

Nos. A10-1269 & A10-1270

STATE OF MINNESOTA
IN SUPREME COURT

In the Matter of the Civil Commitment of:

PETER GERARD LONERGAN,

Petitioner.

In the Matter of the Civil Commitment of:

ROBERT ARCHIE KUNSHIER,

Petitioner.

RESPONDENT'S BRIEF

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LEGAL ISSUE

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

Trial court held: In *Lonergan*, trial court did not address, but determined merits of Lonergan's motion. In *Kunshier*, trial court held "no."

Court of appeals held: In *Lonergan*, court of appeals held Rule 60.02 not available to "seek discharge or make a constitutional challenge to adequacy of treatment." In *Kunshier*, court of appeals held "no."

Minn. R. Civ. P. 81.01(a)

Minn. Stat. § 253B.17, subd. 1 (2010)

Minn. Stat. § 253B.185, subd. 1(e) (2010)

In re K.B.C., 308 N.W.2d 495 (Minn. 1981)

Seling v. Young, 531 U.S. 250, 121 S. Ct. 727 (2001)

STATEMENT OF THE CASE AND THE FACTS

This Court granted review of the petitions of Peter Lonergan and Robert Kunshier. The two men seek to use Minn. R. Civ. P. 60.02 to vacate their ongoing civil commitments—Lonergan as a sexually dangerous person (“SDP”) and Kunshier as a sexual psychopathic personality (“SPP”). The court of appeals affirmed the district court orders denying their Rule 60.02 motions.

Lonergan’s Case

Peter Lonergan has an extensive history of sexual offending from the time he was an early teenager until he last went to prison at age 30. The district court in Lonergan’s commitment case found that he sexually assaulted or abused eight victims, seven of them children. The children, both boys and girls, ranged from three to eight years of age, except that Lonergan continued to sexually abuse his younger brother until the boy was in ninth grade. Lonergan’s abuse of his child victims included fondling, digital penetration, and vaginal, anal and oral sex. He threatened some of the children to keep them from telling, and he shocked one victim with a small buzzer and threatened him with knives. Respondent’s App. (“RA”) 7, 8, 12. When Lonergan was 17, he forced a female hitchhiker to have sex with him. RA6.

Lonergan was convicted and incarcerated for sexual offenses in 1985 and 1992. RA7, 9. His last sentence was for over 22 years. RA9. Both times he was in prison he was determined to need sex offender treatment, but did not participate because he completely denied engaging in any sexual offense. RA13-14.

In August 2006, while Lonergan was still confined in prison, Dakota County filed a petition to commit him as an SPP and an SDP. RA1. A five-day trial on the petition was held in November 2007. Lonergan was represented by an attorney. RA1. In January 2008, the Dakota County District Court (Judge Robert Carolan) issued an order

committing Lonergan as an SDP to the Minnesota Sex Offender Program (“MSOP”). RA1-29.

Proceeding *pro se*, Lonergan appealed his initial commitment to the court of appeals. He raised a number of claims, including that the trial court lacked jurisdiction, that his trial attorney was ineffective, that the trial court’s admission of evidence regarding his conviction offenses was erroneous because he was actually innocent, that he was denied the right to call witnesses and that the district court did not adequately explain why it denied his motion to dismiss. The appellate court affirmed the trial court’s commitment order in an unpublished opinion issued on August 5, 2008. *In re Lonergan*, No. A08-394, 2008 WL 2967088 (Minn. Ct. App. Aug. 5, 2008) (unpublished) (RA30), *review denied* (Minn. Oct. 1, 2008), *cert. denied*, 129 S. Ct. 2391 (2009). This Court denied Lonergan’s petition for review. RA36. The United States Supreme Court denied his petition for writ of certiorari. RA37.

Under Minn. Stat. § 253B.18, subd. 2 (2010), the trial court’s January 2008 commitment order was an “initial” commitment. The statute required MSOP to submit a treatment report, and the court must then hold a review hearing to decide whether to make the commitment final. *Id.*, subds. 2, 3.¹ After Lonergan was released from prison and transferred to MSOP, MSOP conducted its evaluation and submitted a report supporting his continued commitment. RA39-40. Judge Carolan then held a review hearing and, on May 13, 2009, issued an order indeterminately committing Lonergan to

¹ A 2011 statutory change eliminated the review hearing, making the commitment a single-hearing procedure. *See* 2011 Minn. Laws, ch. 102, art. 3, § 1. Lonergan and Kunshier’s commitments, however, occurred under the previous procedure.

MSOP as an SDP. RA43. Lonergan did not appeal the indeterminate commitment order.²

In early 2010, less than a year after his commitment, Lonergan brought a petition before the “special review board” (“SRB”) established by Minn. Stat. § 253B.18, subds. 4c, 5 (2010), requesting to be discharged or provisionally discharged from his commitment, or to be transferred to a non-secure treatment facility. The SRB issued a report on December 26, 2010, recommending that Lonergan’s petition be denied. RA44. Pursuant to the commitment statute, the SRB’s recommendation was made to a special three-judge district court panel. *See* Minn. Stat. § 253B.185, subd. 9(f) (2010). Neither party requested a “rehearing” before the district court panel and, on March 28, 2011, the panel issued its order denying Lonergan’s petition. RA44.

On May 27, 2010, while his SRB petition was pending and a little more than a year after the issuance of the indeterminate commitment order, Lonergan filed a *pro se* Motion for Relief from Judgment seeking relief under Minn. R. Civ. P. 60.02(d), (e) and (f). The grounds stated in the accompanying memorandum were (1) that Lonergan is not mentally ill, so that the grounds for commitment no longer exist, (2) that the treatment at MSOP is inadequate or punitive, and (3) that MSOP and the county misled the district court during the commitment hearings by indicating that treatment would be provided. RA46-65.

On July 7, 2010, without further briefing, the district court, again Judge Carolan, issued an order denying Lonergan’s motion, concluding that none of the cited provisions of Rule 60.02 entitled him to relief. RA66-67.

² He did, however, file lawsuits against the three psychologists who examined him and testified at his initial commitment hearing, including even the examiner he had selected. All three suits were dismissed. RA113-18.

Lonergan filed a *pro se* appeal to the court of appeals from the order denying his Rule 60 motion. His principal brief raised more or less the same claims as he raised in the district court. His reply brief added an argument, not raised in the district court, that the SDP law is an unconstitutional “bill of attainder.” RA101-02.

On January 4, 2011, the court of appeals issued a published opinion affirming the denial of Lonergan’s Rule 60 motion. *See In re Lonergan*, 792 N.W.2d 473 (Minn. Ct. App. 2011) (RA107). The appellate court determined that Lonergan’s claims fell into two categories: (1) that he was entitled to be discharged or transferred to a different treatment program, and (2) that MSOP did not provide him proper treatment. The court held that the first of these claims was precluded by Minn. Stat. § 253B.17, subd. 1 (2010), which excludes persons indeterminately committed as mentally ill and dangerous (“MI&D”), SPP or SDP, from the group of patients who may apply *to the committing court* to have their commitments discharged or their place of commitment changed. 792 N.W.2d at 476-77. Concerning the second claim, the appellate court held that, under the commitment statute, a person committed as an SDP may not challenge the adequacy of post-commitment treatment by means of a Rule 60.02 motion to the committing court, but instead must raise that issue through other avenues. 792 N.W.2d at 477.

Lonergan petitioned for review to this Court. On April 19, 2011, the Court granted review. RA111.

Kunshier’s Case

The other petitioner here, Robert Kunshier, has a history of sexual assault at least as disturbing as Lonergan’s. As the court of appeal summarized in 1994:

Since 1975, he has spent less than 18 months outside secure facilities.

As a juvenile, he was placed on probation for committing assault, burglary, and for making obscene phone calls. Then, in December 1979, Kunshier kidnapped a young woman and for six hours raped her repeatedly.

Two days later, he kidnapped another woman and forced her to perform oral sex. Kunshier pleaded guilty to and was sentenced for kidnapping.

One month after his release in 1986, Kunshier was arrested after attempting to kidnap a woman and her baby at knife-point. Kunshier admits this attempt was sexually motivated.

He was sent to the security hospital for sexual aggressiveness treatment, but escaped after 28 days. He stole a car, led police on a high speed chase, and eventually evaded authorities. He then burglarized a home in St. Cloud, raped the female homeowner, and stole her car. Kunshier was apprehended in South Dakota and was sentenced to the correctional facility at Stillwater.

In re Kunshier, 521 N.W.2d 880, 881-82 (Minn. Ct. App. 1994) (RA136).

In March 1988, Dakota County filed a petition to civilly commit Kunshier as a psychopathic personality (“PP”), the predecessor to the current SPP statute.³ But in December of that year, after a brief commitment hearing, the district court continued the case until 1993 to allow Kunshier to attempt to avoid commitment by participating in treatment in prison before his release scheduled for May 1993. RA119-21. In early 1993, his commitment case was reactivated with the appointment of three psychologists to examine him. RA126-27. The court held a two-day commitment hearing in March 1994. RA127. One of the examiners testified that Kunshier “is as classic an embodiment of the Psychopathic Personality as I have seen in my professional career.” RA131. Another concurred that the seminal treatise on “clinical psychopaths” presented “virtually

³ In 1988, when Kunshier’s commitment proceeding was initiated, commitment of “psychopathic personalities” was governed by Minn. Stat. §§ 526.09–.11 (1988). In 1994, at the same time the SDP law was enacted, the PP law was rewritten to include a significant judicial interpretation, was moved from chapter 526 to the civil commitment law, chapter 253B, and was renamed “sexual psychopathic personality.” *See* 1994 Minn. Laws, 1st Spec. Sess., art. 1, § 2, now codified as Minn. Stat. § 253B.02, subd. 18b (2010). The 1994 law stated that the 1994 SPP law was intended to be “a continuation of” the earlier PP law and that judicial interpretations of the old law would also apply to the new one. 1994 Minn. Laws, 1st Spec. Sess., art. 1, § 5.

a word portrait of Mr. Kunshier.” RA138. On April 12, 1993, the court issued an order initially committing Kunshier to the Minnesota Security Hospital.⁴ RA127.

In October 1993, the Security Hospital filed its required report, and the court held the statutory review hearing the following month. On April 4, 1994, the trial court, Judge Patrice Sutherland, issued her order indeterminately committing Kunshier as a PP. RA133-35.

Kunshier appealed his commitment to the court of appeals. Among other things, he argued that the trial court had addressed the statutory elements for a PP commitment, but had not addressed the elements identified in this Court’s decision in *State ex rel Pearson v. Probate Court*, 287 N.W. 297 (Minn. 1939), *aff’d*, 309 U.S. 270 (1940). The appellate court remanded to the district court to consider whether the evidence established two *Pearson* requirements—“utter lack of power to control sexual impulses and probability that the lack of control will result in harm to others.” *Kunshier*, 521 N.W.2d at 885.

The district court, again Judge Sutherland, held another hearing in March 1995. RA141-48. Following the hearing, the court issued an order finding that Kunshier met the *Pearson* requirements and indeterminately committing him as a PP. RA143-44.

Kunshier appealed that new order to the court of appeals. The appellate court affirmed in an unpublished opinion issued in November 1995, concluding that the utter-lack-of-power-to-control and likelihood-of-reoffense requirements were amply satisfied. The court noted that Kunshier committed

violent sexual assaults . . . while on probation, after escaping from custody, and during or after completing sex offender programming. His assaults have been committed within a day or a week of being released from or

⁴ MSOP had not yet been established.

escaping from custody. . . . He rapes while actively fleeing pursuing peace officers. His sexual impulses override any normal fear of capture or consequences, and he has admitted feeling “fearless” while committing these assaults. The trial court found appellant is “totally dependent” upon confinement to control his sexual impulses.

In re Kunshier, No. C7-95-1490, 1995 WL 687692, at *3 (Minn. Ct. App. Nov. 21, 1995) (unpublished) (RA155).

Since his commitment became final, Kunshier has brought a number of actions seeking release or challenging the conditions of his confinement. In 2002, he petitioned for a full or provisional discharge from his commitment. The petition was denied by the SRB. Kunshier appealed the denial to the three-judge district court panel but subsequently withdrew the appeal. RA158.

In 2005, Kunshier again petitioned for full or provisional discharge. The petition was denied by the SRB, the Commissioner of Human Services, and finally the district court panel. Kunshier appealed to the court of appeals, which denied in an unpublished opinion issued in March 2007. *Kunshier v. Ludeman*, No. A06-1854, 2007 WL 656543 (Minn. Ct. App. Mar. 6, 2007) (unpublished) (RA160), *review denied* (Minn. May 15, 2007).

In April 2007, Kunshier filed suit in the Carlton County District Court against MSOP and various other state entities and officials. His suit, under 42 U.S.C. § 1983, challenged a directive that he submit to an unclothed body search before leaving MSOP to attend a hearing. The district court dismissed Kunshier’s complaint on the merits. He appealed to the court of appeals, which affirmed in an unpublished opinion issued in October 2009. *Kunshier v. Minnesota Sex Offender Program*, No. A09-0133, 2009 WL 3364217 (Minn. Ct. App. Oct. 20, 2009) (unpublished) (RA168), *review denied* (Minn. Dec. 15, 2009).

In August 2008, Kunshier filed a state habeas corpus petition in the Carlton County District Court. Among other things, he claimed that (1) a statement in the committing court's 1988 order continuing his commitment case precluded his later commitment, (2) his commitment attorney's subsequent disbarment for actions in other cases required the vacation of Kunshier's commitment, (3) he was entitled to discharge because he had completed treatment, and (4) the requirement of unclothed body searches in certain situations violated his rights. In January 2009, the district court issued an order denying all of Kunshier's habeas claims. In addition to relying on procedural grounds, the district court rejected each of the above claims on the merits. RA163-66. Kunshier appealed the district court's order to the court of appeals, but the appeal was dismissed because he failed to file a brief. RA167.

The instant matter arises from a *pro se* motion filed by Kunshier in his commitment case on December 22, 2009, seeking to have his 1995 PP commitment vacated pursuant to Minn. R. Civ. P. 60.02(f). RA176. Kunshier's accompanying memorandum raised a number of issues, specifically, that (1) the "End of Confinement Review Committee" erroneously designated Kunshier a Level 3 sex offender for community notification, and there is no way for him to get the risk level lowered (RA177, 182-83), (2) there is no way for him to be released from commitment even if he no longer meets the commitment standard (RA177, 183-87), (3) he was being forced to comply with a new treatment program without proof that the first was unsuccessful (RA177, 187-88); (4) MSOP has failed to release anyone (RA177-78), (5) MSOP will not support Kunshier's release (RA188-89), and (6) his attorney in his original commitment case provided him ineffective assistance of counsel (RA178, 190-92).

A hearing on Kunshier's motion was held in March 2010. The attorney who represented him in his recent SRB and district court panel cases appeared for him. On May 25, 2010, Judge Sutherland issued an order denying the motion in full. RA195. The court held that Rule 60.02(f) is an improper means to review the ongoing commitment of a person committed as a PP, that the equities did not favor Kunshier, that his motion was not brought within a "reasonable time" after his commitment as required the rule, and that claims of mistake and ineffective assistance of counsel must be brought within one year.

Kunshier filed a *pro se* appeal to the court of appeals. He continued to raise two of the six issues he had raised in the district court, specifically that (1) MSOP had failed to release anyone, rendering the discharge criteria "unconstitutional as applied" (RA209-11) and (2) his commitment attorney provided ineffective assistance of counsel by not filing a petition for review with this Court (RA206-09). In addition, he raised several issues he had *not* raised in the district court, specifically that (3) the district court placed the burden on him to show that he was no longer dangerous (RA211-12), (4) the district court lacked jurisdiction to commit him, based on a statement made at the time of the 1988 hearing (RA216-18), and (5) his judgment of commitment was now "satisfied" (RA218-19).

On February 15, 2011, the court of appeals issued an unpublished opinion affirming the district court's order denying Kunshier's Rule 60.02 motion. Citing its recent published opinion in *Lonergan*, the appellate court held simply that Rule 60.02 "is not the mechanism for relief from an indeterminate civil commitment order." *In re Kunshier*, No. A10-1270, 2011 WL 500070, at *2 (Minn. Ct. App. Feb. 15, 2011) (unpublished) (RA221).

Kunshier petitioned for review by this Court. On April 19, 2011, the Court granted review, contemporaneous with its grant of review in *Loneragan*. RA223. On May 26, 2011, the Court granted the petitioners' motion to consolidate the two cases for briefing and oral argument.

After filing the current motion in the district court, Kunshier has filed two other matters relating to his commitment or treatment at MSOP. In August 2010, he and two other MSOP patients filed a suit in Minnesota's federal district court pursuant to 42 U.S.C. § 1983 challenging conditions of confinement at MSOP, particularly concerning the storage and use of computer data and the amount of personal possessions residents may keep in their rooms. On June 6, 2011, Federal Magistrate Judge Jeanne Graham issued a Report and Recommendation that all of Kunshier's claims be rejected on the merits and that his suit be dismissed. RA225-40.

More recently, on or about June 20, 2011, Kunshier filed a petition with the Dakota County District Court in his commitment case, under Minn. Stat. § 253B.17 (2010), asking the court to determine "whether Mr. Kunshier continues to be civilly committed." RA241 On June 30, 2011, the court issued an order denying the petition on the grounds that the court lacked authority to consider it. RA245.

ARGUMENT

I. INTRODUCTION.

The Petitioners here brought motions under Minn. R. Civ. P. 60.02 seeking to vacate their indeterminate SDP and SPP commitments. Respondent County agrees with the court of appeals holding in the *Loneragan* case, i.e., that a person committed as an SDP, SPP or MI&D may not use Rule 60.02 to seek to vacate his commitment on either

of two grounds: that he is entitled to discharge based on his current condition or that treatment provided to him following commitment is inadequate.

As shown below, the Legislature has expressly provided an exclusive mechanism for persons committed as SPP, SDP and MI&D to obtain discharge, provisional discharge or transfer, and the district court plays no part in the process. In addition, under the commitment law, the committing court has essentially no role in overseeing the person's commitment after the indeterminate commitment order. Indeed, Minn. Stat. § 253B.17 (2010), a provision that allows committed persons to return to the committing court for relief following commitment, is expressly made *unavailable* to persons committed as SPP, SDP and MI&D. And, finally, *Seling v. Young*, 531 U.S. 250, 121 S. Ct. 727 (2001), a decision of the U.S. Supreme Court, demonstrates that treatment conditions following commitment do not provide a basis to challenge the validity of the previous commitment order.

The County agrees that some other claims that may be raised by such persons under Rule 60.02 are not categorically precluded from being raised under that rule. Thus, the County concurs that the holding in the unpublished *Kunshier* opinion is overly broad and that a remand in that case is necessary. However, the grounds for relief under Rule 60.02 are narrow and there are, necessarily, strict procedural limits under that rule. On remand, it will be readily determined that *Kunshier* has no valid claim.

Brief mention should be made of the discussion on pages 7–17 in the Appellants' Brief (section IV.B.). There, Petitioners engage in a meandering, and in some respects erroneous, discussion of the history and evolution of civil commitment, including past court decisions with which Petitioners or their counsel disagree. But *none* of the

discussion from the bottom of page 7 through page 17 has even the slightest bit of relevance to the issues in this case. Accordingly, Respondent will not address it further.

II. SCOPE OF REVIEW.

The issue on which this Court granted review is solely a legal one, involving the interpretation of the Commitment Act as well as the Rules of Civil Procedure. This Court reviews such issues de novo. *In re Brown*, 640 N.W.2d 919, 922 (Minn. 2002).

III. THE SPP AND SDP COMMITMENT AND DISCHARGE STATUTES.

A consideration of whether, and in what instances, persons committed as SPPs and SDPs may use Rule 60.02 to attempt to end their commitments must begin with a review of the provisions of the Minnesota Commitment and Treatment Act (“Commitment Act”), Minn. Stat. ch. 253B. The statutory provisions described below show that, unlike the situation with other types of commitments, the committing court affirmatively loses authority to consider the ongoing commitment of a person committed as MI&D, SDP or SPP once the indeterminate commitment order is issued.

Under the Commitment Act, a person may be committed under one or more of six categories: (1) mentally ill (“MI”), (2) chemically dependent (“CD”), (3) developmentally disabled (“DD”), (4) mentally ill and dangerous (“MI&D”), (5) sexual psychopathic personality (“SPP”) and (6) sexually dangerous person (“SDP”). *See* Minn. Stat. § 253B.02, subds. 2, 13, 14, 17, 18b, 18c (2010).

All six of the commitment categories require that the person to be committed be dangerous, either to self or others, due to his or her disorder. For the first three categories—MI, CD and DD—the person must present a substantial likelihood of “physical harm” to self or others. *Id.* at subds. 2, 13, 14. However, for the other three categories of commitment—MI&D, SPP and SDP—the person must present a higher

level of danger to others, “*serious physical harm*” for MI&D persons, and “*serious physical or emotional harm*” for SPPs and SDPs. *Id.* at subds. 7a, 17, 18c(3) (emphasis added); *In re Rickmyer*, 519 N.W.2d 188, 190 (Minn. 1994) (emphasis added). Due to the higher degree of public danger addressed by MI&D, SPP and SDP commitments, the Legislature has provided special procedures for the commitment and the discharge of persons committed under those provisions. *In re K.B.C.*, 308 N.W.2d 495, 498 (Minn. 1981).

Under the Commitment Act, after a person is committed in one of the less-dangerous categories—MI, CD or DD—the committing court has continuing jurisdiction over the person’s case. Following the court’s initial commitment, the treatment facility or the person’s case manager must provide a report to the court within 90 days following the commitment and again before the end of six months. If the reports are not filed on time or indicate that the person does not require further care under commitment, the committing court shall terminate the commitment. Minn. Stat. § 253B.12, subd. 1 (2010). The initial commitment lasts only six months and will be extended only after the committing court holds an additional hearing. Minn. Stat. §§ 253B.12, 253B.13 (2010). A continued commitment may then last for no more than 12 months; if an additional period of commitment is sought, a new petition must be filed and new commitment trial held in the committing court. § 253B.13. Thus, if the patient is to be committed for more than 90 days, the committing court will necessarily have ongoing involvement in the patient’s case.

Moreover, in addition to this required recurring involvement by the district court, under Minn. Stat. § 253B.17, subd. 1 (2010),

[a]ny patient, *except one committed as a person who is mentally ill and dangerous to the public or as a sexually dangerous person or person with a*

sexual psychopathic personality . . ., or any interested person may petition the committing court . . . for an order that the patient is not in need of continued care and treatment or for an order that an individual is no longer a person who is mentally ill, developmentally disabled, or chemically dependent, or for any other relief.

(Emphasis added.) Under this provision, the committing court may terminate the person's commitment at any time. As the court of appeals has recognized, the committing court may even reevaluate whether the treatment facility to which it has committed the person can meet the person's treatment needs and, if it cannot, the court may change the place of commitment to a different facility. *In re Kellor*, 520 N.W.2d 9 (Minn. Ct. App. 1994).

But all of this is in marked contrast to the procedures for persons committed as SDP, SPP and MI&D. Following the final commitment hearing in an SDP, SPP or MI&D case, the person is committed for an *indeterminate*, not a time-limited, period. Minn. Stat. § 253B.185, subd. 1(e) (2010) (containing provision for SPPs and SDPs); Minn. Stat. § 253B.18, subd. 3 (2010) (containing provision for MI&D persons).⁵ And unlike the procedures for the less-dangerous categories, there is no provision for periodic reporting to the committing court regarding persons who are indeterminately committed as SDP, SPP and MI&D. Thus, the committing court will not have ongoing involvement in the person's case as a matter of course, as is true for persons committed as MI, CD or DD.

Moreover, section 253B.17, which allows a person committed as MI, CD or DD to petition the committing court to have the commitment terminated, the place of

⁵ While the provisions of section 253B.18 indicate that they apply to persons petitioned or committed as MI&D, under Minn. Stat. § 253B.185, subd. 1(a) (2010), section 253B.18, subd. 3, and many other provisions of section 253B.18 also apply to persons petitioned or committed as SDP and SPP.

commitment changed “or for other relief,” expressly states that it does *not* apply to persons committed as MI&D, SDP or SDP (except that the committing court has continuing jurisdiction over neuroleptic medication matters for persons committed as MI&D, *see id.*, subd. 1). For persons committed as SDP, SPP and MI&D, rather than giving the committing court the authority to consider their future discharge or transfer, the Legislature has established a special procedure involving a three-member special review board (“SRB”) and a specially appointed three-judge district court panel. Minn. Stat. §§ 253B.18, subds. 4c, 5; 253B.185, subd. 9; 253B.19 (2010).

Section 253B.185, subd. 1(e), states:

After a final determination that a patient is a sexually dangerous person or sexual psychopathic personality, the court shall order commitment for an indeterminate period of time and the patient shall be transferred, provisionally discharged, or discharged, only as provided in this section [i.e., section 253B.185].

Section 253B.18, subd. 3, contains the same language for persons committed as MI&D.⁶

Thus, the statute specifically states that a person committed in one of the three

⁶ Section 253B.18, the MI&D section, provides at subdivision 3:

If the court finds at the final determination hearing held pursuant to subdivision 2 that the patient continues to be a person who is mentally ill and dangerous, then the court shall order commitment of the proposed patient for an indeterminate period of time. 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.

Before August 1, 2010, this provision also governed SPP and SDP commitments, because section 253B.185, subd. 1 (2009), stated, “Except as otherwise provided in this section, the provisions of this chapter pertaining to persons who are mentally ill and dangerous to the public apply with like force and effect to persons who are alleged or found to be sexually dangerous persons or persons with a sexual psychopathic personality.” *See also Call v. Gomez*, 535 N.W.2d 312, 317 & n.3 (Minn. 1995). In 2010, however, the legislature added part of this language (quoted in text) to the SPP/SDP provision, section 253B.185. *See* 2010 Minn. Laws, ch. 300, § 26. Both before and after the 2010

“dangerous” categories may be discharged from commitment or transferred to a different facility only through the SRB or district court panel process. As noted above, these special discharge and transfer provisions are intended “to provide extra protection for society from those who have been found to be dangerous.” *K.B.C.*, 308 N.W.2d at 498.

IV. RECENT COURT OF APPEALS OPINIONS ADDRESSING AVAILABILITY OF RULE 60.02 REMEDY IN SPP AND SDP CASES.

A. Lonergan’s And Kunshier’s Cases.

Beginning at the end of 2009, many individuals committed as SPPs and SDPs have brought motions in their committing courts under Rule 60.02 asking the courts to vacate their commitment orders. All of these motions have been denied in full by the district courts. Most of these committed persons appealed to the court of appeals, and that court has now issued opinions or orders in at least 15 cases affirming the denial of the Rule 60.02 motions.

The first of these appellate decisions was in the *Lonergan* case, one of the two cases now before this Court. *See In re Lonergan*, 792 N.W.2d 473 (Minn. Ct. App. 2011), *review granted* (Minn. Apr. 19, 2011). In his principal appellate brief, Lonergan made two, or perhaps three, claims. First, he challenged the treatment provided at MSOP. He claimed that he was not receiving any sex offender treatment and that the treatment program there was punitive. RA73, 74, 77, 85. Second, and related to the first claim, he asserted that the commitment petitioner had misrepresented to the court in his commitment trial that he would receive treatment if committed. RA74, 77. And, third,

amendment, the language applicable to persons committed as SPP and SDP was essentially the same. Accordingly, the current statute is quoted in text.

he argued that he was entitled to be released because he was no longer mentally ill. RA83-84.⁷

The court of appeals, in a published opinion by Judge Hudson, joined by Judges Ross and Schellhas, affirmed the district court order denying Lonergan's Rule 60.02 motion. The court stated the issue as: "May a person who has been indeterminately committed as a sexually dangerous person [1] seek discharge or [2] make a constitutional challenge to the adequacy of treatment by moving to vacate the commitment order under Minn. R. Civ. P. 60.02?" 792 N.W.2d at 476 (numbering added). The court answered "no" to both parts of this question.

Addressing the first part of the issue—whether a person committed as an SDP may use a Rule 60.02 motion to seek discharge—the appellate court correctly recognized that Lonergan's claim that his commitment should be "vacated" because he was no longer mentally ill⁸ was in fact a request to be discharged from commitment based on his current condition. The court observed that section 253B.17 authorizes MI, CD and DD persons to seek such relief from the committing court, but expressly forecloses that remedy to persons committed as MI&D, SPP and SDP. The court said, "We conclude that the language in Minn. Stat. § 253B.17, subd. 1, which prohibits appellant from petitioning the committing court for discharge from his indeterminate commitment as an SDP, applies equally to preclude a rule 60.02 motion to vacate the indeterminate-commitment order." 792 N.W.2d at 476. The court also noted that the Legislature had provided a

⁷ Lonergan's appellate reply brief raised an additional argument—that the SDP law constitutes an unconstitutional "bill of attainder." RA101-02. But he had not raised this issue in the district court or in his principal brief, and the appellate court did not address it.

⁸ Of course, this argument misses the point on several counts, most basically because Lonergan was not committed as mentally ill.

different procedure for persons committed as MI&D, SPP and SDP to seek discharge from commitment—the SRB and district court panel process. 792 N.W.2d at 477. The court observed that the Rules of Civil Procedure specifically provide that those rules do not apply to civil commitment proceedings to the extent that provisions of the Commitment Act are “inconsistent or in conflict with the procedure and practice provided by these rules.” 792 N.W.2d at 476-77 (quoting Minn. R. Civ. P., App. A).

Addressing the second part of the issue, the court of appeals described Lonergan’s claim: “Appellant also seeks to use a rule 60.02 motion to raise a claim that he was denied appropriate treatment in MSOP.” 792 N.W.2d at 477. The court ruled that such a claim was also improper under Rule 60.02, noting that, in its decision in *In re Travis*, 767 N.W.2d 52 (Minn. Ct. App. 2009), the court had held that a person who is petitioned for commitment as an SPP or SDP may not challenge the adequacy of treatment at MSOP before the committing court. 792 N.W.2d at 477. The appellate court said that the Commitment Act provides other avenues for a patient to raise issues regarding adequacy of treatment. *Id.*

Although the court’s analysis specifically addressed the two claims Lonergan raised—entitlement to discharge and alleged lack of treatment—the court’s concluding statement might be read more broadly. The court said: “The statutory framework under which a person who is indeterminately committed as an SDP may seek discharge or challenge conditions of treatment precludes a motion to vacate the commitment order under Minn. R. Civ. P. 60.02.” 792 N.W.2d at 478.

The other appellate decision on review in this case is *In re Kunshier*, No. A10-1270, 2011 WL 500070 (Minn. Ct. App. Feb. 15, 2011) (unpublished), *review granted* (Minn. Apr. 19, 2011). Kunshier’s appellate brief asserted a number of

underlying claims for his Rule 60.02 motion. Only two of these claims had been raised in the district court: (1) that his trial attorney failed to render effective assistance of counsel by not petitioning this Court to review the 1995 court of appeals opinion affirming his PP commitment (RA206-09), and (2) that MSOP was unconstitutionally applying the statutory release criteria for persons committed as SPPs and SDPs (RA210-11). In addition, as explained above, he raised several issues he had *not* raised in the district court, specifically (3) that the district court placed the burden on him to show that he was no longer dangerous (RA211-12), (4) that the district court lacked jurisdiction to commit him based on a statement made at the time of the 1988 hearing (RA216-18), and (5) that his judgment of commitment was now “satisfied” (RA218-19).

In an unpublished opinion issued by the same panel of the court of appeals as in *Lonergan*, the court affirmed the order denying Kunshier’s Rule 60.02 motion based on the opinion in *Lonergan*, saying:

Although a party may generally rely on rule 60.02 to seek relief from a final order for good cause, Minnesota Rules of Civil Procedure 60.02, we recently held that the rule is not the mechanism for relief from an indeterminate civil commitment order. *In re Commitment of Lonergan*, 792 N.W.2d 473, 476-77 (Minn. App. 2011) (holding that the statutory scheme governing indeterminate commitment of a person as a sexually dangerous person does not authorize a challenge to commitment under Minn. R. Civ. P. 60.02). Rather, the civil-commitment statute explains the procedures by which an indeterminately committed person may seek relief. Minn. Stat. §§ 253B.18, subd. 15; 253B.185, subd. 18 (2010) (establishing guidelines for discharge from commitment). Kunshier, a committed SPP, therefore cannot rely on rule 60.02 to challenge his commitment and must rely instead on the process ordered by statute. *See Lonergan*, 792 N.W.2d at 477.

Kunshier, 2011 WL 500070, at *2 (RA221).

B. Other Court Of Appeals Decisions.

Although the unpublished *Kunshier* opinion appears to hold that a Rule 60.02 motion is categorically unavailable to enable a person indeterminately committed as SPP or SDP to seek to vacate his commitment order on any basis, other unpublished opinions have not applied the *Lonergan* holding in such a blanket fashion. In at least eight unpublished or order opinions since *Lonergan*, the court of appeals has held that a person committed as an SPP or an SDP *may* raise an ineffective-assistance-of-counsel claim relating to his commitment hearing by means of a motion under Rule 60.02. *See In re White*, No. A11-154, 2011 WL 2304178, at *2 (Minn. Ct. App. June 13, 2011) (unpublished) (RA278); *In re Beals*, No. A10-1753, 2011 WL 2119401, at *2 (Minn. Ct. App. May 31, 2011) (unpublished) (RA246); *In re Conner*, No. A10-2281, 2011 WL 1938312, at *2 (Minn. Ct. App. May 23, 2011) (unpublished) (RA253); *In re Lindsey*, No. A10-2123, 2011 WL 1938288, at *3-4 (Minn. Ct. App. May 23, 2011) (unpublished) (RA263); *In re Whipple*, A10-2098, 2011 WL 1938286, at *2-3 (Minn. Ct. App. May 23, 2011) (unpublished) (RA275); *In re Brown*, No. A10-1902, Ord. Opin. at 2-4 (Minn. Ct. App. Apr. 6, 2011) (RA248), *review granted, stayed* (Minn. June 14, 2011); *In re Semler*, A10-1743, Ord. Opin. at 3-4 (Minn. Ct. App. Mar. 1, 2011) (RA267), *review granted, stayed* (Minn. Apr. 19, 2011); *In re Guy*, No. A10-1392, 2011 WL 589642, at *2 (Minn. Ct. App. Feb. 22, 2011) (unpublished) (RA255), *review granted, stayed* (Minn. Apr. 19, 2011). (In each of these cases, however, the appellate court held that the district court properly denied the ineffective-assistance claim based on untimeliness, lack of merit, or both.)

The court of appeals opinion most clearly delineating the scope of *Lonergan*, in the view of one panel of the court, is the decision in *In re Lindsey* by Chief

Judge Johnson, along with Judges Shumaker and Randall. The court said Lindsey's Rule 60.02 motion raised four claims:

(1) that the end-of-confinement review committee (ECRC) erred by determining that he is a Level III sex offender; (2) that his commitment violates his constitutional rights because "he no longer meets the criteria" for commitment; (3) that his commitment violates his constitutional rights because, he asserts, no person has been released from the Minnesota Sex Offender Program (MSOP); and (4) that the attorney who represented him during commitment proceedings provided him with ineffective assistance of counsel.

Lindsey, 2011 WL 1938288, at *1.

The court in *Lindsey* said, "In *Loneragan*, this court considered whether a rule 60.02 motion to vacate is an appropriate procedural vehicle for an SDP patient to seek discharge from commitment or to challenge the adequacy of treatment." *Id.* at *2. The *Lindsey* court then held, "In light of this court's opinion in *Loneragan*, Lindsey's second and third claims plainly are barred." *Id.* at *3.

But the court in *Lindsey* went on to say, "*Loneragan* does not speak to Lindsey's first claim, which challenges the risk-level assessment of the ECRC." *Id.* Nonetheless, the court determined that Lindsey had waived this argument by not raising it on appeal. *Id.*

Likewise, the court held:

Ineffective assistance of counsel, which is Lindsey's fourth claim, was not at issue in *Loneragan*. 792 N.W.2d at 476-77. We do not interpret *Loneragan* to bar such a claim. The *Loneragan* bar is based on the opportunity to present certain claims to a special-review board, which is authorized by chapter 253B to determine whether an SDP patient still is "in need of continued care and treatment." *Id.* at 476 (quoting Minn. Stat. § 253B.17, subd. 1). The special-review board is not authorized to determine whether an SDP patient received ineffective assistance of counsel during commitment proceedings. Thus, Lindsey's fourth claim is

not barred by the statutory remedies in chapter 253B of the Minnesota Statutes.

2011 WL 1938288, at *3. The appellate court considered Lindsey's ineffective-assistance claim, but affirmed the district court's decision that the claim was untimely under Rule 60.02.

Under the reasoning of *Lindsey*, the *Lonergan* holding is limited to two categories of claims: that the person is entitled to be discharged from commitment and that the post-commitment treatment provided at MSOP is inadequate. Other types of claims are not categorically precluded from being brought under Rule 60.02, but are subject to the limitations of that rule.

Likewise, in a published opinion by Chief Judge Johnson in a habeas corpus case in April 2011, the court of appeals ruled that habeas relief was not available for the appellant to challenge the adequacy of counsel in an SPP/SDP commitment matter, but that a timely Rule 60.02 motion would be an available remedy. *See Beaulieu v. Minn. Dept. of Human Servs.*, 798 N.W.2d 542, 550 (Minn. Ct. App. 2011). The court also noted that a Rule 60.02 motion, if brought within a "reasonable time," may be a means to challenge lack of subject matter jurisdiction in an SPP/SDP case. *Id.*, n.4.

V. THE PROVISIONS OF THE COMMITMENT ACT PRECLUDE RULE 60.02 MOTIONS BASED ON CLAIMS THAT THE PERSON QUALIFIES FOR DISCHARGE OR TRANSFER OR THAT HE IS NOT RECEIVING ADEQUATE TREATMENT.

A. The Provisions Of Rule 60.02.

Lonergan's and Kunshier's motions were ones for "relief from judgment" pursuant to Rule 60.02. That rule provides:

On motion and upon such terms as are just, the court may relieve a party or the party's legal representatives from a final judgment (other than a marriage dissolution decree), order, or proceeding and may order a new trial or grant such other relief as may be just for the following reasons:

(a) Mistake, inadvertence, surprise, or excusable neglect;

- (b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial pursuant to Rule 59.03;
- (c) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (d) The judgment is void;
- (e) The judgment has been satisfied, released, or discharged or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
- (f) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time, and for reasons (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. . . .

Rule 60.02 is virtually identical to the corresponding federal rule, Fed. R. Civ. P. 60(b), and is interpreted in accordance with the federal rule. *Newman v. Fjelstad*, 137 N.W.2d 181, 186 (Minn. 1965).

Loneragan stated that he made his Rule 60.02 motion pursuant to clauses (d), (e) and (f) of the rule. RA46. Kunshier's motion indicated that he relied only on clause (f) (although his *pro se* brief in this Court also references clauses (d) and (e)). RA194.

Under clause (d), "A void judgment is one where the court lacks jurisdiction over the subject matter or over the parties." *Lange v. Johnson*, 204 N.W.2d 205, 208 (Minn. 1973). The fact that a judgment was erroneous does not render it void. *Id.*; *Sheridan v. Sheridan*, 4 N.W.2d 785, 788 (Minn. 1942).

The portion of Rule 60.02(e) addressing situations where "it is no longer equitable that the judgment should have prospective application"

represents the historic power of the court of equity to modify its decree in light of changed circumstances. *Jacobson v. County of Goodhue*, 539 N.W.2d 623, 625 (Minn. App. 1995) (citing *System Fed'n No. 91 v. Wright*, 364 U.S. 642, 645-46, 81 S. Ct. 368, 370-71, 5 L. Ed. 2d 349 (1961) (construing federal equivalent of Minn. R. Civ. P. 60.02(e))), *review denied* (Minn. Jan. 12, 1996); *see also* 2A David F. Herr & Roger S. Haydock, *Minnesota Practice* § 60.24 (1998) (discussing Minn. R. Civ. P. 60.02(e)).

Rule 60.02(e) is directly applicable to injunctions “where conditions have changed” and can apply to “any judgment that has prospective effect.”
Herr & Haydock, *supra*, § 60.24

City of Barnum v. Sabri, 657 N.W.2d 201, 205 (Minn. Ct. App. 2003).

Rule 60.02, clause (f), “is clearly a residual clause to cover *unforeseen contingencies*; intended to be a means for accomplishing justice in, what may be termed generally, *exceptional situations*; and, so confined, does not put the finality of judgments at large generally.” *Newman*, 137 N.W.2d at 186 (emphasis added) (quoting 7 James Wm. Moore et al., *Moore’s Federal Practice* ¶ 60.27 (2d ed.)).

The most common situations where relief under Rule 60.02(f) and its federal counterpart is provided are cases involving default judgments and settlements, particularly those involving minors. *See, e.g., Sommers v. Thomas*, 88 N.W.2d 191 (Minn. 1958); *Klapprott v. United States*, 335 U.S. 601, 69 S. Ct. 384 (1949); *Simons v. Schiek’s*, 145 N.W.2d 548, 553 & n.5 (Minn. 1966) (Otis, J., dissenting, summarizing cases). But, even in the case of default judgments and settlements, “[r]elief under this residual clause is appropriate [only] 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. Ct. App. 1990).

Importantly, Rule 60.02 is not intended to provide an alternative to the usual process of judicial review. *Anderson v. Anderson*, 179 N.W.2d 718, 722 (Minn. 1970) (holding relief under Rule 60.02(f) improper, saying, “Finality of judicial decisions requires that parties seek relief from judicial error through the appellate process”); *see also Twelve John Does v. Dist. of Columbia*, 841 F.2d 1133, 1141 (D.C. Cir. 1988) (collecting cases for the proposition that a motion to vacate “may not be used as a substitute for an appeal not taken”).

As noted above, for claims under clauses (d)–(f), the rule requires that “[t]he motion shall be made within a reasonable time . . . after the judgment, order, or proceeding was entered or taken.” “What constitutes a reasonable time [under Rule 60.02] varies from case to case and must be determined in each instance from the facts before the court” *Sommers*, 88 N.W.2d at 195.

A party who raises a claim that in reality falls within clause (a), (b) or (c) may not circumvent the one-year limitation applicable to such claims by attempting to raise the claim under the more-general provision of clause (f). *Chapman v. Spec. Sch. Dist. No. 1*, 454 N.W.2d 921, 923-24 (Minn. 1990). For example, a claim based on one’s attorney’s misconduct or lack of diligence alleges “excusable neglect” and therefore such a motion to vacate must be brought within clause (a)’s one-year deadline, rather than under clause (f). *Id.* The same limitation would preclude a party from re-characterizing a claim falling within the specific provisions of clause (a), (b) or (c) as instead arising under the “no longer equitable that the judgment should have prospective application” language of clause (e). *Schultz v. Commerce First Fin’l*, 24 F.3d 1023, 1025-26 (8th Cir. 1994) (Bartlett, J., concurring).

B. Application Of Rules Of Civil Procedure In Civil Commitment Cases.

As the Petitioners’ brief notes, the Rules of Civil Procedure specifically address when those rules will apply in civil commitment cases. At Minn. R. Civ. P. 81.01(a), the civil rules provide: “These rules do not govern pleadings, practice and procedure in the statutory and other proceedings listed in Appendix A insofar as they are inconsistent or in conflict with the rules.” Appendix A includes “Chapter 253B—Civil commitment.” Thus, the issue here is whether Rule 60.02, both in general and if used to address the

specific grounds for relief asserted by the Petitioners, is inconsistent or in conflict with the Commitment Act.

This Court has not addressed whether Rule 60.02 may apply in civil commitment cases, although it has held that another procedure under the civil rules, a motion for a new trial, is available in civil commitment matters. *See In re Jost*, 449 N.W.2d 719, 721 (Minn. 1990). *Jost* did not specifically mention Minn. R. Civ. P. 59, the rule that authorizes motions for new trials. The court of appeals has held that the provisions of the civil rules concerning pretrial conferences (Minn. R. Civ. P. 16) and use of depositions (Rule 32.01) may be applied in civil commitment cases. *See In re Irwin*, 529 N.W.2d 366, 370, 372 (Minn. Ct. App. 1995). In neither *Jost* nor *Irwin* did the Court specifically discuss Rule 81.01 as the basis for determining that those provisions of the Rules of Civil Procedure would apply.⁹

C. A Rule 60.02 Motion Claiming That The Person Qualifies To Be Discharged From Commitment Conflicts With The Commitment Act.

As explained above, the Commitment Act, at section 253B.185, subd. 1(e), states:

After a final determination that a patient is a sexually dangerous person or sexual psychopathic personality, the court shall order commitment for an indeterminate period of time and *the patient shall be transferred, provisionally discharged, or discharged, only as provided in this section.*

Section 253B.185 then provides that any application by a person committed as an SPP or SDP for discharge, provisional discharge or transfer must first be made to the SRB and

⁹ The court of appeals in *Irwin* did consider whether the provisions of the Rules of Civil Procedure at issue there were inconsistent with the rules adopted by this Court to govern civil commitment cases. *See* Commitment & Treatment Act R. 1(b) (stating, “The Special Rules shall supersede any other body of rules otherwise applicable (e.g., the Rules of Civil Procedure for the District Courts, Probate Court Rules, etc.) in conflict with these Special Rules”).

that the final decision will be made by a special district court panel. *See* §§ 253B.185, subd. 9; 253B.19; *see also* § 253B.18, subds. 4c, 5.

Thus, section 253B.185, subd. 1(e), clearly precludes a person from seeking the relief described there—discharge, provisional discharge or transfer out of MSOP—by any means other than the specified statutory procedure. Seeking such relief via a Rule 60.02 motion is obviously inconsistent with such a procedure.

To make matters even more clear, the Commitment Act itself contains a procedure that is similar to a motion to vacate one’s commitment. Section 253B.17, subd. 1, provides:

Any patient, except one committed as a person who is mentally ill and dangerous to the public or as a sexually dangerous person or person with a sexual psychopathic personality as provided in section 253B.18, subdivision 3, or any interested person may petition the committing court . . . for an order that the patient is not in need of continued care and treatment or for an order that an individual is no longer a person who is mentally ill, developmentally disabled, or chemically dependent, or for any other relief.

(Emphasis added.) But, as the quoted provision shows, the Legislature explicitly provided that this remedy would not be available to persons committed as MI&D, SPP and SDP.¹⁰

¹⁰ In his *pro se* brief in this Court, Kunshier argues that the exclusion from section 253B.17 for persons committed as SPP and SDP does not apply to him because, he asserts, he is not “one committed as a . . . sexual psychopathic personality *as provided in section 253B.18, subdivision 3,*” but instead is committed pursuant to section 253B.185. Kunshier *Pro Se Br.* at 4-5. His assertion is specious. As explained above at note 6, section 253B.185, the section concerning SPPs and SDPs, incorporates many of the commitment procedures in section 253B.18. This included, at the time of Kunshier’s commitment, the provisions of section 253B.18, subds. 2 and 3, providing for a review hearing resulting in indeterminate commitment. Before 2010, these procedures for SPP and SDP commitment cases were provided only in section 253B.18, not in section 253B.185. Thus, Kunshier *was* indeterminately committed as an SPP pursuant to section 253B.18, subd. 3.

Although the claims made by Lonergan and Kunshier below are murky and ever changing, each Petitioner did, in essence, seek to be discharged from commitment based on his current condition and not simply based on a claim that his initial commitment was invalid. In Lonergan’s Rule 60.02 motion/memorandum, he contended that “to be civilly committed and physically restrained, he MUST suffer from a mental illness or severe personality disorder; neither of which has manifested itself in the two years of constant observation” at MSOP. RA51 (emphasis in original). He asserted that his continued confinement, without a qualifying disorder, was invalid. RA51-52.¹¹

In his court of appeals brief, Lonergan argued, “Moreover, did the district court use the proper standards to decide if relief is warranted? . . . In the instant case, [the] court apparently assumed that Lonergan still suffers from a mental illness. This is error.” RA83. He continued, “This burden is not for Lonergan to disprove, but for the government to prove. Once Lonergan petitioned the court, the burden of proof fell upon the government, not Lonergan.” *Id.* He asserted, “Foucha sets forth the standard that must be satisfied regardless of who *makes the application for release.*” RA84 (underlining in original, italics added here).

The other petitioner, Kunshier, also raised several arguments that addressed whether he was entitled to be released based on his current condition. The second captioned argument in his motion/memorandum was that his constitutional rights were violated because “petitioner has no way to gain petitioner’s release from civil commitment, even if petitioner no longer meets the criteria for civil commitment through

¹¹ Without getting too far into the merits of Lonergan’s claim, it should be noted that the U.S. Supreme Court rejected Lonergan’s current argument—that civil commitment of sexually dangerous persons must be based on a “mental illness”—in *Kansas v. Hendricks*, 521 U.S. 346, 359, 117 S. Ct. 2072, 2080-81 (1997).

completion of sex offender commitment.” RA183; *see also* RA185. He also argued that, with an executive order in place, the Commissioner of Human Services could not discharge him and that he would not be allowed to show that his treatment had been successful. RA185, 189.

In his appellate brief, Kunshier argued that he was entitled to relief under Rule 60.02 because he had “satisfied the judgment” of commitment by completing treatment. RA218-19. In the second heading of his argument, he contended, “The Courts abused its discretion by failing to provide the release criteria pursuant to Minn. Stat. § 253B.18, subd. 15 which is now unconstitutional as applied to Appellant.” RA209-10. And he asserted, “[T]he Minnesota Sex Offender Program’s application of the Release Criteria established pursuant to Minn. Stat. § 253B.18, subd. 15 is unconstitutional ‘as applied’ to Appellant.” RA210; *see also* RA211. He contended that “the District Court ha[s] impermissibly shifted the burden to Appellant *to prove that he is no longer dangerous*, in violation of his right to due process.” RA212 (underlining in original, italics added here).

All of these arguments by Lonergan and Kunshier are in reality claims that they are entitled to be discharged from their commitments based on their current conditions. Under section 253B.185, subd. 1(e), this particular type of claim must be raised in a petition to the SRB, which culminates in a decision of the district court panel granting or denying release.

This reasoning applies not only to the Petitioners’ direct requests that they be discharged based on their current condition, but also to any claim that the discharge standard is being unconstitutionally applied or that the burden is being unconstitutionally shifted. The remedy for any person wishing to raise such a claim is to bring his case to

the district court panel and argue for a particular standard or procedure. This is what occurred in *Call v. Gomez*, 535 N.W.2d 312, 319 (Minn. 1995), an appeal from a decision of the district court panel. In *Call*, this Court held that the statutory discharge standard for SPPs must be modified in light of U.S. Supreme Court precedent, and remanded the case to the district court panel to correctly apply the discharge standard. Similarly, in *Coker v. Ludeman*, 775 N.W.2d 660 (Minn. Ct. App. 2009), the court of appeals held that the district court panel had incorrectly applied the statutory burden mechanism provided for MI&D, SPP and SDP discharge, provisional discharge, and transfer cases, and remanded to the panel to apply the burden correctly.

This Court has previously rejected an attempt by persons committed as MI&D and PP to circumvent the statutory release process. In *In re K.B.C.*, 308 N.W.2d 495 (Minn. 1981), three persons committed as PP or MI&D moved their committing courts under Minn. Stat. § 253A.19 (1980) for determinations that they were no longer PP or MI&D. Section 253A.19, the predecessor to the current section 253B.17, contained no explicit bar preventing patients committed as MI&D or PP from using that procedure to be discharged from their commitments. Nonetheless, this Court held in *K.B.C.* that the patients could not do an end run around the special process for discharge provided in the statute (essentially the same as the current discharge process), because the Legislature had intended the SRB/district court panel process to be the exclusive means to obtain release for persons committed in the “highly dangerous to others” categories.

The situation here is even clearer than it was in *K.B.C.* The court of appeals in *Lonergan* correctly held that claims relating to discharge of SPPs and SDPs, i.e., seeking release based on the person’s current condition or progress in treatment rather than some flaw in the indeterminate commitment order, may not be brought under Rule 60.02.

D. A Rule 60.02 Motion Challenging The Treatment A Person Committed As An SPP Or SDP Receives At MSOP Conflicts With The Commitment Act.

Petitioner Lonergan's Rule 60.02 motion/memorandum and his court of appeals brief are replete with claims that MSOP is not providing adequate, or any, treatment. This is a common claim in the SPP/SDP Rule 60.02 cases pending in this Court, the court of appeals and the district courts. (Kunshier is unique in not raising this particular claim.)

As a slight variation on this issue, in an apparent attempt to re-characterize the issue as relating to the commitment order rather than post-commitment treatment, Lonergan's Rule 60 motion asserted that the County and the experts at trial "misrepresented" to the court that Lonergan would receive sex offender treatment if committed. RA49-50, 52. His court of appeals brief refers to this as "trickery" and "fraud" in his commitment. RA74, 77.¹²

However, as shown below, under the Commitment Act it is not the proper role of the committing court to review the adequacy of the treatment provided by the program to which a person is committed as MI&D, SPP or SDP. Thus, an attempt to raise this issue in the committing court by means of a Rule 60.02 motion to vacate the person's commitment is inconsistent with the Commitment Act, and therefore precluded by Rule 81.01(a).

The court of appeals has addressed this issue in several commitment cases involving the non-highly-dangerous commitment categories. In *In re Wicks*, 364 N.W.2d 844 (Minn. Ct. App. 1985), a case involving a person committed as developmentally disabled, the committing court issued various orders directed to both the county and a

¹² But note that, under Rule 60.02, a motion based on "fraud . . . , misrepresentation or misconduct of an adverse party" must be brought "not more than a year after the judgment, order or proceeding was entered." Lonergan's motion was brought more than a year after the entry of the indeterminate commitment order.

state regional treatment center (“RTC”) regarding the treatment to be provided to Wicks.

The court of appeals reversed the order, saying:

The trial court ordered the hospital to file a program plan with the court and to teach specified skills. Although we sympathize with the trial court’s frustration at the lack of resources for Wicks, “the treatment of patients is properly raised before a hospital review board and not before the committing court.” *In re Pope*, 351 N.W.2d 682, 683 (Minn. Ct. App. 1984). *There is no provision in the statute for the trial court to directly monitor the treatment of patients.*

364 N.W.2d at 847 (emphasis added). The court pointed to Minn. Stat. § 253B.03, subd. 7 (2010), the section of the Commitment Act describing the committed person’s right to treatment. 364 N.W.2d at 847. That subdivision states: “A person receiving services under this chapter has the right to receive proper care and treatment, best adapted, according to contemporary professional standards, to rendering further supervision unnecessary.” § 253B.03, subd. 7. The *Wicks* court emphasized that this statute provides that “the treatment facility shall devise a written program plan for each person” subject to the Commitment Act and that, for state-operated facilities (i.e., RTCs), the statute directs that “[t]he commissioner shall monitor the program plan and review process . . . to insure compliance with the provisions of this subdivision.” 364 N.W.2d at 847 (citing and quoting § 253B.03, subd. 7). The court of appeals determined that, under the statute, the Commissioner of Human Services and the head of the treatment program—not the committing court—are responsible to determine appropriate treatment for committed persons.

Later, in *In re Kolodrubetz*, 411 N.W.2d 528 (Minn. Ct. App. 1987), the appellate court considered the case of a person committed as MI. The patient argued that the RTC should make changes to her treatment program recommended by the hospital review

board. Rejecting that argument, Chief Judge (later Chief Justice) Popovich wrote for the court of appeals:

This court has repeatedly stressed that the committing courts may not involve themselves in treatment decisions. *See, e.g., In re Wicks*, 364 N.W.2d 844, 847 (Minn. Ct. App. 1985), *pet. for rev. denied* (Minn. May 31, 1985) (monitoring of treatment program for mentally retarded patients not a function of the committing court). The United States Supreme Court has emphasized that “interference by the * * * judiciary with the internal operations of [state] institutions should be minimized.” *Youngberg v. Romeo*, 457 U.S. 307, 322, 102 S. Ct. 2452, 2461, 73 L. Ed. 2d 28 (1982).

411 N.W.2d at 533 (omission in original). The appellate court then held:

The committing court should not have reviewed the treatment recommendations of the AMRTC Review Board or the Commissioner’s response (or lack thereof) on a petition brought pursuant to Minn. Stat. § 253B.17, subd. 1. Treatment decisions may be challenged by the patient before the review board and by a suit for damages pursuant to 42 U.S.C. § 1983 after administrative remedies have been exhausted.

411 N.W.2d at 535.

Wicks and *Kolodrubetz* involved persons committed as DD and MI, commitment categories where the person’s case *can* be brought back to the committing court under section 253B.17. Although the court of appeals held in these cases that the committing court lacked authority to review and direct the specific treatment a patient would be provided in a treatment facility, in another case the appellate court held that the committing court *is* permitted to reevaluate whether the treatment facility to which it has committed the person is able to meet the person’s treatment needs in order to determine whether the court should change the person’s place of commitment. *In re Kellor*, 520 N.W.2d 9, 12 (Minn. Ct. App. 1994). The appellate court held that, under the language of section 253B.17, subd. 1, allowing the committing court to issue “an order that an

individual is no longer a person who is mentally ill . . . , or for any other relief” (emphasis in appellate opinion), the committing court did have the authority to change the place of commitment, which necessarily included the authority to determine which facility could best meet the person’s treatment needs.

However, in contrast to the situation under section 253B.17, where the committing court has the authority to end the person’s commitment or transfer the person to another treatment program, section 253B.185, subd. 1(e), states that, once a person is indeterminately committed as an SPP or SDP, “the patient shall be transferred, provisionally discharged, or discharged, only as provided in this section,” i.e., through the SRB and district court panel process. The committing court’s involvement in the matter is essentially completed upon issuance of the indeterminate commitment order. Thus, the reasoning in *Wicks* and *Kolodrubetz* that the committing court lacks authority to evaluate the specifics of the post-commitment treatment program applies with even greater force in the context of an SPP or SDP commitment.

Lonergan apparently argues that he seeks review of the MSOP treatment, not to ask the Court to direct MSOP how to conduct the treatment, but rather to determine whether his prior indeterminate commitment order is unconstitutional in light of the treatment now being provided. In *In re Travis*, 767 N.W.2d 52 (Minn. Ct. App. 2009), the court of appeals considered not only whether Travis’s challenge to treatment would be premature during his commitment case, but also whether it would be relevant to a claim that his commitment would be unconstitutional. Addressing the latter claim, the appellate court discussed the U.S. Supreme Court’s decision in *Seling v. Young*, 531 U.S. 250, 121 S. Ct. 727 (2001), a case that considered whether persons civilly committed as “sexually violent predators” in the State of Washington could raise the actual conditions

of their later confinement and treatment to show that their commitments were unconstitutional. The high Court in *Seling* rejected such a challenge, for reasons aptly summarized by our own appellate court in *Travis*:

The Court concluded that such an as-applied examination would be “unworkable . . . an analysis [that] would never conclusively resolve whether a particular scheme is punitive” and would “prevent a final determination of the scheme’s validity under the Double Jeopardy and Ex Post Facto Clauses.” *Id.* The Court reached this conclusion because the confinement spans a time period under changing conditions; the Court noted the “inherent difficulty in ascertaining current conditions and predicting future events.” *Id.* at 267, 121 S. Ct. at 737. The Supreme Court concluded that the act’s civil nature “cannot be altered based merely on vagaries in the implementation of the authorizing statute.” *Id.* at 263, 121 S. Ct. at 735.

Thus, insofar as *Seling* addresses an inquiry on actual practices, it negates their significance. This being said, the decision specifically contemplates a patient’s rights to demand treatment. The Supreme Court noted that Young and others like him had other remedies like “a state law cause of action [on right to treatment],” which would belong in the Washington courts; challenges in state and federal courts using the federal Constitution; or a § 1983 action, which Young already had pending against the facility. *Id.* at 265, 121 S. Ct. at 736.

Travis, 767 N.W.2d at 63 (omission and insertion in original).

Under the holding of *Seling* and the reasoning of *Travis*, the conditions of Lonergan’s current treatment may not be used to consider the validity of his commitment order issued previously. Thus, this is not a proper claim to be raised under Rule 60.02(a)-(d) or (f), as it does not relate to the validity of the previous commitment order.

Nor does the claim fit within the terms of Rule 60.02(e) that addresses a situation where “it is no longer equitable that the judgment should have prospective application,” because that clause “represents the historic power of the court of equity to modify its decree in light of changed circumstances.” *City of Barnum*, 657 N.W.2d at 205. In

contrast to such broad and ongoing equitable power, sections 253B.17, subd. 1, and 253B.185, subd. 1(e), of the Commitment Act make it clear that the committing court does *not* have such broad ongoing oversight powers over MI&D, SPP and SDP commitments.

In addition, an adequate consideration of the treatment Lonergan is being provided by MSOP would require that the Commissioner of Human Services, who operates MSOP, and her attorney, the Attorney General, be involved in the case. MSOP and the Commissioner are not parties to commitment cases. And county attorneys, who represent the commitment petitioners, are not in a position to adequately present a case for the treatment provided at MSOP. They are not intimately familiar with the treatment provided at MSOP and, even more clearly, do not represent MSOP. There is no authority for the committing court to make the Commissioner a party to a commitment case or to otherwise draw her into the case.¹³

Moreover, to adequately address a matter as complicated as the treatment provided at MSOP would certainly involve substantial discovery and possibly other aspects of regular civil litigation. Allowing committed persons to raise adequacy-of-treatment issues before the committing court would fundamentally change the nature of the cases. And it would create the potential for scores of committing judges throughout the state to issue varied determinations about how MSOP should conduct its treatment activities.

¹³ The court of appeals, in an unpublished opinion, has held that the committing court lacks the authority to make the Commissioner a party to the commitment case, saying: “Appellant first seeks to add the Commissioner of Human Services and the Commissioner of Corrections as parties to the petition for commitment. . . . Appellant’s desire to assert his right to treatment does not make the Commissioners indispensable parties to the commitment petition.” *In re Thomas*, No. C6-95-735, 1995 WL 465611 (Minn. Ct. App. Aug. 8, 1995) (unpublished) (RA272).

While Lonergan and others committed as SDPs or SPPs can not raise their right-to-treatment or inadequate-treatment issues in the committing courts, they do have other means to challenge the adequacy of treatment. As the court of appeals held in *Travis*,

there is no showing that respondent could not raise his right-to-treatment argument through other legal avenues after commitment, such as habeas corpus, 42 U.S.C. § 1983 (2006), declaratory or injunctive relief, or the special review board.¹⁴ See Minn. Stat. § 253B.22 (2008) (providing review boards for patients).

Travis, 767 N.W.2d at 58-59; see also § 253B.23, subd. 5 (stating committed person's habeas corpus rights not abridged); *Kolodrubetz*, 411 N.W.2d at 535 (observing that treatment claims may be raised in § 1983 action); *Wicks*, 364 N.W.2d at 847 (stating that “the treatment of patients is properly raised before a hospital review board and not before the committing court”).

Similarly, the United States Supreme Court in *Seling*, 531 U.S. at 265-66, 121 S. Ct at 737, observed that persons committed under a statute similar to Minnesota's SPP and SDP laws do have remedies to challenge adequacy of treatment. The Court noted that a federal court § 1983 suit was pending and that the state treatment facility was actually subject to a court injunction. And the Court pointed out that § 1983 suits may be brought in state, as well as federal, court.

¹⁴ The appellate court's reference to the “special review board” in this context was likely an error. The SRB is the special body established to consider discharge, provisional discharge, transfer and pass-eligibility petitions relating to persons committed as MI&D, SPP, and SDP. § 253B.18, subds. 4c, 5. Separate and distinct from the SRB, the Commissioner of Human Services must establish a “review board” for each facility under her jurisdiction to “review the admission and retention of its patients” and to “investigate conditions affecting the care of patients.” Minn. Stat. § 253B.22, subds. 1, 4 (2010). While the court in *Travis* referenced the “special review board” as one option for considering adequacy of treatment, the court followed this reference with the citation for “review boards,” section 253B.22.

No one disputes that there are avenues for persons committed as SPPs and SDPs to raise claims concerning the adequacy of the treatment they are provided. In the *Travis* case, the Attorney General's Office, representing the state Department of Human Services, agreed that there are remedies for committed SPPs and SDPs who believe the treatment provided to them falls short of legal requirements. The State said:

Finally, there will be no hardship for Travis to raise treatment issues if and when he is committed to MSOP and believes that he is not receiving adequate treatment. These legal avenues include a habeas corpus petition, or a lawsuit asserting a section 1983 claim or declaratory judgment action, not to mention the review process set out in the civil commitment statutes themselves.

RA283.

Patients committed in Minnesota as SPPs and SDPs are well aware of these other remedies and use them frequently. As described above, one of the petitioners here, Kunshier, has brought § 1983 suits against MSOP in both state and federal court, and has pursued a state court habeas proceeding concerning his civil commitment.

This Court should reject Lonergan's attempt to challenge his post-commitment treatment in a Rule 60.02 motion seeking to vacate his commitment order. The Commissioner, who operates MSOP, is not a party to the proceeding and the County Attorney is in no position to make a case for MSOP. If those issues are to be addressed, it must be in a different proceeding to which the Commissioner can be made a party.

A Rule 60.02 motion to vacate an SPP or SDP commitment based on the claimed inadequacy of MSOP treatment following commitment is inconsistent with the scheme of the Commitment Act, and is therefore barred by Rule 81.01.

VI. PERSONS COMMITTED AS SPP AND SDP ARE PERMITTED TO BRING AT LEAST SOME CLAIMS PURSUANT TO RULE 60.02, ASKING TO HAVE THEIR COMMITMENT ORDERS VACATED.

The County does not contend that there are no claims that could appropriately be brought by persons committed as SPP and SDP under Rule 60.02. Rather, the County agrees with the reasoning of the court of appeals in the *Lindsey* decision described earlier. Under that decision, claims that the person is entitled to release based on his current condition and challenges to the adequacy of post-commitment treatment are precluded, but other claims are not necessarily barred.

For example, the court in *Lindsey* held that an ineffective-assistance-of-counsel claim actually relates to the validity of the commitment order and may be brought in a timely Rule 60.02 motion. *Lindsey*, 2011 WL 1938288, at *3. (But the appellate court held that the district court had correctly rejected Lindsey's ineffective-assistance claim because it was untimely.) In addition, the *Lindsey* court held that Lindsey's claim relating to his community notification risk level was not necessarily precluded by the *Lonergan* holding, but declined to address the claim because Lindsey did not discuss it in his appellate brief. *Lindsey*, 2011 WL 1938288, at *3.¹⁵

¹⁵ In addition, a Rule 60.02 motion on this basis is clearly not within the purview of the district court. The Legislature has provided a completely different mechanism for determination and review of community notification risk levels, and the district court has no involvement in it. Community notification is governed by Minn. Stat. § 244.052 (2010). Under this statute, a "risk level" is administratively determined by an "End of Confinement Review Committee" established by the Commissioner of Corrections. *Id.*, subd. 3(a). If a person wishes to challenge his risk level determination, it is heard by the state Office of Administrative Hearings as a contested case, and the administrative law judge ("ALJ") makes a final decision. *Id.*, subd. 6. Appeal of the ALJ's decision is to the court of appeals. Minn. Stat. § 14.63 (2010). Bringing a Rule 60.02 motion in a person's commitment case to dispute the community notification risk level is contrary to section 244.052.

In addition to ineffective assistance of counsel, there are likely other claims that could be legitimately brought under Rule 60.02 by a person committed as SPP or SDP. For example, the court of appeals has previously recognized that, if a commitment order were void for lack of personal or subject matter jurisdiction, it could be vacated under Rule 60.02(d). *See In re Beaulieu*, 737 N.W.2d 231, 235 (Minn. Ct. App. 2007); *In re Ivey*, 687 N.W.2d 666, 670 (Minn. Ct. App. 2004). Likewise, the appellate court has held that a person who stipulates to commitment as MI&D may attempt to have the stipulation vacated in very limited circumstances generally applicable to stipulations in civil matters. *In re Rannow*, 749 N.W.2d 393, 396-97 (Minn. Ct. App. 2008).¹⁶ Presumably such a motion could be made pursuant to Rule 60.02. Moreover, one might hypothesize a circumstance of fraud or newly discovered evidence that would meet the strict requirements of Rule 60.02¹⁷ and would support a motion under that provision.

These claims and probably others could be brought under Rule 60.02—subject, of course, to the timeliness and other limitations of the rule. The County does not contend that Rule 60.02 motions are categorically precluded for persons indeterminately committed as MI&D, SPP and SDP. Rather, the County agrees with the court of appeals that the two types of claims at issue in *Loneragan* are precluded. In addition, there may be other types of claims, not anticipated or discussed here, that would be categorically

¹⁶ Several unpublished court of appeals opinions have addressed motions to set aside stipulated commitments in SDP cases. *See, e.g., In re Harju*, No. A09-1619, 2010 WL 431593, at *2 (Minn. Ct. App. Feb. 9, 2010) (unpublished) (RA258), *review denied* (Minn. Apr. 20, 2010).

¹⁷ Such claims must be made within a reasonable time, but not more than a year, after the order in question and the circumstances that would support a motion based on fraud or newly discovered evidence are extremely narrow. While the movants in many of the pending Rule 60.02 cases purport to rely on fraud or newly discovered evidence, the County does not believe that any of them raises a valid claim on those grounds.

precluded as Rule 60.02 claims because it would be inconsistent with the Commitment Act to raise them under that rule. But that is beyond the scope of this case.

VII. THE ORDER IN *LONERGAN* SHOULD BE AFFIRMED; *KUNSHIER* SHOULD BE REMANDED TO THE COURT OF APPEALS.

For the reasons discussed above, the court of appeals opinion in *Loneragan* should be affirmed. To the extent that the *Loneragan* opinion was unclear as to whether the categorical bar to Rule 60.02 motions applied to all such motions that might be brought by persons committed as SPP and SDP, or only to motions on the two bases involved in *Loneragan*, this Court's opinion will clarify that issue.

The *Kunshier* case, however, should be remanded. The court of appeals in that case applied *Loneragan* to bar not only Kunshier's claim that he was entitled to release based on his current condition, but also his other claims such as ineffective-assistance-of-counsel and lack of jurisdiction. As just explained, the County does not contend that these claims are categorically barred as claims that might be raised under Rule 60.02. Indeed, as discussed above, the court of appeals in a number of other cases has concluded that ineffective-assistance claims by a person committed as SPP or SDP may be raised in a Rule 60.02 motion. Of course, the County contends that neither of these claims by Kunshier has any merit, that the ineffective-assistance claim is barred as untimely, and that the lack of jurisdiction claim is precluded because Kunshier did not raise it in the district court and because it was decided against him on the merits in his previous habeas matter.

CONCLUSION

Based on the arguments above, Respondent Dakota County requests that this Court affirm the court of appeals decision in *Loneragan* and affirm in part and reverse and remand in part the decision in *Kunshier*, as more specifically described above.

Dated: July 15, 2011

Respectfully submitted,

JAMES C. BACKSTROM
Dakota County Attorney

A handwritten signature in black ink, appearing to read "John L. Kirwin", is written over a horizontal line. The signature is fluid and cursive.

JOHN L. KIRWIN
Special Assistant County Attorney
Atty. Reg. No. 56157

DEBRA E. SCHMIDT
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