

*This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A14-0013**

In the Matter of the Civil Commitment of: Eric John Eischens

**Filed June 23, 2014  
Affirmed  
Smith, Judge  
Dissenting, Randall, Judge**

Becker County District Court  
File No. 03-PR-12-2876

Ryan B. Magnus, Jennifer L. Thon, Jones and Magnus, Mankato, Minnesota (for appellant)

Lori Swanson, Attorney General, Angela Helseth Kiese, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Smith, Presiding Judge; Connolly, Judge; and Randall, Judge.\*

**UNPUBLISHED OPINION**

**SMITH**, Judge

We affirm appellant's indeterminate commitment as a sexually dangerous person because the state met its burden of proving by clear and convincing evidence that appellant is highly likely to reoffend and because the district court did not clearly err by finding that a less-restrictive alternative is not available.

---

\* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

## **FACTS**

On March 27, 2013, Becker County petitioned to civilly commit appellant Eric John Eischens as a sexually dangerous person (SDP). Eischens was 18 years old at the time, and voluntarily living at a center for inpatient sex-offender treatment. After the petition was filed, the district court placed Eischens on a hold at the Minnesota Sex Offender Program (MSOP). The district court appointed two psychological examiners—the second at Eischens’s request—and, after a two-day court trial, determined that Eischens satisfies the statutory requirements for commitment as an SDP and ordered him indeterminately committed to MSOP.

It is undisputed that this petition presents a rare and complex factual scenario, and that the experts involved disagree on how to address the situation. Eischens began offending by the age of five, and he has been in residential treatment since the age of nine. Eischens’s strong propensity to reoffend even in highly structured and supervised settings has prompted multiple programs to implement extraordinary security measures, for his safety and the safety of other program participants. As a result of such measures, Eischens’s last documented offense occurred approximately six years ago, at the age of 14. A summary of Eischens’s history follows.

### **Family and foster care**

As an infant, Eischens was abused and neglected by his mother. Following a near-fatal drowning in a bathtub, when Eischens was 14 months old, he was placed in foster care. At age two, Eischens was reunited with his father. From then until age nine,

Eischens fluctuated between living with his father and stepmother, and living in foster care. Most of Eischens's out-of-home placements were prompted by his severe behavioral problems, which included inappropriate sexual conduct with his two younger brothers. By age five, Eischens was regularly fondling his younger brother's penis. At age eight, while in foster care, an older foster boy prompted Eischens to perform oral sex on him and penetrated Eischens anally with his penis. Back home, Eischens's "sexual play" escalated; Eischens repeatedly lured his brothers into secluded spaces, engaged in inappropriate sexual conduct including oral sex and anal penetration, and instructed them not to tell their parents.

#### **Northwood Residential Treatment Center**

In August 2003, at age nine, Eischens entered Northwood Residential Treatment Center. While there, Eischens engaged in sexual conduct with several different boys; at one point, Eischens described this conduct as mutual "humping and kissing," fondling, oral sex, and anal sex. Northwood's staff became aware of this behavior, and moved Eischens to a single room. Thereafter, staff observed Eischens engaging in grooming behavior, but prevented him from being alone with other residents.

#### **Mille Lacs Academy**

In December 2005, at age 11, Eischens entered Mille Lacs Academy, a sex-specific residential treatment program. At Mille Lacs Academy, Eischens was involved in more than 70 "critical incidents," including numerous acts of physical aggression towards staff and peers, and several incidents of sexual contact or sexually inappropriate behavior. By December 2006, Mille Lacs Academy determined that, due to Eischens's

behavioral issues, his “ability to complete sex-specific treatment did not appear to be feasible.” It noted that “a more suitable placement” was being arranged. Shortly thereafter, Eischens and another Mille Lacs Academy resident planned and executed a sexual encounter; the two engaged in fondling and oral sex in the other resident’s bed.

### **Behavioral Solutions Halfway House**

In February 2007, at age 12, Eischens entered Behavioral Solutions Halfway House, a one-on-one treatment facility. During a home visit later that year, at age 13, Eischens drew and gave to his younger brother sexually explicit pictures, sexually abused his brother, and held a knife to his brother’s throat. After the home visit, Eischens told another Behavioral Solutions resident that his brother “took it in the ass.” The following summer, at age 14, Eischens snuck into another resident’s room and sexually assaulted him; Eischens admitted to performing oral sex on and anally penetrating his victim.<sup>1</sup> The state charged Eischens with two counts of criminal sexual conduct, but dismissed the charges after Eischens was found incompetent to stand trial. In response to the incident, Behavioral Solutions moved Eischens to a private apartment and implemented constant staff supervision.

### **Leo A. Hoffman Center**

In August 2010, at age 16, Eischens entered inpatient sex-offender treatment at Leo A. Hoffman Center. In December 2012, approximately five months before Eischens’s juvenile jurisdiction expired, Becker County obtained an advisory opinion

---

<sup>1</sup> At one point, Eischens claimed to have perpetrated against this victim between four and ten times.

from psychologist James Gilbertson, Ph.D., regarding civil commitment. In March 2013, the county filed a civil commitment petition and Hoffman Center unsuccessfully discharged Eischens for “lack of progress” and “danger to self or others.”

### **Recent Assessments**

In November 2012 and April 2013, Hoffman Center assessed Eischens’s risk. His scores on the Juvenile Sex Offender Assessment Protocol-II (JSOAP-II) and the Estimate of Risk of Adolescent Sexual Offense Recidivism (ERASOR) both indicated a high degree of risk for reoffending.

For a sexual-recidivism assessment in his December 2012 advisory opinion, Dr. Gilbertson administered the Static-99R and also examined static and dynamic factors that have a significant bearing on recidivism. Eischens’s score on the Static-99R placed him in the moderately high to high category of risk for future sexual offense. His score on the SVR-20 placed him at a high risk for sexually acting out. Based on these results, Dr. Gilbertson concluded that Eischens was highly likely to engage in future acts of harmful sexual conduct.

The first court-appointed examiner, Linda Marshall, Ph.D., interviewed Eischens and conducted risk assessments and psychological tests. The Hare Psychopathy Checklist-Revised (Hare PCL-R) indicated a moderate level of psychopathy. Eischens’s score on the Static-99R placed him in the moderately high to high category of risk for future sexual offense. His score on the SVR-20 also placed him at a moderate to high risk of sexual violence. Based on the interview and a thorough review of Eischen’s

record, Dr. Marshall concluded that Eischens is highly likely to engage in future acts of harmful sexual conduct.

The second court-appointed examiner, Mary Kenning, Ph.D., opined that “there are no actuarial measures of risk that can be used with young men this age whose offenses occurred prior to age 14.” She concluded that “while [Eischens’s] sexual behavior is likely to continue to be immature in comparison to that of his peers, it is not possible to predict with any degree of psychological certainty that he is highly likely to reoffend.”

## DECISION

### I.

“On appeal from an order committing a person as an SDP, this court is limited to an examination of the [district] court’s compliance with the statute, and the commitment must be justified by findings based upon evidence at the hearing.” *In re Civil Commitment of Navratil*, 799 N.W.2d 643, 647 (Minn. App. 2011) (alternation in original) (quotation omitted), *review denied* (Minn. Aug. 24, 2011). We review factual findings for clear error. *In re Civil Commitment of Stone*, 711 N.W.2d 831, 836 (Minn. App. 2006), *review denied* (Minn. June 20, 2006). And “[w]here the findings of fact rest almost entirely on expert testimony, the [district] court’s evaluation of credibility is of particular significance.” *In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995). But whether the evidence is sufficient to meet the statutory requirements for commitment is a question of law, which we review de novo. *In re Linehan*, 518 N.W.2d 609, 613 (Minn. 1994)

(*Linehan I*); *In re Commitment of Martin*, 661 N.W.2d 632, 638 (Minn. App. 2003), review denied (Minn. Aug. 5, 2003).

A person may be civilly committed as an SDP if the petitioner proves that the person meets the statutory criteria by clear and convincing evidence. Minn. Stat. §§ 253B.18, subd. 1(a), .185, subd. 1(c) (2012). An SDP is 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. § 253B.02, subd. 18c(a) (2012). A showing that a person has a complete inability to control his or her sexual impulses is not required. *Id.*, subd. 18c(b) (2012). Rather, the person must be “highly likely [to] engage in harmful sexual acts in the future.” *Stone*, 711 N.W.2d at 840 (quotation omitted). “Clear and convincing evidence is evidence that is more than a preponderance of the evidence but less than proof beyond a reasonable doubt.” *State v. Jones*, 753 N.W.2d 677, 696 (Minn. 2008) (quotation omitted).

Eischens argues that the district court erred by ordering his commitment as an SDP because the state failed to prove the third requirement of the statute—that he is highly likely to reoffend. To determine whether a person is “highly likely” to reoffend, a district court must consider six factors:

- (1) the offender’s demographic characteristics;
- (2) the offender’s history of violent behavior;
- (3) the base-rate statistics for violent behavior among individuals with the offender’s background;
- (4) the sources of stress in the offender’s environment;
- (5) the similarity of the present or future context to those contexts in which the offender used

violence in the past; and (6) the offender's record of participation in sex-therapy programs.

*Stone*, 711 N.W.2d at 840 (citing *Linehan I*, 518 N.W.2d at 614); *see also In re Civil Commitment of Ince*, \_ N.W.2d\_, \_\_, 2014 WL 1628112, at \*7-8, 11 (Minn. Apr. 23, 2014) (reaffirming that “highly likely” determination must be based on “the *Linehan* factors and all relevant evidence”).

Neither low actuarial scores nor any other single factor is determinative of whether someone is highly likely to reoffend. *See Navratil*, 799 N.W.2d at 649 (rejecting argument that commitment was not warranted when base-rate statistics indicated low likelihood to reoffend). Rather, “the need for a multi-factor analysis lies in the very purpose for civil commitment” and the district court should consider “all evidence relevant to the civil commitment decision.” *Ince*, 2014 WL 1628112, at \*8. However, the district court should “be wary of the potential factor repetition that can result from considering the *Linehan* factors in addition to multiple actuarial assessments that use different approaches based on factors that are the same as or similar to the *Linehan* factors.” *Id.*

Here, the district court used the six *Linehan I* factors to conclude that Eischens is highly likely to reoffend. We address each factor in turn.

First, regarding the offender's demographic characteristics, the district court noted that Eischens's age, gender, marital status, and personal history place him at an increased risk to reoffend. Eischens does not challenge this conclusion.

Second, regarding Eischens's history of violent behavior, the district court found Eischens's "sexual offenses against children younger than [him] to be violent," as well as his "behaviors of assaulting others and threatening his brother with a knife." Eischens contends that "violence" has a "variable definition" and, therefore, this "factor cannot be used to support commitment." But Eischens provides no support for this contention. And the record provides ample support for the district court's finding of violent behavior.

Third, regarding the base-rate statistics for violent behavior among individuals with Eischens's background, the district court found that, "to the extent they apply, [these statistics] indicate a heightened risk of re-offense." Eischens argues that, because of his present age and his age at the time of his last documented offense, the tools employed by Dr. Marshall and Dr. Gilbertson "are not applicable" and "cannot be used to provide base rates for [him]." But the district court acknowledged the dearth of appropriate tools and explicitly credited the testimony and opinions of Dr. Marshall and Dr. Gilbertson, finding their "testimony more credible and persuasive [than the testimony of Dr. Kenning], because they conducted a multi-faceted risk assessment with the best tools available to them in this case." The district court also observed that Eischens's risk assessments "over the years have always reflected a high likelihood of sexual recidivism" The record—which contains no evidence of base-rate statistics indicating a low likelihood to reoffend—supports the district court's finding.

Fourth, regarding the sources of stress in Eischens's environment, the district court found that Eischens "may be predisposed to cope with stress in a sexually harmful manner," indicating a high risk of re-offense. The district court noted that Dr. Marshall

“opined and testified that Eischens may have difficulty residing in the community due to his inability to live independently,” and Dr. Marshall expressed “great concern that [Eischens] has acted out sexually when angry or stressed.” Eischens does not explicitly challenge this finding, and it is supported by the record.

Fifth, regarding the similarity of the present or future context to those contexts in which Eischens used violence in the past, the district court found that this factor weighs in favor of commitment. The district court opined that Dr. Kenning “disregards the fact that the group home she recommends is an adult version of the group home in which [Eischens] offended in 2008.” It also noted that Dr. Marshall “has never seen anyone before monitored in the way people have monitored [Eischens],” and Dr. Gilbertson testified that Eischens’s “victims can be anybody when no one is looking.” Although Eischens contends that in a group home for adults he “would not be in the presence of potential targets,” the record supports the district court’s finding.

Sixth, regarding Eischens’s record of participation in sex-therapy programs, the district court found that this factor weighs in favor of commitment. Although it is undisputed that Eischens has never completed a treatment program, Eischens asserts that his “inability to complete treatment . . . strongly weighs against commitment because it is not predictive of risk.” But Eischens offers no support for this assertion. And the district court noted that Dr. Marshall found Eischens “has retained little information about his own sexual offending cycle and behaviors,” Dr. Gilbertson “saw no evidence from Eischens regarding how he could improve himself,” and Dr. Kenning found his progress had “stagnated.” The record supports the district court’s finding.

Eischens challenges only the third statutory element—that he is highly likely to reoffend—which is analyzed under the six *Linehan I* factors. Because the district court’s analysis of these factors is supported by the record and by Eischens’s admission that he would reoffend if not continuously supervised, and this analysis supports a conclusion that Eischens is highly likely to reoffend, Eischens’s argument is without merit and he is not entitled to relief on this ground.

## II.

Eischens also argues that the district court failed to adequately address the less-restrictive alternatives he suggested. Under Minnesota law, the district court “shall commit the patient to a secure treatment facility unless the patient establishes by clear and convincing evidence that a less-restrictive treatment program is available that is consistent with the patient’s treatment needs and the requirements of public safety.” Minn. Stat. § 253B.185, subd. 1(d) (2012).<sup>2</sup> “[T]he burden of proving that a less-restrictive program is available is on the patient.” *In re Robb*, 622 N.W.2d 564, 574 (Minn. App. 2001), *review denied* (Minn. Apr. 17, 2001). We will not reverse a district court’s findings on the propriety of a treatment program unless its findings are clearly erroneous. *In re Thulin*, 660 N.W.2d 140, 144 (Minn. App. 2003).

---

<sup>2</sup> In 2013, the legislature amended this provision. We observe that, in his appellate brief, Eischens quotes only the new statutory language: “If the court finds by clear and convincing evidence that the respondent is a sexually dangerous person or a person with a sexual psychopathic personality, 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 respondent under commitment*, and is consistent with the person’s treatment needs and the requirements of public safety.” Minn. Stat. § 253D.07, subd. 3 (Supp. 2013) (emphasis added).

Eischens testified that he has not been accepted anywhere for placement and he would “let someone decide” where he would live. On appeal, he concedes that one of his three proposed options did not have any openings, and he failed to contact anyone at the second option. As to the third option, Eischens concedes that he “will likely have to live in some kind of residential facility for the rest of his life,” but this option is available for no more than five years. The dissent takes issue with the Minnesota Sex Offender Program and calls for changes in its operation. While we may agree with the sentiment of a need for changes, it is not our role to make policy changes. That is the province of the legislature. Our role is to review the decisions of the district court and determine whether the district court erred in the application of the facts to the law in this case. On this record, the district court’s conclusion that “there are no less restrictive alternatives that meet Eischens’s needs and the requirements of public safety” is not clearly erroneous. Eischens’s argument is without merit and he is not entitled to relief.

**Affirmed.**

**Randall, Judge (dissenting)**

“He who cannot draw on three thousand years is living from hand to mouth.” Johann Wolfgang von Goethe (1749-1832, German poet, playwright, novelist, scientist, statesman, director, critic, and artist)

I dissent from the majority’s conclusion that the district court was right in sending appellant to be “warehoused” in a confined institution, likely for the rest of his life, unless the Minnesota Legislature does something (which they talked about—but did nothing). During the 2013 legislative session, the Minnesota Legislature had an opportunity to implement recommendations of a Sex Offender Civil Commitment Advisory Task Force, but the bill did not pass the full House. *Karsjens v. Jesson*, \_\_ F. Supp. 2d\_\_, 2014 WL 667971, at \*2 n. 10 (D. Minn. Feb. 20, 2014). And the governor directed the Commissioner of the Department of Human Services to oppose future petitions for provisional discharge and suspend any transfers. *Id.*

Appellant is now 19 years old. Appellant has never been convicted of any felony in his entire life and never formally adjudicated a juvenile delinquent for any criminal sexual conduct offense. Appellant’s “last inappropriate sexual conduct which resulted in an intervention was at age 14.” (T 327)

A petition was filed to commit appellant as a Sexually Dangerous Person (SDP). The district court appointed two psychologists as court examiners, Dr. Linda Marshall was the court’s first examiner, and Dr. Mary Kenning was the second examiner. Becker County retained Dr. James Gilbertson, who was also the pre-petition examiner. At the hearing, the district court received numerous exhibits and heard testimony of the expert

witnesses, as well as testimony from appellant, his step-mother, his county social worker, and two employees from the Leo Hoffman Center.

Appellant had an interesting start in life.<sup>3</sup> Appellant was born on April 25, 1994. Appellant was severely abused and neglected by his biological mother when he was an infant and very young child. This included throwing him into a broken dresser drawer, leaving him in a car with the engine turned off in below-zero temperatures without a jacket, burning him with a lighter and cigarettes, and generally neglecting him by allowing him to sleep in soiled sheets, drink curdled milk, and eat moldy food. When appellant was 14 months old, he was found face down in the bathtub without a pulse. This near-fatal drowning resulted in significant brain damage. (T 171) Appellant's early life was very dysfunctional. After appellant was removed from his biological mother's care, he was bounced between his biological father's home and numerous foster homes. He was sexually abused between the ages of four and nine while in foster care. Appellant has been described as institutionalized.

Based on this history, it is not surprising that appellant displayed disruptive behaviors and acted out sexually as a child. Appellant has an extensive history of mental health treatment and multiple diagnoses for psychological disorders since a young age. His IQ has fluctuated in testing but generally indicates he is lower functioning. His cognitive functioning has made him eligible for a Community Alternatives for Disabled

---

<sup>3</sup> Unless otherwise noted, these facts are from the appellant's brief.

Individuals (“CADI”) waiver based on his cognitive disabilities.<sup>4</sup> Appellant has been identified as possibly having autism spectrum disorder, based on his display of adaptive deficits and inability to read social skills. (T 173-75) Whatever the reason, appellant is significantly less advanced than other 19-year-olds. *A 2006 assessment indicated that when appellant was 12 years old he was functioning at the level of a four-year-old.*

With “civil commitment,” (the Federal District Court for the District of Minnesota has recognized that our commitment statute is not “civil,” noting that “a fact-finder may very well conclude that the conditions of Plaintiffs’ confinement, including the deficiencies in treatment, rise to the level of ‘shocking the conscience.’”), *see Karsjens*, 2014 WL 66797, at \* 9, we are throwing up our hands and admitting defeat. We might as well give appellant a gold coin to give to Charon the Boatman, who will then ferry appellant across the river Styx to the netherworld. Federal District Court Judge Donovan W. Frank has indicated in no uncertain terms that the federal courts will do what the State of Minnesota should be doing. *Kasjens*, 2014 WL 667971, at \*26 (“To be sure, where state actors fail to remedy constitutional infirmities of statutes and programs such as those at issue here, the federal courts may be called upon to act in the interests of justice, as required by the evidence.”).

In previous dissenting and concurring opinions, I expressed my view that the Sexually Dangerous Person and Sexual Psychopathic Personality Commitment Act is only used for “preventive detention.” *See In re Linehan*, 544 N.W.2d 308, 319-26 (Minn.

---

<sup>4</sup> A CADI waiver enables adults and children with developmental disabilities to live in the community rather than in a care facility. [http://mn.db101.org/mn/rograms/health\\_coverage.waivers/program2c](http://mn.db101.org/mn/rograms/health_coverage.waivers/program2c).

App. 1996) (Randall, J., dissenting), *aff'd*, 557 N.W.2d 171, 175 (Minn. 1996), *vacated and remanded*, 522 U.S. 1011, 118 S. Ct. 596 (1997), *aff'd as modified*, 594 N.W.2d 867, 878 (Minn. 1999), *cert. denied*, 528 U.S. 1049, 120 S. Ct. 587 (1999); *see also In re Civil Commitment of Navratil*, 799 N.W.2d 643, 652 (Minn. App. June 13, 2011) (Randall, J., dissenting); *Joelson v. O'Keefe*, 594 N.W.2d 905, 913-18 (Minn. App. May 18, 1999) (Randall, J., concurring specially) (comparing “preventive detention” of civil commitment to “the old Stalinist Russian winter resort for political dissidents at the gulag archipelago”), *review denied* (Minn. Jul. 28, 1999). In this case, my predictions are fully realized: the State of Minnesota is using civil commitment as “preventive detention” of a 19-year-old who has never been convicted or adjudicated delinquent for a criminal sexual conduct in his life and whose last offense was five years ago! *Linehan I* was written in 1996—nothing has changed in 18 years.

In affirming the commitment, the majority defers to the district court’s credibility judgment, making the commitment decision “effectively insulated from appellate review.” Eric S. Janus, *Minnesota’s Sex Offender Commitment Program: Would an Empirically-Based Prevention Policy be More Effective?*, 29 Wm. Mitchell L. Rev. 1083, 1111 (2003). I would vacate the district court’s order for commitment and remand to the district court for reconsideration in light of the supreme court’s opinion in *In re Civil Commitment of Ince*, \_\_\_ N.W.2d \_\_\_, 2014 WL 1628112 (Minn. Apr. 23, 2014). In *Ince*, the supreme court reaffirmed the “highly likely” standard enunciated in *In re Matter of Linehan*, 557 N.W.2d 171, 180 (Minn. 1996) (*Linehan III*), but concluded that “ ‘highly likely’ cannot be defined by numeric value.” *Id.* at \*6. Next, the supreme court clarified

that the district court may consider all evidence relevant to the determination of whether an individual is “highly likely” to reoffend, which may include actuarial assessments as well as clinical judgments. *Id.* at \*7-8. The supreme court cautioned the district courts “to be wary of the potential factor repetition that can result from considering the *Linehan* factors in addition to multiple actuarial assessment that use different approaches based on factors that are the same as or similar to the *Linehan* factors.” *Id.* at 8. Because it was not clear that district court adhered to the *Linehan* factors after largely accepting expert opinion on the actuarial evidence, the supreme court remanded to the district court for reconsideration and additional findings. *Id.* at \*9, 11

Appellant correctly points out that the district court adopted Dr. Marshall’s and Dr. Gilbertson’s opinions that appellant is “highly likely” to reoffend in its findings on the *Linehan III* factors. (Order at 41) Both those two experts (their expert opinions look like rote) relied, in part, on actuarial risk assessment tools in offering their opinions that appellant is highly likely to reoffend. (Order at 35, 37-39) (T 162-63, 184-90, 247-53) Noteworthy is that Dr. Kenning based her opinion on clinical assessment only and determined that appellant was *not* highly likely to reoffend. (T 320) Dr. Kenning’s reason for not relying on actuarial assessments was that these assessments *are not considered valid tools for evaluating juvenile sex offenders*. (T 321-24) It is not possible to determine whether the district court’s reliance on the examiners’ opinions based on actuarial assessments evidence double-counted certain of the *Linehan III* factors. A remand is necessary to permit the district court to reconsider the “highly likely” to reoffend finding and ensure that relevant factors are only counted once.

I dissent, as I have before, to express my view concerning the great myth that civil commitment is “remedial . . . for treatment purposes and . . . not for purposes of preventive detention.” *Call v. Gomez*, 535 N.W.2d 312, 320 (Minn. 1995) (citing *In re Blodgett*, 510 N.W.2d 910, 916 (Minn. 1994)). Minnesota’s Civil Commitment Act cannot be called “punishment” because that would be unconstitutional.

As anyone in the game from the bottom to the top knows, you are only civilly committed after you have *served every hour of every day that you owe the state of Minnesota* for a previous conviction for a sexual offense. So we call it “remedial” and we steer away from the bad word “punishment.” The hell it is not punishment.<sup>5</sup>

The next great myth (close to being a “lie”) is that it is for medical treatment. If there was any legitimate extended medical treatment provided, then why in the 20 years since MSOP was created has the number of civilly committed offenders grown to 698 clients? *Karsjens*, 2014 WL 667971 at \*1 n.4 The third great myth or “lie,” is that once you are civilly committed you have a rational due process chance to be medically discharged. The reality is that only two clients have been provisionally discharged. *Id.*

Minnesota holds the dubious statistic of having the highest per capita commitment rate in the nation. Office of the Legislative Auditor, State of Minnesota, Evaluation Report: Civil Commitment of Sex offenders (2011) (“OLA Report” at 18), *available at* <http://www.auditor.leg.state.mn.us/ped/pedrep/ccso.pdf>). The reality of miniscule

---

<sup>5</sup> One of the issues in a pending federal lawsuit is the Plaintiffs’ claim that commitment to MSOP is the equivalent of a prison commitment. *See Karsjens*, 2014 WL 667971 at \*12 n.12 (noting Plaintiffs’ are double bunked in wet cells with a stainless steel toilet/sink combination, doors are metal with a small viewing window, and Plaintiffs’ are locked in their cells every evening).

releases proves the so-called “treatment” is ineffective to nonexistent. *See* Janus, 29 Wm. Mitchell L. Rev. at 116-18 (discussing research showing that failure to progress in MSOP treatment may reflect other disabilities and is not a valid measure of risk of re-offense). The lack of adequate treatment is also one of the issues in the pending federal lawsuit. *See Karsjens*, 2014 WL 667971, at \*3, \*8.

The low discharge rate from MSOP effectively means lifetime confinement equivalent to prison incarceration without possibility for release for the 19-year-old appellant based on sexual conduct that occurred when he was 14. *See Karsjens*, 2014 WL 667971, at \*7. This is cruel and inhuman. U.S. Const. amends. 8, 14. The United States Supreme Court recognized that children are different because of their “lack of maturity” and “underdeveloped sense of responsibility,” which leads to “recklessness, impulsivity, and heedless risk-taking.” *Miller v. Alabama*, 132 S. Ct. 2455, 2458, 3469 (2012) (holding it is cruel and inhuman punishment to impose a mandatory sentence of life in prison without possibility for parole on a 14-year-old convicted of murder). *It is these very traits of impulsivity and lack of maturity that persuaded the experts in this case that appellant should be locked up!* Where will we move “the confinement-for-life” line next?!

Dr. Kenning supported placement in the community under careful monitoring, while she acknowledged that there are limited appropriate placements available. It is unfathomable that there are no community-based alternatives to lifetime commitment at MSOP that would provide adequate supervision for appellant. (OLA Report at 42) In 2011, the Legislative Auditor reported that MSOP’s annual cost is \$120,000 per offender

(the truth is probably closer to \$140,000 now), compared with about \$35,000 per year for an inmate at a Minnesota correctional facility. (OLA Report at 1,11, 15). Our resources, the taxpayers' money, would be better spent on real programming in prison and programming in the community. (OLA Report at 42-43, 45) Where would all the money come from to ramp up what present programs there are in prison for sex offenders? Those funds dollars would come from the budget for MSOP. *See* Janus, 29 Wm. Mitchell L. Rev. at 1101-07 (comparing the expenditures for sexual violence treatment and prevention in the community with expenditures for MSOP commitments and concluding that three offenders could be treated in the community for the cost of one offender civilly committed). Do the math: 698 at \$120,000 a year equals \$83,760,000; 698 at \$140,000 a year equals \$97,720,000. That is the present budget to warehouse people at MSOP. The number of "clients" is projected to increase to 1109 by 2020. *Karsjens*, 2014 WL 667971, at \*1 n.4.

As the record shows, appellant qualifies for a CADI waiver because his undisputed low cognitive functioning. If there was community based residential treatment available, appellant would have a resource for funding.

If appellant is released to a form of intensive supervised programming, and he commits a crime, what do we do with him? Here's an answer: treat him like every citizen in Minnesota accused of a crime. He gets an attorney of his own choosing, or he gets a public defender. He's entitled to all constitutional protections afforded by the United States Constitution, the Bill of Rights, and the Minnesota Constitution. There would be protections like a trial by jury, presumption of innocence, the right to be free

from compelled self-incrimination, and all other constitutional rights we hold dear would be automatically extended to appellant. Just as we extend those rights to a defendant accused of premeditated first-degree murder and all other degrees of homicide, armed robbery, violent assault, and violent sexual assault. If appellant is convicted, he will receive a sentence under present Minnesota Sentencing Guidelines and the discretion of a Minnesota district court judge. *See State v. Jackson*, 749 N.W.2d 353, 359 n.2 (Minn. 2008) (stating that any sentence in the cell is the presumptive sentence and not a departure). He will also have a guarantee of at least one review of his conviction. *See Carlton v. State*, 816 N.W.2d 590, 614 (Minn. 2012) (discussing authority guaranteeing right of substantive review of a conviction by direct appeal or postconviction). What a novelty! Charge appellant with a crime and if convicted, give him a rational sentence for what he did with an “outdate” instead of warehousing him for life “for something he might think of doing in the future.” It is essential to understand this argument that with every crime in Minnesota, no matter how heinous, there is an “outdate.”<sup>6</sup> If there is one thing all inmates in Minnesota and in all other states, male or female, understand, it is their “outdate.” *See State v. Calmes*, 632 N.W.2d 641, 644 (Minn. 2001) (noting due process may be violated if defendant’s sentence is enhanced after defendant has

---

<sup>6</sup> For premeditated first-degree murder the presumptive sentence is life in prison with at least 30 years served before the defendant is eligible for a parole hearing. Minn. Stat. § 244.05, subs. 4, 5. (2012). He is not guaranteed parole, but is guaranteed a hearing, and more than one. With every other crime in the State of Minnesota, the offender serves 2/3 of the sentence in prison (“hard time”) and the remaining 1/3 on supervised release, perhaps under intensive supervised release (ISR), and a gradual lessening of supervision as the offender progresses.

developed “crystallized expectation of finality” in the earlier sentence). In Minnesota, the “outdate” generally occurs after the offender has served 2/3 of the sentence plus the 1/3 served on supervised release. *See* Minn. Stat. §§ 244.04, subd. 1, 244.05, subd. 1b(a) (2012). Inmates calculate that date, treasure that date, and do what they can to protect it. For sexual offenders deemed dangerous and with a propensity to reoffend, simple legislative tinkering with sentencing guidelines would allow the DOC to use that 1/3 of good time as incentive, a carrot so to speak, to compel offenders to attend mandated programming and therapy or run the risk of losing some of that 1/3 good time. If presented with that choice, the inmate would have the free choice to refuse to comply with programming and therapy but then serve 100% of the sentence imposed.

As a married man, and as the father of children, including a daughter, I can understand the passions, the anger, and the utter irrational desire for revenge when faced with horrific acts of sexual predation.

I understand how the Civil Commitment Act (SPP and SDP) was passed under the guise of “gee, we have to do something, or we won’t get by our next election, but we have to sugarcoat it and call it civil and remedial and for medical treatment so it will pass constitutional muster.”

But as a judge, I hate lying about it. *See Joelson*, 594 N.W.2d at 918 (Randall, J., concurring specially).

I respectfully dissent. I would remand the case straight back to the district court in light of *State v. Ince* and the lessons learned in *Karsjens v. Jessen*.