Minn. App. 1984)
Chapter 558 (except that part of second sentence of 558.02 beginning 'a copy of which')	Partition of real estate	<i>Wendschuh v. Wendschuh</i> , 244 N.W.2d 660, 309 Minn. 581 (Minn. 1976)

**Minnesota Rules of Civil Procedure
Appendix A--Special Proceedings Under
Rule 81.01**

**Cases recognizing applicability of
Minn. R. Civ. P. 60.02 (examples)**

Chapter 559 Actions to determine
adverse claims (except that part of third
sentence of 559.02 beginning 'a copy of
which')

Hopen v. Weaver, No. A08-1152 (Minn.
App. June 30,2009)

573.02 Action for death by wrongful
act (see also Gen. R. Prac. 142-144)

Miklas v. Parrott, 663 N.W.2d 583
(Minn. App. 2003)

Writ of habeas corpus

Gassler v. State Of Minn., 787 N.W.2d
575, 590 n.2 (Minn. 2010) (concurring
opinion).

As the Court of Appeals has acknowledged, Rule 81.01(a) and Appendix A operate only to the extent that a specific statutory provision “is inconsistent with the rules and therefore supersedes the rules.” *Zetah v. Isaacs, supra* at 428 N.W.2d 99-100; *see also, e.g., Gale v. County of Hennepin*, 609 N.W.2d 887, 892 (Minn. 2000). As previously noted the decisions below dramatically depart from that focused analysis and instead, they categorically disqualify SDP and SPP movants from receiving Rule 60.02 relief. This Court should remand these cases with directions to apply the standard methodology to them.

V. CONCLUSION

The simple answer to the simple question posed by the Court is “yes.” Rule 81.01(a), which the Court of Appeals ignored, addresses inconsistencies between statutes and rules, but does not create categorical exclusions. As nearly uniform jurisprudence indicates, there is no inherent conflict between Rule 60.02 and the commitment or other statutes listed in Appendix A. The Court should remand for detailed consideration as to whether any specific issue presented by either Appellant raises any specific inconsistency between the rule and a statute.

Respectfully submitted,



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CERTIFICATION: The foregoing brief complies with R.Civ.App.P. 132.03 Subd. 3. It contains approximately 6,910 words exclusive of tables and statutory and case addenda. It was prepared in 13 point type using Microsoft Word version 14 (Office 2010).

STATE OF MINNESOTA

FIRST JUDICIAL DISTRICT

COUNTY OF DAKOTA

IN DISTRICT COURT

In Re Civil Commitment of:

Court File No. 19-P5-88-1302

Robert Archie Kunshier,

Petitioner.

**FINDINGS OF FACT
AND ORDER**

This matter came before the Court for a hearing on Petitioner's Motion for Relief from Judgment on March 11, 2010 before the Honorable Patrice K. Sutherland at the Dakota County Judicial Center, Hastings, MN. David Jaehne appeared on behalf of Petitioner, who appeared by ITV. Karen Henke appeared on behalf of the Dakota County Attorney's Office. The Court received Exhibits Numbers 1 through 8 without objection. Upon Petitioner resting his case, the County moved for dismissal of the Petition.

Based upon the pleadings, affidavits, arguments of counsel and a review of the file, the Court makes the following:

FINDINGS OF FACT

1. That on May 6, 1993, Petitioner was civilly committed as a Psychopathic Personality. Upon final determination on April 4, 1994, he was committed for an indeterminate period of time. On September 21, 1994, the Minnesota Court of Appeals remanded the case. After further hearing by the District Court, Appellant was committed upon final determination on May 18, 1995.
2. In 2003, Petitioner completed all four phases of the Minnesota Sex Offender Program and began participation in the transitional stage. However, in March of 2004, he was removed from the transitional program for violating institutional rules and was returned to treatment.
3. On March 30, 2005, Petitioner filed a petition seeking full or provisional discharge from commitment. The Commissioner of Human Services adopted the Recommendation of the Special Review Board and denied the petition. Petitioner appealed this decision and the Appeals Panel affirmed on the grounds that Petitioner failed to establish a prima facie case for full or provisional discharge.
4. On March 6, 2007, The Minnesota Court of Appeals upheld the Appeals Panel decision to deny Petitioner full or provisional discharge. The Court of Appeals found Petitioner failed to provide sufficient evidence that he no longer posed a threat to the public and is no longer in need of treatment at a secure facility. The Court noted Petitioner's extensive history of committing violent sexual offenses, his recent rule violations in the transitional and treatment programs, and the fact that his doctors and treatment team did not support his petition for discharge.

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CAROLYN M. HENN, Court Administrator

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5. Thereafter, Petitioner petitioned for Writ of Habeas Corpus challenging his original commitment; his continued confinement beyond completion of treatment; and the legality of the conditions of his confinement. On January 16, 2009, the Court denied the Petition without an evidentiary hearing, finding Petitioner failed to establish a prima facie case for habeas relief.
6. On December 22, 2009, Petitioner filed the current Motion for Relief from Judgment pursuant to Minnesota Rule of Civil Procedure 60.02(f). Petitioner asserts he is entitled to relief of the original civil commitment order because he was denied State and Federal Constitutional rights when: (1) he was committed as a level 3 sex offender; (2) he has no way to gain release from civil commitment even though he believes he no longer meets the criteria for commitment; (3) he is being forced to complete an additional treatment program without clear and convincing evidence that he failed to successfully complete the first program; (4) Moose Lake Regional Treatment Center, Saint Peter State Hospital and the Department of Human Services have failed to release anyone; and (5) he was denied effective assistance of counsel when represented during his 1995 commitment case.
7. Petitioner's Motion under Minnesota Rule of Civil Procedure 60.02 is untimely and is ultimately an improper authority for review.

ORDER

1. Petitioner's Motion for Relief from Judgment is **DENIED**.
2. Respondent's Motion for Dismissal of the Petition is **GRANTED**.
3. The attached Memorandum is incorporated herein.

Dated: May ²⁷21, 2010



Patrice K. Sutherland
Judge of District Court

MEMORANDUM

Minnesota Rule of Civil Procedure 60.02(f) provides relief from final judgment for "[a]ny other reason justifying relief from the operation of the judgment." Under 60.02(f), "[r]elief is available only under exceptional circumstances and then, only if the basis for the motion is other than that specified under clauses (a) through (e). Chapman v. Special Sch. Dist. No.1, 454 N.W.2d 921, 924 (Minn.1990). Relief is available "when the equities weigh heavily in favor of the party seeking relief and relief is required to avoid an unconscionable result." Hovelson v. U.S. Swim & Fitness, Inc., 450 N.W.2d 137, 142-43 (Minn.App.1990), *review denied* (Minn. Mar. 16, 1990). Motions under Rule 60.02(f) must be made within a "reasonable time" after entry of final judgment. For the following reasons, Petitioner's Motion for Relief must be dismissed.

Minn. R. Civ. P. 60.02(f) Is An Improper Authority For Review

In the case at hand, Petitioner is not entitled to relief under Minn. R. Civ. P. 60.02(f). Petitioner's Motion contravenes the proper procedures for review under Minnesota Statute. Minnesota State Statutes § 253B.18, subd. 3, states: "After a final determination that a patient is a person who is mentally ill and dangerous to the public, the patient shall be transferred, provisionally discharged or discharged, only as provided in this section." This provision applies to persons found to be sexually dangerous persons or persons with a sexual psychopathic personality. Minn. Stat. § 253B.185, subd. 1. As a person committed as a Psychopathic Personality, Petitioner is bound by procedures under this provision. Specifically, Petitioner may file a petition for a reduction in custody (including discharge) to a Special Review Board every six months. Minn. Stat. § 253B.185, subd. 9(c). If the Special Review Board denies the Petition, its findings of fact and recommendations are forwarded to a judicial appeal panel for final

determination. *Id.*, subd. 9(f). Since Petitioner's last request for full or provisional discharge was made more than 6 months ago, he is entitled to petition the Review Board and if necessary, appeal to the proper authority. As it stands, this Court is not the proper authority to review Petitioner's claims.

The Petition Fails to Meet Rule 60.02(f) Standard For Relief

Even if it could be said that Petitioner is entitled to Rule 60.02(f) relief, his Motion must nevertheless be denied. Relief under this provision is available only under exceptional circumstances, "when the equities weigh heavily in favor of the party seeking relief and relief is required to avoid an unconscionable result." *Hovelson*, at 142-43 (Minn. App.1990), *review denied* (Minn. Mar. 16, 1990). The equities in this case weigh heavily against Petitioner. Petitioner has had nearly 30 opportunities to avail himself of the review and appeal process provided under § 253B.185. Yet, he has participated only twice in the past 15 years. On both occasions, the Special Review Board determined that a reduction of custody was not appropriate given Petitioner's failure to prove he no longer posed a threat to the public and is no longer in need of treatment at a secure facility. The Court noted Petitioner's extensive history of committing violent sexual offenses, his recent rule violations in the program, and the fact that his doctors and treatment team did not support his petition. Most recently, Petitioner requested habeas corpus relief and asserted then, as he does now, that his constitutional rights are being violated by his continued confinement even though he no longer meets the criteria for commitment, that he is being forced to complete an additional treatment program without clear and convincing evidence that he failed the first, and because the Minnesota Sex Offender Program fails to release *anyone*. The 2009 Court Order denying Petitioner habeas corpus relief specifically found Petitioner continues to "pose a threat to the public" and is "still in need of

treatment at a secure facility." Additionally, Petitioner's constitutional challenge to the civil commitment of sexually dangerous persons has been settled by the Minnesota Supreme Court. In re Linehan, 594 N.W.2d 867, 871-72 (Minn.1999); *see* Call v. Gomez, 535 N.W.2d 312, 319-20 (Minn.1995) (stating that civil commitment law is remedial and not for preventative detention); In re Blodgett, 510 N.W.2d 910, 916 (Minn.1994) (noting that purpose of civil commitment is to provide treatment and commitment is not "equivalent to life-long preventive detention"). The facts and the law in this case support Petitioner's continued confinement.

Other flaws with Petitioner's Motion should briefly be noted. Petitioner claims he was mistakenly committed as a level three sex offender. However, claims of mistake of fact are properly addressed by Rule 60.02(a). A motion for relief under Rule 60.02(a) must be brought within one year from the entry of judgment. Minn. R. Civ. P. 60.02. Petitioner cannot be allowed to avoid this one-year limitation by asserting that Rule 60.02(f) applies to this claim. *See* Chapman at 924 (Minn.1990). Additionally, Petitioner's Motion alleges ineffective assistance of counsel during his original commitment as a basis for Rule 60.02(f) review. It has previously been held that Rule 60.02(f) is not the proper recourse for ineffective assistance of counsel claims. *See e.g.*, Chapman at 923-24 and Gould v. Johnson, 379 N.W.2d 643, 649 (Minn. App. 1986), *review denied* (Minn. Mar. 14, 1986).

For the above stated reasons, Petitioner does not meet Rule 60.02(f) standard for relief.

Petitioner's Motion is Untimely Under Rule 60.02(f)

Lastly, Petitioner's Motion is untimely under Rule 60.02(f). In Bode v. Minnesota Department of Natural Resources, the Court held that a motion to appeal made 18 years after entry of final judgment was not timely. 612 N.W.2d 862 (Minn. 2000). The Court stated a

"reasonable time" is determined by considering all circumstances and relevant factors, including the desirability that judgments be final. Petitioner's final determination of commitment was made in 1995. The present Motion comes 15 years after the entry of final judgment. Considering the untimeliness of Petitioner's Motion, the fact that Petitioner's continued confinement is supported by the facts and law, and given that he is afforded the opportunity for review and appeal of his commitment status every six months under Minn. Stat. § 253B.185, the Court finds it desirable to let judgment in this case be final.

IN CLOSE, Petitioner has failed to establish that he is entitled to the relief he requests. Petitioner's Motion is hereby dismissed.

PVS 5/24/10

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF DAKOTA

FIRST JUDICIAL DISTRICT

File No. 19-P1-06-8179

In re the Civil Commitment of

Peter Gerard Lonergan,
Respondent.

ORDER

The above-entitled matter came before the Honorable Robert F. Carolan, Judge of District Court, on June 24, 2009, at Dakota County Judicial Center, Hastings, Minnesota pursuant to a motion by the respondent for relief from Judgment based on Minn. R. Civ. Proc. 60.02 (d), (e) and (f).

There were no appearances.

FILED DAKOTA COUNTY
CAROLYN M. REMM, Court Administrator

Based upon the proceedings, this Court makes the following:

JUL 7 2010

FINDINGS OF FACT

1. An order for an initial commitment of the respondent was filed on January 2, 2008.
2. The Commitment was affirmed by unpublished opinion of the Court of Appeals on August 5, 2008.
3. Respondent was indeterminately committed to the Minnesota Sex Offender Program by Order dated May 13, 2009.
4. Respondent is moving for relief from judgment pursuant to Minnesota Rule of Civil Procedure 60.02 (d), (e) and (f).
5. Respondent's motion papers were signed on May 27, 2010. The moving papers were mailed to the court on June 3, 2010 and received by the court June 30, 2010. The papers

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have been turned over to the Dakota County Court Administrator for filing.

6. Respondent did not file his motion through his attorney.

7. Rule 60.02 (f) provides relief "only under exceptional circumstances and then, only if the basis for the motion is other than that specified under clauses (a) and (e)." Chapman v. Special Sch. Dist. No. 1, 454 N.W.2d 921, 924 (Minn. 1990). Because respondent's motion is based, in part on Rule 60.02 (e), relief under clause (f) is not available.

CONCLUSION OF LAW

1. The commitment is not void, as contemplated by Minn. R. Civ. Pro. 60.02 (d), as a matter of law.

2. The commitment has not been satisfied, released or discharged.

3. The commitment is not based upon a prior judgment which has been reversed or otherwise vacated.

4. There is no equitable basis for finding that the commitment should not continue.

ORDER

1. Respondent's motion for Relief from Judgment pursuant to Minnesota Rule of Civil Procedure 60.02 (d), (e) and (f) is DENIED.

Dated: June 30, 2010

BY THE COURT:



Robert F. Carolan
Judge of District Court