**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A13-2098**

Terrance J. Friend, petitioner,
Appellant,

vs.

Lucinda Jesson,
Commissioner of Human Services,
Respondent

**Filed June 23, 2014**
**Affirmed**
**Worke, Judge**

Carlton County District Court
File No. 09-CV-13-607

Terrance J. Friend, Moose Lake, Minnesota (pro se appellant)

Lori Swanson, Attorney General, Ricardo Figueroa, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Larkin, Judge; and Stauber, Judge.

**U N P U B L I S H E D  O P I N I O N**

**WORKE**, Judge

Appellant challenges the district court's order denying his habeas petition, which alleged that his commitment to the Minnesota Sex Offender Program (MSOP) was unconstitutional on several grounds. We affirm.

## FACTS

After serving 12 years in prison for convictions of criminal sexual conduct involving multiple female victims between the ages of five and twelve, appellant Terrance J. Friend was indefinitely civilly committed to MSOP as a sexual psychopathic personality (SPP) and as a sexually dangerous person (SDP) in 1996.

On March 20, 2013, Friend filed a petition for a writ of habeas corpus setting forth thirteen claims for relief. Friend asserted that (1) the Minnesota Commitment and Treatment Act, Minn. Stat. §§ 253B.01-.24 (2012)[1] (the Act) is an unlawful bill of attainder; (2) the Act impairs the obligation of contracts under the federal constitution; (3) his due process rights were violated; (4) his right to equal protection has been violated because he is treated differently from people who are civilly committed but who are not sex offenders; (5) the courts have violated the separation-of-powers doctrine by interpreting the Act; (6) his substantive due process rights have been violated because of the duration of commitment and the lack of adequate treatment; (7) he has been personally stigmatized by being labelled as an SPP and an SDP; (8) the Act is void for vagueness; (9) he was unlawfully detained in a prison setting in 2006; (10) his due process rights of liberty are violated by the sex offender registration laws; (11) he is being unlawfully held because MSOP is not providing the anticipated treatment that is the purpose of the Act and instead he is subject to punitive conditions; (12) changes in

[1]The sections of the Act dealing with sex-offender commitment have been transferred to Minn. Stat. §§ 253D.01-36 (Supp. 2013). The new chapter is cited as "Minnesota Commitment and Treatment Act: Sexually Dangerous Persons and Sexual Psychopathic Personalities." Minn. Stat. § 253D.01.

MSOP have infringed on his individual rights; and (13) MSOP coerces and extorts money from him by forcing him to pay for personal items through the prison system.

The state filed a return to Friend's petition. Although the district court received a complete copy, the copy served on Friend was missing several pages. When the state discovered this error, it filed and served a complete return. Friend objected and moved to strike the additional pages as an improper amendment. The district court denied Friend's motion and gave Friend additional time to reply to the arguments set forth on the supplemental pages. Ultimately, the district court denied Friend's habeas petition without an evidentiary hearing. This appeal followed.

**D E C I S I O N**

We review the district court's findings denying a habeas peitition to determine whether they are supported by the evidence and its legal determinations de novo. *State ex rel. Allen v. Fabian*, 658 N.W.2d 913, 915 (Minn. App. 2003). The petitioner must set forth sufficient facts in the petition to establish a prima facie case for discharge. *State ex rel. Fife v. Tahash*, 261 Minn. 270, 271, 111 N.W.2d 619, 620 (1961). The petitioner has the burden of showing that he is illegally detained. *Case v. Pung*, 413 N.W.2d 261, 262 (Minn. App. 1987), *review denied* (Minn. Nov. 24, 1987).

A writ of habeas corpus permits a person to obtain "relief from imprisonment or restraint." Minn. Stat. § 589.01 (2012); *Beaulieu v. Minn. Dep't of Human Servs.*, 798 N.W.2d 542, 546 (Minn. App. 2011), *aff'd* 825 N.W.2d 716 (Minn. 2013). It may not be used by "persons committed or detained by virtue of the final judgment of a competent tribunal of civil or criminal jurisdiction." Minn. Stat. § 589.01. It is not a substitute for

an appeal and may not be used to collaterally attack a judgment. *State ex rel. Schwanke v. Utecht*, 233 Minn. 434, 440, 47 N.W.2d 99, 103 (1951). This court concluded that the scope of a habeas inquiry is limited to constitutional claims and jurisdictional challenges. *Beaulieu*, 798 N.W.2d at 548. *See State ex rel. Guth v. Fabian*, 716 N.W.2d 23, 26-27 (Minn. App. 2006) (stating that habeas petition may be used to challenge conditions of imprisonment as cruel and unusual punishment), *review denied* (Minn. Aug. 15, 2006).

Friend has challenged the constitutionality of the Act. This presents a question of law subject to de novo review. *State v. Wenthe*, 839 N.W.2d 83, 87 (Minn. 2013). "Minnesota statutes are presumed constitutional" and will be declared unconstitutional "with extreme caution and only when absolutely necessary." *Id.* The party asserting unconstitutionality has the burden of proof. *Id.*

***Bill of attainder***

Friend argues that the amendments to the Act since 1994 create an unconstitutional bill of attainder. *See* U.S. Const. art. I, § 9; Minn. Const. art. I, § 11. A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without . . . the protections of a judicial trial." *Council of Indep. Tobacco Mfrs. of Am. v. State* (*Tobacco I*), 685 N.W.2d 467, 474 (Minn. App. 2004) (quotation omitted), *aff'd* 713 N.W.2d 300 (Minn. Mar. 16, 2006). Stated otherwise, a bill of attainder is "a statute that specifically singles out an identifiable group or individual for the infliction of punishment by other than judicial authority." *Council of Indep. Tobacco Mfrs. of Am. v. State* (*Tobacco II*), 713 N.W.2d 300, 313 (Minn. 2006) (quotation omitted). The purpose of the prohibition against bills of attainder is grounded

in the separation-of-powers doctrine and is intended to prevent the legislature from usurping the judiciary's role in determining guilt and punishment. *Tobacco I*, 685 N.W.2d at 474.

A bill of attainder (1) singles out an identifiable individual or group; (2) has a punitive purpose; and (3) does not provide for a judicial trial. *Id.* It punishes based on past conduct; if a party can amend his conduct to escape punishment, the regulation is not a bill of attainder. *Id.* A court considers three things when determining if a law has a punitive purpose: (1) whether it imposes some kind of punitive consequence; (2) whether the law has a non-punitive purpose; and (3) whether the legislature had a punitive motive in creating the law. *Id.* at 474-75.

Historically, courts have ruled that civil commitment of sex offenders for the purposes of treatment and public safety is not punitive. *See Kansas v. Hendricks*, 521 U.S. 346, 369, 117 S. Ct. 2072, 2086 (1997); *In re Civil Commitment of Lonergan*, 811 N.W.2d 635, 642 (Minn. 2012). Because the Act does not have a punitive purpose, it is not a bill of attainder.

***Impairment of obligation of contract***

Friend alleges that the amendments to the Act are a violation of the constitutional prohibition against impairment of contract. *See* U.S. Const. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts"); Minn. Const., art. I, § 11. Friend argues that the state was contractually obligated to provide "psychiatric care and treatment for an alleged mental illness/disorder that 'might' cause sexually dangerous acting out in the future, and that the treatment program would be approximately thirty-

two months in duration." He alleges that the state has failed to provide adequate treatment and that he is no longer termed a "patient," indicating that there no longer is a purpose for confinement.

In his habeas petition, Friend argued that his prison sentence was a contract with the state and that his civil commitment, which occurred four days prior to the expiration of his prison sentence, impaired that contract. The district court order addressed this issue, not the issue that Friend now argues. We will not decide issues that were not presented to the district court. *See Midwest Family Mut. Ins. Co. v. Wolters*, 831 N.W.2d 628, 633 (Minn. 2013).

***Double jeopardy***

Although Friend describes his third allegation as a claim of double jeopardy, he again asserts that the Act is a bill of attainder that singles out "disfavored persons or groups and met[es] out summary punishment for past conduct." He alleges that MSOP does not provide "psychiatric care" and argues that the amendments to the Act do not apply to him because he was committed as a "client" and the amendments refer to "patients."

The bill-of-attainder argument has been rejected by Minnesota courts. *See Lonergan*, 811 N.W.2d at 642 (stating that purpose of civil commitment for sexual offenders is for treatment, not punishment). Insofar as Friend is arguing that his civil commitment following completion of his prison sentence constitutes double jeopardy, this court rejected a similar argument. *See In re Civil Commitment of Martin*, 661 N.W.2d 632, 641 (Minn. App. 2003), *review denied* (Minn. Aug. 5, 2003). This court

reasoned that "[p]rotections against double jeopardy are not implicated by the [Act], because the purpose of commitment under the [Act] is treatment and not punishment." *Id.*

***Equal protection***

Friend argues that persons committed as SPP or SDP are singled out for different treatment from those civilly committed for other reasons, in violation of his constitutional right to equal protection. This argument was rejected in *Martin*. *Id.* (stating that the Act's "classification of [SDPs] is justified by the reasonable connection between a proposed patient's mental disorder and the state's interest in public protection and treatment."). *See also In re Blodgett*, 510 N.W.2d 910, 917 (Minn. 1994) (rejecting equal-protection claim based on different treatment of sexual offenders diagnosed as mentally ill and other sexual predators).

***Separation of powers***

Friend argues that judicial interpretation of the Act, a legislative enactment, violates the separation-of-powers doctrine. Specifically, he contends that the Minnesota Supreme Court's interpretation of the SDP law to require that an offender be "highly likely" to engage in harmful sexual conduct, rather than relying on the statutory language of "likely" to engage in harmful sexual conduct, violates the separation-of-powers doctrine. *In re Linehan*, 557 N.W.2d 171, 180 (Minn. 1996), *judgment vacated* (522 U.S. 1011, 118 S. Ct. 596 (1997)), *aff'd* 594 N.W.2d 867 (Minn. 1999). But the supreme court's interpretation of the SDP law on remand did not change the legislative content of

the Act but rather assured that it was administered consistently with the state and federal constitution, which is within the judiciary's power. *Id.*

***Due-process violation based on inadequate treatment***

Friend argues that his constitutional right to substantive due process was violated by MSOP's failure to provide adequate treatment, which in turn means that no one is released from MSOP. He also challenges the duration of treatment. The state relies on *Strutton v. Meade*, which states that civilly committed persons have "a substantive due process right to reasonably safe custodial conditions [but not] a broader due process right to appropriate or effective or reasonable treatment of the illness or disability that triggered the patient's involuntary confinement." 668 F.3d 549 (8th Cir. 2012) (quotation omitted). The Eighth Circuit concluded that despite a Missouri state mandate that the state provide for treatment of mental abnormality so that a committed person can be released, the failure to do so will constitute a substantive due-process violation only when the state's actions are "truly egregious and extraordinary." *Id.* (quotation omitted).

Friend relies on general statements and averments that MSOP extends far beyond the expected duration, that no one is released, that the treatment is not effective for remediating mental-health issues, but he does not provide concrete information about the type of treatment he personally has received, or whether he has participated in treatment, or whether he has refused treatment. "[A] person may not assert his right to treatment until he is actually deprived of treatment." *In re Martenies*, 350 N.W.2d 470, 472 (Minn. App. 1984), *review denied* (Minn. 1984). The record here does not contain enough

information to determine if Friend has been deprived of treatment or what type of treatment Friend has actually received.

Friend also ignores the second purpose of the Act, which is to ensure public safety. In *Blodgett*, the supreme court stated that "the state's interest in the safety of others is no less legitimate and compelling [than its interest in curing sex offenders]." 510 N.W.2d at 916.

In the end, Friend has failed to provide enough evidence to support his claim of a substantive due-process violation that would support his habeas petition. *See Fife*, 261 Minn. at 271, 111 N.W.2d at 620 (stating habeas petitioner must set forth sufficient facts to establish a prima facie case); *Case*, 413 N.W.2d at 262 (stating that habeas petitioner has the burden of showing he is illegally detained).

***Demonizing and stigmatizing***

Friend charges that sex offenders are demonized and stigmatized for political purposes. Friend does not set forth a constitutional or jurisdictional argument, which makes this an inappropriate ground for habeas relief. *See Beaulieu*, 798 N.W.2d at 548 (holding that scope of habeas relief is limited to constitutional and jurisdictional challenges).

***Procedural and evidentiary challenge***

Friend asserts that a person should either serve a prison term or be committed for mental-health treatment, but that to do both "unconstitutionally crosses the line into extended preventive detention," and is a due-process violation. Friend does not support this with citations to caselaw or other authority, and does not explain what he means by

"lacking proper procedure/evidentiary standards." Generally, in an appeal, matters not supported by argument or authority are deemed waived. *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997). In any event, courts have consistently rejected the argument that civil commitment may not follow a term of imprisonment. *See Hendricks*, 521 U.S. at 369-70, 117 S. Ct. at 2086 (concluding that Kansas commitment act did not constitute a second prosecution if individual met requirements for civil commitment under the statute); *Blodgett*, 510 N.W.2d at 916 (rejecting assertion that civil commitment is "equivalent to life-long preventive detention" when MSOP provides treatment and periodic review).

***Unlawful detention***

Friend was placed in a Department of Corrections (DOC) annex building in 2006 and returned to the Moose Lake Facility in 2009. He argues that this was unlawful detention. But the purpose of a habeas corpus petition is to challenge a current restraint of liberty in order to obtain relief from imprisonment or restraint. Minn. Stat. § 589.01. To the extent that Friend is challenging his confinement from 2006 to 2009 in the current habeas petition, that issue is moot. *See In re Risk Level Determination of J.V.*, 741 N.W.2d 612, 614 (Minn. App. 2007) ("A matter may be dismissed as moot if an event occurs that resolves the issue or renders it impossible for the court to grant effectual relief."), *review denied* (Minn. Feb. 19, 2008).

***Registration and notification laws***

Friend argues that he is deprived of a liberty interest because of the predatory-offender-registration requirement of Minn. Stat. § 243.166 (2012) and notification

requirement of Minn. Stat. § 244.052 (2012). Section 243.166 requires a predatory offender, which includes someone civilly committed as SPP or SDP, to register a primary address with a corrections agent. Section 244.052 requires an end-of-confinement review of a predatory offender to assess the public risk the offender poses; this statute also requires a law-enforcement agency to notify residents who live in the area where the offender will reside of the presence of a predatory offender.

Friend contends that this is an unconstitutional denial of a due-process liberty interest because he will not be released until "he has shown he no longer has a serious mental illness that would contribute to 'clear and convincing' future dangerousness." In *Boutin v. LaFleur*, 591 N.W.2d 711, 717-18 (Minn. 1999), the supreme court concluded that the registration requirement was a civil regulatory action that was rationally related to a public purpose and that it was not unreasonable, arbitrary, or capricious. *See Kaiser v. State*, 641 N.W.2d 900, 907 (Minn. 2002) (concluding that registration requirement is non-punitive and collateral consequence of conviction).

In *Paul v. Davis*, the United States Supreme Court considered whether publication of a list of active shoplifters by a police department offended a liberty interest. 424 U.S. 693, 695, 96 S. Ct. 1155, 1157-58 (1976). The Court concluded that "stigma to one's reputation" alone did not deprive a person of a liberty interest without an additional denial of "any right vouchsafed to him by the State." *Id.* at 701, 712, 96 S. Ct. at 1160, 1166; s*ee also Boutin*, 591 N.W.2d at 518 (citing *Paul* as adopting a "stigma-plus" test). Here, the notification and risk-assessment requirement is made by a committee and an offender has the right of administrative review. Minn. Stat. § 244.052, subds. 3, 6.

Notification occurs only after a predatory offender "resides, expects to reside, is employed, or is regularly found" in an area. *Id.*, subd. 4(a). To this extent, Friend's challenge to the notification requirement is premature.

***No available release***

Friend argues that "[t]he release procedure found in the Civil Commitment Act does not work" because the release panel has been overruled, governors have ordered that no sex offender should be released, MSOP continually changes the program requirements, and the legislature continues to amend the Act. But Friend has not alleged that he personally has requested and been denied release. In order to challenge an alleged denial of constitutional rights, a party must show that he will suffer or has suffered "direct and personal harm" that is "personal, actual, or imminent." *Riehm v. Comm'r of Pub. Safety*, 745 N.W.2d 869, 873 (Minn. App. 2008), *review denied* (Minn. May 20, 2008).

***Change of circumstances***

Friend argues that the changes in conditions in MSOP from the beginning of his commitment to the present are punitive and amount to an unlawful bill of attainder. Friend asserts that whereas he previously "retained all the rights of any citizen in open society," including the right to send and receive mail and phone calls, to visit other patients in the facility, to have a credit card and mail-order privileges, and to transport without waist and leg chains, and that all these rights were removed with changes to the program. The state argues that this is an impermissible topic for a habeas petition, because it requires "analysis of the Patient's Bill of Rights and MSOP policies," and is

not limited to constitutional or jurisdictional issues. The state also argues that these are reasonable and non-punitive restrictions that do not constitute punishment.

In reviewing pretrial-detention conditions, the Supreme Court noted that confinement in a secure facility "results in restricting the movement of a detainee in a manner in which he would not be restricted if he simply were free to walk the streets pending trial." *Bell v. Wolfish*, 441 U.S. 520, 537, 99 S. Ct. 1861, 1873 (1979). It further noted that "[l]oss of freedom of choice and privacy are inherent incidents of confinement in such a facility." *Id.* The distinction between constitutional and unconstitutional restraint is whether the restrictions are punitive or "mere regulatory restraint." *Id.*

In *Karsjens v. Jesson*, No. 11-3659, 2014 WL 667971, at *13 (D. Minn. Feb. 20, 2014), the federal court concluded that similar claims survived dismissal because they raised a prima facie case of deprivation of a liberty interest. The federal court noted that "[w]hile the Eighth Circuit has determined that the liberty interests of individuals committed to state custody . . . are 'considerably less than those held by members of free society,' the Eighth Circuit has also acknowledged that such individuals are 'entitled to more considerate treatment and conditions of confinement' than prison inmates." *Id.* (quoting *Senty-Haugen v. Goodno*, 462 F.3d 876, 886 (8th Cir. 2006)).

Friend may have raised a cognizable constitutional claim, but the remedy for his claim is not release from MSOP, but modification of MSOP procedures. A habeas petition is not the appropriate means for modifying MSOP procedures. The rationale of

*Beaulieu* suggests that a habeas action is not the correct means for challenging statutory or institutional policies. 798 N.W.2d at 548.

***Coercion and extortion***

Friend argues that he is subject to coercion and extortion, because his rights to acquire personal supplies and health services have been curtailed; he asserts that he is forced to use services provided by the DOC that are more expensive or of poor quality, to pay for his cost-of-care, and to return half of any pay he earns to the state.

Minn. Stat. § 253D.19 and its predecessor, Minn. Stat. § 253B.185, subd. 7 permit the commissioner of human services to limit certain statutory rights of persons committed to MSOP. According to section 253D.19, subdivision 2, the commissioner may limit rights to personal privacy, private communications, retention and use of personal property, management of financial affairs, visits and group participation, correspondence, and telephone privileges. The commissioner may also determine what amount of the cost of his care a committed sex offender must pay. Minn. Stat. § 246B.06, subd. 1 (2012).

The Eighth Circuit dismissed similar claims of limited access to outside vendors and computer communication as "*de minimus* restrictions with which the Constitution is not concerned." *Senty-Haugen*, 462 F.3d at 886, n.7 (quotation omitted). In considering Senty-Haugen's claim of deprivation of a liberty or property interest, the Eighth Circuit concluded that it must balance the specific interest affected, the likelihood of an erroneous deprivation, and MSOP's "interest in providing the process that it did, including the administrative costs and burdens of providing additional process." *Id.* at

886. It noted that the curtailment of liberty interests for civilly committed persons is "constitutionally permissible," and that the federal court gives "deference to state officials managing a secure facility, and [MSOP] staff have a substantial interest in providing efficient procedures to address security issues." *Id.* at 886-87.

***Motion to strike***

Friend argues that the district court abused its discretion by denying his motion to strike part of the state's return reply to his petition. The copy of the return served on Friend omitted several pages, although the copy filed with the district court was complete, indicating that the error was inadvertent.

The district court has discretion to consider an untimely filing despite failure to comply with the rules. *Benassi v. Back & Neck Pain Clinic, Inc.*, 629 N.W.2d 475, 483 (Minn. App. 2001), *review denied* (Minn. Sept. 11, 2001). The filing here was not untimely. Friend was given an additional month to respond to the arguments made on the missing pages, so he was not prejudiced. Given these facts, the district court did not abuse its discretion in permitting the state to file the missing pages.

***Evidentiary hearing***

Friend notes that his petition was denied without an evidentiary hearing, but does not include argument or citation to support a claim that this was error. This court generally does not address an assignment of error based on mere assertion and not supported by argument or authority. *Embree v. U.S. Bank Nat'l Ass'n*, 828 N.W.2d 141, 145 (Minn. App. 2013).

**Affirmed.**