Summary of Points and Authorities underlying the claims made in Karsjens.

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Plaintiff's arguments in summary:

I. Are based on the first and fourteen amendments to the US constitution, the Minnesota Constitution, and the Minnesota Commitment and Treatment Act.

II. Allege violations of:
   a. Right to provide adequate treatment.
   b. Right to be free from punishment.
   c. Right to less restrictive alternatives to secure confinement.
   d. Right to be free from inhumane treatment.
   e. Right to religion and religious freedom.
   f. Freedom of speech and association.
   g. Right to be free from unreasonable searches and seizures.
   h. Right to privacy.

III. Plaintiffs ask for injunctive relief and damages.

IV. Key defenses:
   a. Eleventh Amendment – immunity of the state from damages.
   b. Adequate treatment is being provided.
   c. All key decisions regarding commitment and discharge have been vetted by courts of competent jurisdiction.
   d. The constitution provides great latitude to the states in operating state institutions.
   e. The constitution provides great latitude to the states in restriction freedom of speech and religion in institutional settings.
   f. The Eighth Circuit has upheld the denial of a Missouri sex offenders "right to treatment" claim, holding, under the circumstances presented, that the individual did not have a "fundamental right to treatment," and that therefore the "professional standards" rubric of Youngberg v. Romeo does not apply. Rather, a "shock the conscience" standard applies for judgment right to treatment claims. Strutton v. Meade.
   g. In Seling v. Young (US 2001), the U.S. Supreme Court rejected the validity of an "as-applied" challenge to a statute based on ex post facto or double jeopardy grounds. The court left open the possibility of an as-applied substantive due process challenge based on persistent patterns of executive implementation.

V. Selected authorities that might be raised by the plaintiffs.
   a. The SPP/SDP statutory scheme must have a non-punitive purpose.
      i. *Hendricks* directs courts to examine "conditions surrounding . . . confinement" to determine whether they "suggest a punitive purpose on the State's part."
      ii. *In re Linehan,* 557 N.W.2d 171, 187 (Minn. 1996) (this is the "initial question" in the determination of constitutionality.)
      iii. *Foucha v. Louisiana*, 504 U.S. 71, 76 (1992) (holding that a person civilly committed "was not convicted, [therefor] he may not be punished.")

iv. The state's mere disclaimer of the intent to punish is not sufficient. *Hamdi v. Rumsfeld*, 542 U.S. 507, 556–57 (Scalia, J., dissenting) (stating: "It is unthinkable that the Executive could render otherwise criminal grounds for detention noncriminal merely by disclaiming an intent to prosecute, or by asserting that it was incapacitating dangerous offenders rather than punishing wrongdoing.").

v. *Kansas v. Crane*, 534 U.S. 407, 412 (2002) (civil commitment must not become a "mechanism for retribution or deterrence".)

b. The commitment scheme must apply only to a "narrow" group of the "most dangerous." *Hendricks*, 521 U.S. at 357. A commitment statute that casts too broad a net is of "doubtful validity." *Pearson*, 309 U.S. at 274.

c. The provision of adequate treatment is a necessary condition for a non-punitive purpose.

i. Non-punitive purpose is demonstrated by the state's promise to provide treatment. In *Foucha*, Justice O'Connor's pivotal concurrence made the centrality of treatment clear, insisting on a "medical justification" for civil commitment. 507 U.S. at 88 (O'Connor, J., concurring).

ii. Linehan III, 557 N.W.2d at 187, 189 (legislature's intention to provide "comprehensive care and treatment for committed sex offenders" as a central prop of constitutional validity. Observing, "commitment was for the purpose of treatment.)

iii. *Call v. Gomez*, 535 N.W.2d 312, 319–20 (Minn. 1995) (entitlement to treatment demonstrates that the psychopathic personality statute "is not for punitive or punishment purposes, but rather is remedial . . . ")

iv. *Seling v. Young* (2001), the Supreme Court again hinted broadly that the Constitution provides some guarantee of treatment in sex offender commitments.

v. Thompson v. Ludeman et. al, 11-cv-1704 (DWF/JJK) at p. 59 "Minnesota's civil commitment law for sex offenders is not intended to be punitive. Its purported purpose is to protect the public while the committed individual is treated for his mental abnormality." "If, however, the committed sex offender is put into indefinite physical confinement under punitive conditions with treatment that is so inadequate that it shocks the conscience, then the committee's right to substantive due process under the Fourteenth Amendment is implicated." See id. at p. 59. It would be "arbitrary in the sense that [their] punitive confinement, depriving [them]of [their] fundamental constitutional rights, would not be align with the statute's purported purpose of protecting the public while the Plaintiff receives 'proper care and treatment, best adapted, according to contemporary professional standards, to rendering further confinement unnecessary.'")

d. Standards for determining constitutional adequacy of treatment.

i. "treatment, best adapted, according to contemporary professional standards, to rendering further supervision unnecessary" (Minnesota Civil Commitment Act, 1998)

ii. *Youngberg v. Romeo* (1982), which required that professional medical judgment be exercised; treatment must conform to professional standards. ("accepted professional judgment, practice, or standards"). But see discussion of Eighth Circuit case above Strutton v. Meade.

iii. *Allen v. Illinois* (1986), specifically noting Illinois' undertaking to provide treatment "designed to effect recovery." 478 U.S. 364 (1986)

iv. The Minnesota Supreme Court thought it important to memorialize the claim by the state that "treatment and rehabilitation are essential to MSH's mission," and to recite the promises made by the state that "each of the four phases [of the MSOP treatment program] will last approximately 8 months for model patients." *Id.* In a separate case, the Minnesota Supreme Court characterized the treatment as "intensive," "well-planned" and "well-structured." *Call*, 535 N.W.2d at 319 n.5. The court relied on the state's promise that treatment would assist patients in "obtaining discharge into the community." *Id.* Believing in the good faith of the state, the court's opinion featured the state's representation that "[a]n average patient is expected to complete the program in a minimum of 24 months." *Id.*

e. The treatment provided by MSOP has been constitutionally inadequate.

f. Least restrictive alternative

i. To deprive a person of liberty, the state must use narrowly tailored means to achieve a compellingly important end (*In re Linehan,* 1999; *State v. Post,* 1995).

g. Time-limited by purpose

i. "the nature and duration of commitment [must] bear some reasonable relation to the purpose for which the individual is committed." (*Jackson v. Indiana,* 406 U.S. 715 (1972).). United States v. Salerno, 1987; Zadvydas v. Davis, 2001)

ii. "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). A commitment, proper *ab initio*, becomes unconstitutional just as soon as the justifications for confinement cease to obtain. "It [is unconstitutional to] continue [confinement] after that basis no longer existed." *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975).

iii. *Call*, 535 N.W.2d at 319 ("so long as statutory discharge criteria are applied in such a way that person subject to commitment as psychopathic personality is confined only for so long as he continues to need further inpatient treatment and supervision for sexual disorder and to pose danger to public.")

h. Evidence that constitutional standards are not being adhered to:

i. "The governor doesn't want these guys to get out, and he's made that clear ever since he was running for office." Warren Wolfe, Sex Offender Release Rules are Changed, STAR TRIB., July 11, 2003, at 1B (quoting Chief of Staff Charlie Weaver).

ii. Compare Minnesota's record with other states:

1. Minnesota: one person (committed since 1988) released on provisional discharge.
2. Wisconsin: current committed population (January 2012) 314. Currently on Supervised Release: 23. Historical: SR placement: 95. SR discharges 30. Institution discharges: 66.
3. NY (law passed 2007). Total of 270 confinement orders. Of that 270, there have been 34 releases from confinement to SIST (SIST = Strict and Intensive Supervision and Treatment; in the community). 93 individuals were initially committed by the court to SIST.

i. Plaintiffs' additional allegations:
   i. Conditions are punitive and non-therapeutic
   ii. Physical space not designed with therapeutic goals in mind.
   iii. Unwarranted and unreasonable searches.
   iv. Physical restraints: restrictions are identical to maximum security prison, without consideration of individual security risk.
   v. Inadequate medical treatment.
   vi. Restrictions on the possession of personal property.
   vii. Restrictions from accessing the Internet.
   viii. Inadequate diet
   ix. Communication and media restrictions.
   x. Religious restrictions.
      1. Defendants monitor Plaintiffs and Class members when they speak to clergy and religious volunteers, even though they have been screened by MSOP staff upon entry to the facility. They also monitor Plaintiffs and Class members during religious services.
      2. Defendants do not provide Plaintiffs and Class members Kosher or Halal meals. Plaintiffs and Class members cannot wear yarmulkes, kufis, or religious medallions and pendants unless they are in their cells or at a religious service.
      3. Plaintiffs and Class members are only allowed five religious items in their personal property, and Defendants limit the types of religious items Plaintiffs and Class members may have.
      4. Defendants only allow Plaintiffs and Class members to have religious feasts once a year, despite the fact that Plaintiffs and Class members have offered to pay for those feasts.

VI. Turay litigation (Washington State)

In Turay v. Seling, a federal district court determined that Washington's Special Commitment Center (SCC) failed to meet professionally reasonable standards for treatment, and issued an injunction in June 1994 "to make constitutionally adequate mental health treatment available at the SCC."44 The court's injunction was decisively affirmed upon review by the Ninth Circuit Court of Appeals.

Finding progress slow, the court appointed a special master, nominated by the SCC, to assist in achieving compliance and report progress toward the same. Five years and seventeen progress reports later, the court found "a continuing failure to meet minimum professional standards." In November 1999, the court issued a contempt order based on the following findings: [T]he continuing "failures to comply with the injunction . . . are failures to meet constitutionally required minimum professional standards for the treatment of sex offenders"; that the record showed "footdragging which has continued for an unconscionable time"; that defendants "persistently have failed to make constitutionally adequate mental health treatment available to the SCC residents, and have departed so substantially from professional minimum standards as to demonstrate that their decisions and practices were not and are not based on their professional judgment"; that defendants "have failed to take all reasonable steps within their power to comply or substantially comply with the injunction, and have intentionally disregarded the injunction's requirements[.]" All of these failures were in turn ascribed to a systemic resource allocation problem. The court's injunction was not dissolved until March 2007, nearly fifteen years later.