STATE OF MINNESOTA **SUPREME COURT APPEAL PANEL**

COUNTY OF HENNEPIN

Appeal Panel File No. AP16-9042

In the Matter of the Civil Commitment of: County File No. 27-P1-91-034113

Thomas Ray Duvall **FINDINGS AND ORDER**

The above-entitled matter came on for trial before the undersigned Supreme Court Appeal Panel ("Panel") at the Dakota County Courthouse, Hastings, Minnesota on April 18-21, 2017 and April 26, 2017.

William L. H. Lubov, Esq., appeared with and on behalf of Thomas Ray Duvall (hereinafter Petitioner). Noah Cashman and Heather Kjos, Assistant Attorney General, appeared for and on behalf of the Commissioner of Human Services. Theresa Couri, Assistant Hennepin County Attorney, appeared for an on behalf of Hennepin County.

This proceeding was before the Judicial Appeal Panel on the request of the Commissioner and Hennepin County for Rehearing and Reconsideration of the Recommendation of the Special Review Board ("SRB"), dated March 3, 2016, granting Petitioner's application for provisional discharge. (Petitioner's Exhibit No. 3).

Without objection by the parties, the Court admitted into evidence all or portions of the documents identified and attached herein as Appendix A.

The Court heard testimony from Dr. Lauren Herbert; Scott Duvall; Andrew LaMotte; Heather Condon; Thomas Jones; Kristen Dehrkoop; Michelle Sexe; Tim Benesch; Scott Halvorson; Troy Larson, Patrick Quigley, Katherine Thelemann; MaryBeth Gradyminer; Josh Coopman; Kristi

Mike; Chris Onken; Dr. James Alsdurf; Jerome Brown; Dr. Mary Kenning; Dr. Harry Hoberman; and Petitioner, Thomas Duvall.

Based upon all of the files, records and proceedings herein, the Court makes the following:

FINDINGS OF FACT

Procedural History

1. On January 19, 1991, the Hennepin County Attorney filed a petition to commit Petitioner as a psychopathic personality. On April 4, 1991, the Hennepin County District Court initially committed Petitioner as a psychopathic personality.

2. On August 14, 1991, the Hennepin County District Court indeterminately committed Petitioner to the Minnesota Sex Offender Program ("MSOP").

3. Petitioner petitioned the Special Review Board (SRB) for a provisional discharge from his commitment on June 25, 2015.

4. On March 1, 2016, the SRB conducted a hearing on the petition. In its Findings of Fact and Recommendations dated March 3, 2016, the SRB recommended provisional discharge.

5. The Commissioner and Hennepin County objected to the recommendation and requested a hearing before this Panel.

6. The Panel appointed Dr. James Alsdurf as the Court-appointed examiner. The Commissioner retained Dr. Harry Hoberman and Dr. Mary Kenning as her experts. All three psychologists completed reports and filed them with the Court.

7. At the beginning of the trial, the parties stipulated that based on the SRB findings and recommendations, as well as the Sexual Violence Risk Assessment report prepared by Dr.

Herbert, dated March 20, 2017, Petitioner met his initial burden of production. The parties agreed the trial should proceed to the second phase of the proceedings that requires any party opposing provisional discharge to prove by clear and convincing evidence that the provisional discharge should be denied, Minn. Stat. §253D.28, Subd. 2.

***Background and Criminal History*:**

8. Petitioner was born on August 24, 1955 and is currently 62 years old.

9. Petitioner has spent most of his adult life in prison or an institution.

10. Petitioner never married but was involved in an intimate relationship for approximately 2 years beginning when he was 19 years-old. This relationship ended when his 17 year-old girl friend became pregnant and decided to have an abortion, contrary to Petitioner's wishes.

11. Petitioner dropped out of school in the 9th grade and completed his GED in prison.

12. Petitioner never established a significant work history in the community, however he has received good reports related to his work in prison and at MSOP.

13. Petitioner has had a significant history of substance abuse beginning in 7th grade. Substances include: alcohol, marijuana, acid, and methamphetamine.

14. Petitioner has been taking Naltrexone, a medication used to reduce cravings in adults with chronic alcohol use issues, since 2012 and reports that the medication has been effective in reducing his sexual preoccupation.

15. The SRB Findings of Fact and Recommendation dated March 3, 2016 report that Petitioner's offense history includes:

a. As a juvenile, Petitioner "committed burglaries, sold narcotics, stole cars, and made obscene phone calls."

b. As an adult, Petitioner "was sentenced for a variety of non-sexual offenses including Driving Under the Influence, Disorderly Conduct, Assault, Obstructing Legal Process, and Driving After Revocation."

c. Petitioner's sexual offences "began in 1978 when he was charged with Criminal Sexual Conduct in the Third Degree. He received a stay of execution of sentence, placed on probation, and ordered to complete sex offender treatment. He absconded from the treatment facility and was then sentenced to prison in St. Cloud. He was released on parole 18 months later and sent to a group home. While there, he was charged with raping a 17 year-old girl that he picked up at the State Fair. In 1981, while on parole, he was arrested for Terroristic Threats and Assault after attempting to force a female into his car at knifepoint. He then served the remaining 8 months of his sentence in prison in Stillwater. In 1982, just three days after his release from prison, he was charges with Criminal Sexual Conduct in the Second Degree and Criminal Sexual Conduct in the First Degree. He was sentenced to prison for 108 months. In 1987, just 12 days after his release from prison, while on parole, he sexually assaulted a 17 year-old girl, and he was convicted of Criminal Sexual Conduct in the First Degree. He was sentenced to 240 months in prison."

16. Petitioner's offenses include use of weapons, multiple forms of penetration, penetration with objects, threats of violence and physical assaults.

17. Petitioner's last offense was in 1987.

***Treatment History*:**

18. Petitioner has a history of failed attempts at chemical dependency treatment in 1974 and 1977.

19. In 1999, Petitioner participated in and successfully completed chemical dependency treatment while incarcerated in the Lino Lakes Correctional Facility. Petitioner also participated in chemical dependency treatment in 2012 while in MSOP.

20. Petitioner participated in sex offender treatment at Alpha Human Services for 3½ months in 1979 before absconding and being sent to prison for 18 months. After being released

from prison, Petitioner completed Damascus Way, but was returned to prison after attempting a sexual assault in 1981. After being convicted of the sexual assaults of three victims on May 3, 1986, Petitioner entered the Transitions Sex Offender Program (TSOP) in prison.

21. On September 8, 1987 Petitioner was transferred from TSOP to 180 Degrees halfway house on work release. While at 180 Degrees, Petitioner reported no deviant sexual feelings, no use of drugs or alcohol, and that he was attending Alcoholics Anonymous (AA). During this time (December 1987) Petitioner committed his last sexual offense and now admits that he faked his way through treatment and had been consuming chemicals for some time. TSOP noted that future programs had to be aware of, among other issues, that Petitioner is dishonest about his sexual feelings and sexual fantasies.

22. On August 9, 1994, Petitioner entered the MCF-Stillwater Sexual Education and Evaluation Center (SEEC) but quit on September 12, 1994. From January 1999 to May 2001 Petitioner attended the MCF-Lino Lakes Sex Offender Treatment Program (SOTP-LL).

***Current Treatment Progress*:**

23. Petitioner was transferred to MSOP-St. Peter on May 3, 2001 and is currently in Phase III of the MSOP treatment program. Petitioner has been in the Community Preparation Services (CPS) portion of the program since April 8, 2009, residing outside of the secure perimeter at MSOP's St. Peter campus and attending treatment.

24. CPS is designed for MSOP clients who have successfully progressed through all three treatment phases at MSOP and have advanced to placement in a non-secure facility. CPS includes three stages that are progressive in nature and allow for an increase in responsibility

and accountability, while remaining under supervision. Petitioner has been in the final stage of the CPS program since April 22, 2010.

25. Petitioner is a Phase III treatment participant. Petitioner is in the final stages of Phase III treatment programming referred to as "Preparing for Successful Re-entry". In this stage, participants are expected to adhere to their Individual Treatment Plan (ITP), maintain a community based support system, be viewed by the therapeutic community as a leader, and prepare for their provisional discharge and transition to the community. The records reflect that Petitioner is actively engaged and by and large, very successful in his current treatment programming.

26. Petitioner has achieved all the privileges associated with his level of treatment. Petitioner participates in regular, supervised off-campus events as well as daily, unsupervised on-campus privileges. Of note to this Panel is the absence of any reported issues or incidents occurring during Petitioner's exercise of his privileges while in the community.

27. Petitioner has been prescribed Naltrexone for the off-label use of decreasing sexual fantasies. Petitioner continues to have intrusive thoughts of past victims while on the drug. According to the testimony and records, due to a surgery, Petitioner briefly stopped taking Naltrexone and reported an increase in both the vividness and intensity of his deviant sexual fantasies.

28. Petitioner is a mentor to other clients at MSOP, actively participates in community based support groups and does well with minimal supervision.

29. Petitioner participated in outpatient individual therapy at Project Pathfinder in St. Paul from 2009 to 2014 and continues to participate twice per month in a men's group at Project Pathfinder.

30. Petitioner completed a Penile Plethysmograph evaluation (PPG) to measure physical arousal to various sexual stimuli on February 22, 2012. This PPG did not detect any arousal to violent or coercive sexual stimuli involving adult and teen females.

31. The Special Review Board Treatment Report Update (SRBTR) dated March 3, 2017 was prepared by Megan Gramlow MSW, LICSW, and reviewed by Nicole Elsen, PsyD., LP, MSOP Assessment Director.

32. The SRBTR states that:

a. Petitioner "has made a significant effort in treatment to maintain transparency regarding his healthy and deviant arousal. Additionally, he has actively engaged in different means to reinforce healthy arousal, in addition to decreasing and managing his deviant sexual arousal."

b. Petitioner "has been consistently engaging in reintegration opportunities, which have served to support his successful transition to the community, including demonstrating the ability to manage his high risk factors while in the community, live independently, and increasing and enhancing his support network."

c. Petitioner "has demonstrated the ability to create and sustain intimate relationships."

d. Petitioner "has demonstrated a consistent ability to manage his cooperation with rules and supervision, while monitoring and managing his urge to gain power and control."

e. Petitioner "has demonstrated the ability to independently manage his mental health."

f. Petitioner "has not demonstrated behavioral concerns regarding hostility towards females or authority figures."

g. Petitioner "is well-disciplined in his treatment efforts, and maintains consistent attendance within his treatment across all areas (i.e. treatment groups, psychoeducational modules, individual sessions, reintegration outings, and community support groups)."

h. Petitioner's "disclosure of his unhealthy or deviant sexual thoughts is viewed as positive in terms of treatment progress and maintenance. It is possible that these types of thoughts will always exist for (Petitioner), and he has demonstrated that he is able to manage these thoughts consistently and independently in a healthy manner."

i. Petitioner "has participated and completed the Arousal Management treatment programming, which, again is 'an intensive module that assists clients in developing skills needed to manage inappropriate/deviant arousal.'"

j. After each deceptive polygraph, Petitioner works with treatment providers to determine why the polygraphs indicated deception.

k. Petitioner "indicated he was disappointed a treatment designed assignment (i.e. sexual journals) was reportedly 'used against' him in a previous risk assessment."

l. "Despite (Petitioner's) perception and how such journals may be 'used against' him, he continued to document his thoughts and behavior (both deviant and healthy)."

m. If Petitioner is provisionally discharged, he "will remain under a level of supervisory control in an effort to safeguard his gradual return to the community."

n. Treatment records indicate that Petitioner "demonstrates the ability to consistently cooperate with rules and supervision across all settings (i.e. treatment, vocational, volunteer, living unit, and reintegration outings within the community)."

o. Petitioner "has demonstrated meaningful change over an extended period of time, indicating he has internalized treatment concepts and integrated the skill sets necessary for living an independent, healthy life."

33. The SRBTR Recommendation is dated March 3, 2017 and was authored by Christopher Schiffer, MA, LP, MSOP Clinical Director. Mr. Schiffer states in the Recommendation that:

a. Petitioner's "continued risk of intrusive deviant sexual thoughts, as indicated by the deceptive finding on the polygraphs, is in itself indicative of the unhealthy way his sexuality formed, and may take a lifetime of work and change to manage and restructure. The deceptive findings on these two recent polygraphs do raise questions about the degree of transparency this client has in regards to his masturbatory fantasies, however all other evidence demonstrates general collaboration, transparency, and motivation to continue managing arousal to violence."

b. The "only sexuality component clearly tied to recidivism in the research is deviant arousal, and the PPG results for this client provide no evidence that he is currently aroused to violence."

c. Based upon Petitioner's "progress in treatment, the MSOP leadership support his petition for provisional discharge…"

Diagnoses:

34. The MSOP Sexual Violence Risk Assessment Update (SVRA) dated 3-20-2017, authored by Dr. Lauren Herbert, offered the following diagnosis of Petitioner:

a. Sexual Sadism Disorder, In a controlled environment
b. Antisocial Personality Disorder
c. Adjustment Disorder, With Anxiety
d. Alcohol Use Disorder, Severe, In a controlled environment
e. Cocaine Use Disorder, Moderate, In a controlled environment
f. Cannabis Use Disorder, Moderate, In a controlled environment
g. Methamphetamine Use Disorder, Mild, In a controlled environment
h. Other Hallucinogen Use Disorder, LSD, Moderate, In a controlled environment
i. Problems Related to Other Legal Circumstances (civil commitment)

35. Dr. James M. Alsdurf, the court appointed examiner; Dr. Mary Kenning and Dr. Harry M. Hoberman, who were retained by the Commissioner, testified in this matter and expressed opinions that Petitioner is properly diagnosed with sexual sadism and antisocial personality disorder.

36. The Hare Psychopathy Checklist-Revised Second Edition (PCL-R) is a structured measure for determining psychopathy. Evidence was presented that Petitioner has been assessed on several occasions on the PCL-R and "has historically been rated as meeting criteria for classification as a psychopath."

MSOP Treatment Team Testimony:

37. Many members of Petitioner's MSOP treatment team, both current and recent past, testified on Petitioner's behalf. None of the treatment team members noted any concerns, negative incidents, rule violations, or security concerns with Petitioner. Rather the testimony from the MSOP professionals was consistent in describing Petitioner as an engaged, transparent treatment participant and often described Petitioner as a model client. While not opining as to whether provisional discharge was appropriate, Petitioner's treatment team members are in support of Petitioner's provisional discharge request.

38. Kristi Mike is Petitioner's current primary therapist. Ms. Mike testified that Petitioner is open and transparent in communications with MSOP staff and has internalized treatment concepts. Ms. Mike believes Petitioner has a solid relapse prevention plan and several protective factors that protect against his risk of recidivism. Ms. Mike testified that Petitioner "has done everything in treatment asked of him."

39. Ms. Mike testified and acknowledged that Petitioner continues to have deviant sexual thoughts. Ms. Mike further testified that while a thought, in and of itself, is not deviant unless acted upon, having deviant thoughts about minors who fall within Petitioner's victim pool is problematic.

40. According to Ms. Mike, a primary goal of Petitioner's treatment is a non-deceptive polygraph before he is provisionally discharged, and that she, Jerome Brown, Kristin Dehrkoop, and Tim Benesch met to discuss Petitioner's polygraph. Ms. Mike testified that she had "worked" with Petitioner to help him pass a polygraph.

41. Kristen Dehrkoop is the clinical supervisor at MSOP-St. Peter and served as Petitioner's direct therapist from May 2015 to December 2016. Ms. Dehrkoop is responsible for Petitioner's treatment programming, writing his treatment plans, his quarterly reports, and notes from individual sessions with Petitioner.

42. In her testimony, Ms. Dehrkoop described Petitioner as a leader inside and outside of the group. Ms. Dehrkoop further testified that Petitioner "owns his treatment".

43. Ms. Dehrkoop testified as to Petitioner's use of Naltrexone to reduce his sexual thoughts. As previously described, when Petitioner stopped taking Naltrexone prior to a surgical procedure, Petitioner experienced in increase in sexual thoughts. According to Ms. Dehrkoop, when experiencing these thoughts, Petitioner utilized his relapse prevention plan and support system appropriately.

44. Petitioner journals about his deviant sexual fantasies as prescribed by his MSOP treatment team.

45. Ms. Dehrkoop testified she is aware of and has processed Petitioner's sexuality journals with him. Ms. Dehrkoop opined that journaling is important for Petitioner and that it increases Petitioner's transparency about his sexual fantasies, his arousal, his sexual triggers and "potentially his masturbation practices". Ms. Dehrkoop also testified that Petitioner has

expressed that he is tired of journaling. Ms. Dehrkoop denied advising Petitioner to throw away his journals.

46. Ms. Dehrkoop testified as to the content contained within Petitioner's sexual journals. Ms. Dehrkoop discussed the therapeutic value of sexuality journals in allowing treatment professionals to glean a client's ongoing needs, even against the troublesome use of graphic and raw language when describing fantasies.

47. Ms. Dehrkoop described the differences between healthy sexual thought, unhealthy sexual thoughts and criminal thoughts providing examples of each. Based upon Ms. Dehrkoop's testimony, it is clear that treatment professionals are seeking transparency and completeness in a patient's sexual journaling. Ms. Dehrkoop testified that accountability is crucial and minimization or deception with either treatment professionals or the Court is concerning and problematic.

48. Ms. Dehrkoop also acknowledged that a treatment goal for Petitioner is a successful polygraph confirming the accuracy of Petitioner's reporting in his sexuality journals. Specifically, whether Petitioner is accurately and completely self-reporting his sexual fantasies. Since 2014, Petitioner has participated in six polygraphs regarding masturbation to violence and force and has failed five of six polygraphs.

49. The Panel is concerned with what appears to be a form over substance approach to Petitioner's failed polygraph assessments.

50. Ms. Dehrkoop testified that she calls Petitioner by his first name "Tom" and that confirmation bias can arise with sex offender therapists.

51. Ms. Dehrkoop is not authorized to provide an opinion on Petitioner's risk of recidivism and her opinion relates solely to Petitioner's therapeutic progress.

52. The Panel understands and respects the delicate balance that must be considered when encouraging transparency and completeness by MSOP clients in their treatment programming against the possible use of such documentation as evidence against them in the future proceedings. Using such information may have a chilling effect upon participation. However, in this matter, when considering Petitioner's DSM-5 diagnoses and specifically his sexual sadism, this Panel must carefully examine, what if any consideration it must give to Petitioner's decision to stop journaling in conjunction with his recent polygraphs indicating deception when asked about the completeness of his sexuality journals against the statutory factors for provisional discharge.

53. Several other members of Petitioner's treatment team testified. In each of their respective professional opinions, their testimony reflected that Petitioner does not present any behavioral issues, is transparent in his treatment and is viewed as an example and asset to the therapeutic community. Examples of such testimony included:

- Petitioner volunteers in the community three times a week, goes on outings two times a week, and has had no negative reports about his interactions with staff, patients, or individuals in the community. (Patrick Quigley testimony)
- Petitioner's interactions with others at MSOP are healthy, positive, and kind; Petitioner has significant support from staff and outside support individuals. Petitioner does the right thing when no one is watching (MaryBeth Gradyminer testimony)
- Petitioner is polite, helpful, patient, and empathetic; Petitioner has never acted inappropriately in the community and no concerns regarding the safety of the community. (Josh Coopman testimony)
- Petitioner will be successful in the community based upon his support system, the provisional discharge plan, the involvement of the reintegration specialist, and the ongoing treatment he will receive in the community. (Michelle Sexe testimony)

- Petitioner is transparent, support of group member and he is considered a community leader. (Tim Benesch testimony)
- Petitioner is transparent in all disclosures, and is a rule follower; no concern regarding Petitioner's safety in the community. (Troy Larson testimony)

54. The Panel notes that while Petitioner's treatment team members are intimately familiar with Petitioner's treatment engagement and gains, they are not qualified to provide an opinion on risk. As such, the Panel has assigned credibility and weight to their opinions as professionals with historical knowledge of Petitioner's MSOP treatment progress.

55. For the past eight (8) years, Petitioner has worked within the community at a local thrift store. Heather Condon, the store manager, testified that Petitioner was the first MSOP volunteer accepted at the store and that Petitioner has made a positive impact. Ms. Condon testified that she finds Petitioner to be respectful, courteous, diligent, reliable, and one who takes pride in his work. Petitioner has never exhibited inappropriate behavior at the store. Petitioner works well with all employees and volunteers, most of whom are female. To date, Ms. Condon has not received any negative comments regarding Petitioner and testified that Petitioner has never portrayed himself as the victim.

56. Petitioner has a strong, pro-social and diverse network within the community. Petitioner attends the Men's Center including the Choosing Healthy Sexual Boundaries support group, Project Pathfinders, has an AA sponsor and group, as well as supportive family members.

57. Andrew Lamotte has been Petitioner's AA sponsor since 2004 and testified he would continue to sponsor Petitioner if provisionally discharged. Mr. Lamotte testified that Petitioner is doing well with respect to his chemical dependency. The Panel notes that Petitioner's sobriety is well managed while under civil commitment in a controlled environment, with close monitoring.

58. Thomas Jones initially met Petitioner as a volunteer with Project Pathfinders. Additionally, Petitioner regularly attends Choosing Healthy Sexual Boundaries, a support group started by Mr. Jones. Mr. Jones testified that based upon Petitioner's contributions to the support group he was invited to facilitate groups. Mr. Jones testified that Petitioner is a "top-notch facilitator" and that other group members look to Petitioner for support and leadership.

59. Scott Duvall, Petitioner's brother, testified that the two parties renewed their relationship approximately 10 years ago and testified that he attends many events with Petitioner and would continue to do so should Petitioner be provisionally discharged. The records reflect and the Panel notes that Mr. Scott Duvall was drinking with Petitioner on the day of Petitioner's last and most serious violent sexual offense. Mr. Scott Duvall was aware that Petitioner was on probation and prohibited from drinking alcohol. The Panel has applied limited weight to Mr. Scott Duvall's testimony.

60. If released on provisional discharge, Petitioner has secured a residential placement with Zumbro House. In his testimony, the owner of Zumbro House, Mr. Chris Onken, confirmed Petitioner's acceptance and placement within a Zumbro House facility and noted that the facility is equipped to meet Petitioner's needs.

61. Petitioner has a strong relapse prevention plan. The Panel notes the lack of any evidence to the contrary.

62. On September 9, 2014, March 16, 2015, September 10, 2015, December 3, 2015, June 8, 2016, and March 13, 2017, Petitioner participated in specific issue polygraphs on the question of whether Petitioner masturbates to violent sexual fantasies at a frequency consistent with his self-reports. Petitioner's responses indicated deception on all but one of the polygraph

examinations, meaning that he was minimizing or not fully disclosing the extent of his masturbation to or thoughts of deviant and violent sexual fantasies.

63. On March 1, 2017, Petitioner misrepresented the existence of his sexual fantasy journals to the court appointed examiner, Dr. Alsdurf. Specifically, Petitioner stated that he disposed of them at the request of his therapist. After a break in the interview and a conversation with his attorney, Petitioner recanted and told Dr. Alsdurf that he had the fantasy logs and would provide them to Dr. Alsdurf and the parties.

64. According to the testimony, neither Petitioner's therapist nor her clinical supervisor instructed Petitioner to dispose of his sexual fantasy journals.

65. The Panel heard testimony that no specific protocols are presently in place at MSOP with respect to keeping, maintaining, and disclosing items such as fantasy logs/sexual journals. Given the lack of formality regarding such record keeping, the Panel has considered and applied limited weight to any destruction of the journals. Rather, this Panel is more persuaded by the value of the content within the journals, Petitioner's misrepresentation regarding their existence, how the journals have impacted/influenced Petitioner's treatment programming, and any corroborating evidence of such treatment programming and Petitioner's success and/or failure in such programming.

66. Regarding his sexuality journals, Petitioner testified that he uses the language that he is actually thinking, and that he does not sanitize those thoughts. Petitioner agreed that the sexually objectifying language in the journals are the thoughts in his head. Petitioner acknowledges objectifying women, and struggling with deviancy.

67. Petitioner acknowledges that despite access to other sexually arousing images, his thoughts continue to include deviant sexual images from his past sexual offenses.

68. Petitioner acknowledges not engaging in sex offender treatment in any meaningful way prior to his civil commitment at MSOP. Petitioner admitted to lying his way through prior treatment, being under the influence of drugs during prison treatment programs, and conning and manipulating treatment providers and supervisors. The Panel notes such behaviors are consistent with the concerns of the expert risk assessors when considering his sexual sadism diagnosis.

69. Regarding his failed polygraphs, Petitioner claimed he is doing everything he can to pass his polygraphs. Petitioner acknowledged that his "treatment care givers" want him to pass and move on with the polygraphs, and want him to succeed but he can't pass them. Petitioner denied that one of the reasons he failed the polygraphs is that he is lying.

70. The Panel recognizes that polygraph validity and credibility is not universal among experts and that such assessment methods should be considered in the totality of the circumstances when considering any evidentiary value against the statutory criteria for provisional discharge.

***Risk Assessment and Expert Testimony*:**

Dr. Lauren Herbert:

71. Four separate experts performed forensic evaluations in these proceedings and testified as to Petitioner's sexual recidivism risk in light of his petition for provisional discharge.

72. Dr. Herbert is a licensed psychologist, employed by the Department of Human Services as the Forensic Evaluation Department Director and Chief Doctoral Internship Training

Director. Her duties include overseeing all of the Sexual Violence Risk Assessments ("SVRA") for clients petitioning for a reduction in custody level at MSOP. On March 20, 2017, Dr. Herbert prepared the SVRA Update to assist the Court in its decision-making process.

73. For this matter, Dr. Herbert interviewed the Petitioner, reviewed his records since the completion of her initial 2016 SVRA of Petitioner, interviewed collateral sources, including treatment providers and reintegration staff, toured Zumbro House, and scored and reviewed actuarial assessments.

74. The SVRA contains the following information:

a. Petitioner's current Individual Treatment Plan (ITP) "identifies goal areas of Sexuality, Self-Monitoring, and Group Behavior."

b. According to Petitioner's most recent records, he has maintained enhanced to proficient ratings in all of his identified treatment areas.

c. The records reflect and Dr. Herbert notes that Petitioner has been behaviorally compliant throughout his time at MSOP and notes no concerns in that regard.

d. The Quarterly Treatment Report for the period ending on February 2, 2017 (QTR) states that: Petitioner had consistently used 'his techniques to interrupt deviant sexual thinking/arousal when it occurred, to include thought stopping, challenging, self-talk, positive affirmations, shifting focus and aversive scenes."

e. The QTR states that Petitioner "consistently exhibited self-sufficiency in his ability to manage when emotionally triggered through the use of adaptive coping responses and schema interventions."

f. Petitioner completed the Arousal Management module which is "an intensive module that assists clients in developing skills needed to manage inappropriate/deviant sexual arousal."

g. Petitioner's treatment providers report that Petitioner "has 'really maxed' the treatment work he can do at the MSOP"…and needs "to engage in treatment programming in the community setting, the goal to further expand his skills while continuing to increase his level of autonomy."

h. Petitioner was assessed using the Stable-2007 instrument which measures dynamic risk factors and received a score of 4 which places him in the "Moderate Need" category. "Capacity for Relationship Stability and Deviant Sexual Preference appear to continue to be a present concern for (Petitioner)."

i. Records indicate that Petitioner "continues to experience ongoing sexual attraction to teenage females and occasionally experiences deviant intrusive thoughts."

j. "It is unclear whether (Petitioner) will ever be void of sexually deviant thoughts. To this, the management of these thoughts are (*sic*) a vital component of his future."

k. The Stable-2007 assessment identifies the following dynamic risk factors as historically present but no longer a current concern for Petitioner: Significant Social Influences; Hostility Toward Women; General Social Rejection; Lack of Concern for Others; Impulsivity; Poor Problem Solving Skills; Negative Emotionality; Sex Drive/Sex Preoccupation; Sex as Coping; and Cooperation with Supervision."

l. Petitioner was assessed using the Static-99R instrument which measures static risk factors and received a score of 7 which places him among offenders who "generally present with much higher risk for sexual re-offense than typical offenders…" In scoring the Static-99R, Dr. Herbert identified Petitioner as most closely resembling the "Routine" sample of offenders as opposed to the "High Risk/Need" sample of offenders.

m. Identified static risk factors for Petitioner are: Previously Lived with a Lover for at Least Two Years; Prior Conviction(s) for Non-Sexual Violence; Multiple Prior Sex Offenses, More than Three Prior Sentencing Dates, Conviction for Non-Contact Sex Offenses; Unrelated Victims, Stranger Victims and Male Victims.

n. Petitioner was assessed using the Structured Assessment of Protective Factors (SAPROF) which measures protective factors for adult offenders. 14 of 17 protective factors are present for Petitioner. The following protective factors were identified for Petitioner: Empathy; Coping; Self-Control; Work; Leisure Activities; Financial Management; Motivation for Treatment; Attitude Toward Authority; Life Goals; Medication; Social Network; Professional Care; Living Circumstances; and External Control.

75. Since the 2016 SVRA, with one exception, Petitioner has continued and consistently worked on areas of treatment concern which are incorporated in Dr. Herbert's most recent report and current assessment of Petitioner. Petitioner did not complete the recommended psychoeducational module designed to address his sexual sadism. Rather, Petitioner participated in a "psycho-education group to address the specific issue of sexual sadism" from May 1, 2012 to March 22, 2013 when he discontinued attending the group because he obtained staff support for his provisional discharge request.

76. Dr. Herbert is impressed that the Petitioner has continued to document his reporting to staff in areas that could potentially be used against him in the court process.

77. Dr. Herbert supports Petitioner's placement at Zumbro House and believes it would provide appropriately structured programming for Petitioner. Specifically, Zumbro House "provides positive behavioral supports, encourages adaptive behavior, while reducing negative or harmful behaviors through individualized care. Additionally, they provide security and structure that require a level of responsibility, while allowing residents to develop autonomy; vital components to (Petitioner's) successful transition back into the community."

78. While at MSOP Petitioner has not engaged in inappropriate sexual activity with staff, visitors, or other patients. The records reflect that Petitioner is viewed as a standard bearer for MSOP treatment programming.

79. According to Dr. Herbert, Petitioner's volunteer work at the thrift shop has provided Petitioner with increased confidence and self-esteem, and it is an important consideration that the Petitioner has been able to maintain that employment for eight years.

80. Dr. Herbert has reviewed the reports of Drs. Alsdurf, Hoberman, and Kenning, and her opinion and recommendations are not affected by the opinions of those individuals.

81. Based upon her research and review of treatment literature, it is her opinion that a diagnosis of sexual sadism is not necessarily correlated with recidivism.

82. Dr. Herbert testified that Petitioner has been in a 24-hour treatment setting for many years, and that it would be exhausting for Petitioner to try to manipulate every person involved in his treatment programming. Petitioner has been committed at MSOP since 1991. The Panel finds it highly improbable that Petitioner could successfully manipulate multiple members of his treatment team over such a significant period of time without relapse or recognition of such behavior/action. The Panel has weighed Dr. Herbert's opinion in light of the statutory factors.

83. Based upon Dr. Herbert's review of the treatment records, she does not find any support for the contention that the Petitioner lacks empathy. Dr. Herbert believes community based treatment at Project Pathfinders in conjunction with Petitioner's vocational supervisors would assist Petitioner to avoid recidivistic acts.

84. Dr. Herbert believes that polygraphs are a treatment tool, but not a tool to specifically address whether a client is being truthful; rather, the results are to be utilized by his treatment providers to address Petitioner's treatment goals. While the deceptive polygraphs concerned Dr. Herbert and remain a vital focus for treatment providers, she opined that they do not appear to be a measure that should deter (Petitioner) from transitioning to a less secure setting.

85. Based upon Minn. Stat. § 253D.30 subd. 1, Dr. Herbert concludes that Petitioner continues to require treatment, but can receive that treatment in a community setting. Dr. Herbert believes it is more beneficial for Petitioner to continue his treatment in the community, where he can continue to work on his identified needs, while being exposed to risk.

86. With regard to Project Pathfinders, Dr. Herbert has no reason to believe that that program is not equipped or capable of providing Petitioner with the requisite treatment to meet his ongoing needs.

87. Dr. Herbert further testified to Petitioner's strong community support system, including vocational opportunities, community based sex offender treatment programming, chemical dependency supports, and familial support.

88. In her opinion, the Petitioner satisfies the statutory requirements for provisional discharge from civil commitment.

Dr. James Alsdurf:

89. Dr. James M. Alsdurf served as the Court Examiner in this proceeding. Dr. Alsdurf reviewed medical records for Petitioner, the SRB Findings of Fact and Recommendation, MSOP treatment records and evaluations and Petitioner's sexual fantasy logs. Dr. Alsdurf also interviewed members of Petitioner's MSOP treatment team, administered certain psychological tests and conducted a forensic clinical interview with Petitioner on March 8, 2017.

90. Dr. Alsdurf testified that he reviewed over 500 pages of Petitioner's sexual journals. The journals covered the period of time from 2014 through the end of January 2017. Dr. Alsdurf found that the journals showed "a high degree of hypersexuality" and that they showed "the intrusion of deviant sexual thinking with some frequency, quite a bit of frequency."

Dr. Alsdurf added that the journals also focused on isolating body parts, which "still [had] a violent quality to it." Such observations surprised Dr. Alsdurf given the extensive amount of treatment Petitioner has had. Dr. Alsdurf further testified that Petitioner reported to him that Petitioner had not had any deviant fantasies or masturbated to them in many years, but after reading the fantasy journals, Dr. Alsdurf found such self-report inconsistent and stated that Petitioner's sexual obsessions continue today.

91. Based upon his review of Petitioner's sexual journals, Dr. Alsdurf opines that Petitioner continues to need treatment and supervision in his current treatment setting because his baseline interest in sex continues to be very high, that it is pervasive and that he "is like the person who's trying to stop smoking, but all he can think about all day is smoking . . . so it's like he doesn't have any relief from it… he's always just tremendously pressured by the tension and the intrusion and the presence of this experience."

92. During his interview with Dr. Alsdurf, Petitioner admitted to experiencing increased deviant arousal in February, 2017 and that MSOP attempted to manage this increase in deviant arousal by addressing it in Petitioner's Arousal Management Group. Dr. Alsdurf noted that MSOP had been using this treatment group to reduce Petitioner's deviant arousal for at least a year. However, that there was no evidence in the treatment records that this method of treatment had been effective in reducing Petitioner's deviant sexual fantasies.

93. Dr. Alsdurf testified that Petitioner's inability to pass a polygraph exam regarding whether he is revealing all of his deviant sexual fantasies did influence his recommendation to oppose Petitioner's provisional discharge request. Dr. Alsdurf also considered the fact that

Petitioner is able to pass polygraphs as reflected in one of the most recent six polygraphs administered as well as his full disclosure polygraph which did not indicate signs of deception.

94. Dr. Alsdurf opines that Petitioner continues to need treatment and supervision in his current setting, that he is not ready for community placement and outpatient treatment, and that he cannot make an appropriate adjustment to open society. Dr. Alsdurf further believes that the provisional discharge plan does not include enough specificity to provide a reasonable degree of protection to the public if Petitioner were to be provisionally discharged.

95. Dr. Alsdurf conducted actuarial assessments on Petitioner. Specifically, the Static-99R actuarial instrument for static risk factors and was scored at 7 which places him in the "Well Above Average Risk" category to reoffend sexually. The following static risk factors were identified for Petitioner: "has not lived with a lover for at least two years; prior convictions for non-sexual violence, multiple prior sexual offenses (6 charges) and three convictions prior to the index sexual offense, more than four prior sentencing dates, conviction for non-contact offenses (obscene phone calls in 1973), unrelated victim, stranger victims, and…..a male victim from when (Petitioner) was a teenager." The risk factors result in a total score of 10, but 3 points are deducted because of Petitioner's age.

96. Petitioner was assessed with the Structured Risk Assessment-Forensic Version (SRV-FV), an instrument that "focuses on the identification of long-term vulnerabilities related to the assessment of long-term risk for sexual re-offending." Long-term vulnerabilities are also referred to as dynamic risk factors. Petitioner "sustained a score which indicates he is in the high need category."

97. Dr. Alsdurf also administered three psychological tests to Petitioner during the course of evaluating him for this proceeding. On the MMPI, Petitioner scored high in the area of psychopathic deviance. Dr. Alsdurf also administered the Millon Clinical Multiaxial Inventory-III (MCMI-III) which showed Petitioner to have a clinically significant level of antisociality. Finally, Dr. Alsdurf administered the Multi-phasic Sex Inventory (MSI). This test is designed to assess the subject's sexual thinking and compare it to a group of individuals who have been identified as sex offenders. Dr. Alsdurf considers the results of all three of these psychological tests to show that Petitioner continues to present a risk to the community, and that he continues to need treatment and supervision in his current setting.

Dr. Mary Kenning:

98. The Commissioner retained Dr. Kenning to review Petitioner's records and opine whether or not provisional discharge is appropriate for Petitioner. Dr. Kenning has not previously evaluated Petitioner.

99. Dr. Kenning prepared a report regarding her evaluation of Petitioner dated April 3, 2017 and testified at the hearing in this matter. Dr. Kenning reviewed all of the records, evaluations and other information submitted as exhibits in this matter. Dr. Kenning used this information to assess Petitioner using actuarial risk instruments, including the Static-99R, the Static-2002R, the SAPROF and the SRA-FV.

100. In her professional opinion, Petitioner does not meet the statutory criteria for provisional discharge under section 253D.30, subdivision 1.

101. Dr. Kenning agrees with MSOP's diagnosis of Petitioner's sexual sadism disorder. Dr. Kenning testified that what is known is that sexual sadists "don't do well in standard

treatment programs . . . . [and that] [l]ots of times people who are psychopathic just learn the lingo and they're able to repeat it, but . . . it doesn't affect very much of how they actually behave or think about events."

102. Petitioner's sexual fantasy logs concern Dr. Kenning regarding the public's safety should Petitioner be released on provisional discharge. Specifically, Dr. Kenning notes Petitioner's sexual fantasy logs "are remarkable for their brevity, rote quality, and paucity of content."

103. Similar to the other experts, Dr. Kenning notes concerns about Petitioner's objectification of the body parts of past victims as documented in his journals. Dr. Kenning opines that Petitioner's continued use of this language, when used in reference to an offense, needs to be explored further by his treatment team.

104. Dr. Kenning conducted actuarial assessments for these proceedings. Per Dr. Kenning, Petitioner received a score of 7 on the Static-99R which "means that out of 100 sex offenders with the same risk score between 25 and 30 individuals would be reconvicted of a new sexual offense after five years in the community. Conversely, between 70 and 75 individuals would not be reconvicted of a new sexual offense in that time period."

105. Petitioner received a score of 8 on the Static-2002R which means "that out of 100 sex offenders with the same score between 25 and 39 individuals would be reconvicted of a new sexual offense after five years in the community. Conversely, between 61 and 75 individuals would not be reconvicted of a new sexual offense in that time period."

106. Petitioner received a score of 4.675 which "is a very high score, indicating significant additional dynamic factors contributing to risk."

107. Dr. Kenning did note and concurs that new research indicates "that protective factors are important in the assessment of risk of violent or sex offense recidivism." According to Dr. Kenning's findings, Petitioner has "the presence or partial presence of 15 of 17 protective factors" and indicates "a strong degree of protection from risk in his present setting."

108. Dr. Kenning opines that Petitioner "cannot return to Project Pathfinder, where there appears to have been a significant halo effect and a high degree of advocacy for him in the past." This opinion is consistent with those of Dr. Alsdurf and Dr. Hoberman, both of whom opine that the strong working alliance within Petitioner's treatment team may be compromising objectivity when addressing Petitioner's treatment progress and ongoing needs.

109. Dr. Kenning expressed concern and appears to refute the conclusion by MSOP that Petitioner no longer needs the treatment and supervision in his current setting based upon records, particularly Petitioner's "sexual behavior logs".

110. Dr. Kenning does not believe the conditions of Petitioner's provisional discharge plan at Commissioner's Exhibit 19 provide a reasonable degree of protection to the public. Given the intense supervision Petitioner currently receives at CPS, Dr. Kenning believes that a more gradual move to provisional discharge is more appropriate.

111. Additionally, Dr. Kenning opined that as the plan is currently written does not allow Petitioner to successfully adjust to the community. Again, according to Dr. Kenning, Petitioner needs a more gradual introduction to society than what is contemplated by his current provisional discharge plan. Specifically, the independence that would be afforded Petitioner under his current plan makes him vulnerable to recidivism.

Dr. Harry Hoberman:

112. Dr. Harry Hoberman is a clinical psychologist licensed in Minnesota with training and experience in the assessment and diagnosis of sex offenders. For these proceedings, Dr. Hoberman testified that he reviewed all of Petitioner's records, obtained psychological interpretations from Dr. Alsdurf regarding the MCMI-III and the MSI – and all the exhibits offered by the Commissioner in this case.

113. Dr. Hoberman was not able to interview Petitioner. Petitioner elected to not interview with Dr. Hoberman.

114. Dr. Hoberman testified that he scored Petitioner on the PCL-R twice, once in his 2014 report of Petitioner, and again in 2017. Dr. Hoberman testified that he assigned Petitioner a score of 36 in 2014, and 34 in 2017. Both scores indicate a high degree of clinical psychopathy. Dr. Hoberman also opined that Petitioner exhibits incremental psychopathic behavior. Incremental psychopathic behavior occurs when a psychopath is in a structured treatment setting and provides a gradual approximation of what the treatment staff wants as a desired outcome.

115. Given Petitioner's high psychopathy scores, Dr. Hoberman emphasized his concerns regarding Petitioner's ability to manipulate staff and evaluators.

116. Dr. Hoberman testified that it is critical to keep in mind Petitioner's history of psychopathy when looking at his appropriateness for provisional discharge. Particularly, Dr. Hoberman testified to his concerns regarding Petitioner's pattern of faking or conning his way through treatment programs. Dr. Hoberman also noted similarities and consistency in how MSOP and Project Pathfinders treatment team members describe Petitioner's current progress to past

treatment programs that Petitioner has admitted he "faked his way through". The Panel has carefully considered the totality of the records in this regard.

117. Dr. Hoberman opines that Petitioner's sexual sadism, antisocial personality disorder, psychopathy and hyper-sexuality have not been adequately treated while at MSOP. Importantly, that Petitioner's antisocial personality disorder and psychopathy fuel Petitioner's inability to control his sexual behavior. According to Dr. Hoberman, Petitioner's good behavior while at MSOP is not an indication that Petitioner will continue that good behavior in the community. Dr. Hoberman opines that Petitioner may benefit form schema therapy or "mentalization" therapy.

118. Dr. Hoberman conducted actuarial assessments for these proceedings. Accordingly, Dr. Hoberman assigned Petitioner as score of 7 on the Static-99R placing Petitioner in the "well above average" risk category for sexual recidivism.

119. Dr. Hoberman assigned of score of 9 on the Static-2002R placing him in the "above average" risk category.

120. Dr. Hoberman opined that it is of great concern that Petitioner is having deviant sexual thoughts based on the offenses he committed 30 to 40 years ago. For Dr. Hoberman, these ongoing fantasies mean Petitioner's sexual sadism is active and managed only because he is in a highly monitored environment. Dr. Hoberman also testified that the frequency of Petitioner's deviant sexual thoughts, his thoughts of past crimes, and his thoughts of teenagers in general and specific body parts are all key factors in Petitioner's hyper sexuality and subsequent risk to public safety.

121. In his professional opinion, when considering Petitioner's sexual sadism in conjunction with Petitioner's antisocial personality disorder and high psychopathy score, it is impossible for Petitioner to be in the community.

122. Dr. Hoberman testified that Petitioner's good behavior, and the testimony and support of his treatment team regarding his good behavior has no predictive value. The Panel has considered Dr. Hobermann's testimony in conjunction with the opinion of Dr. Herbert that the best predictor of future action is past action. It is the responsibility of this Panel to apply such opinions against the plethora of records reflecting Petitioner's behavioral compliance and reported treatment gains, both within the confines of MSOP and in the community. The evidentiary value of such records and testimony has been given significant weight in this Panel's decision with respect to the statutory elements.

123. Dr. Hoberman testified that the interpretations of physiological assessments of Petitioner have been problematic. Petitioner's problematic polygraphs include Petitioner's failure to pass five of the last six polygraphs, and his last PPG which occurred in 2012. For Dr. Hoberman, Petitioner's most recent physiological assessments are problematic because they are "discrepant with other sources of information from Petitioner as well as the testing" conducted by Dr. Alsdurf. Specifically, Dr. Hoberman elaborated that Petitioner reported deviant sexual fantasies towards females, teenage females, and his past crimes yet Petitioner still failed five of the past six polygraphs. According, Dr. Hoberman this inconsistency needs to be further explored in his current treatment setting.

124. Dr. Hoberman testified that Petitioner's course of treatment and present mental status indicates he still needs treatment and supervision in his current treatment setting. Dr.

Hoberman testified that in particular Petitioner's high psychopathy, deviant sexual arousal (sexual sadism) and hypersexuality have not been adequately addressed. Dr. Hoberman testified that Petitioner's current mental status puts him at high risk to reoffend, and that his treatment has been "misdirected and inadequate."

125. Dr. Hoberman testified that Petitioner's provisional discharge plan does not provide an adequate degree of protection to the public and would not allow him to successfully adjust to the community because it lacks specificity.

126. Dr. Hoberman's written report criticizes the MSOP treatment program. Dr. Hoberman states that:

a. Petitioner's "course of sex offender treatment and repeated requests for (provisional discharge) reflects much or all that is wrong with MSOP as a (forensic institution)."

b. MSOP "lacks transparency to the point of repeatedly interfering with the rights of stakeholders …"

c. MSOP's forensic evaluators "are inadequately trained to provide absolutely necessary and/or essential services."

d. Petitioner and MSOP do not accept that success from sex offender treatment "particularly with very high risk, psychopathic sexual offenders" is "unlikely for some or most residents."

127. Dr. Hoberman states in his report that "the nature of the records greatly limits the conclusions that an external evaluator can reach as to whether (Petitioner) is a 'technical' completer of sex offender treatment or if he has meaningfully and/or effectively engaged in and benefited from his exposure to MSOP's sex offender treatment."

128. Dr. Hoberman opines that Petitioner "is to be commended for pursuing sex offender treatment at MSOP and subsequently at (Project Pathfinder). He is also to be

commended for exhibiting consistent pro-social and responsible behavior during his time in the Transition phase and now at CPS. These are all significant accomplishments, generally speaking and they appear to reflect positive changes that (Petitioner) has made in terms of improved self-confidence, interpersonal skills and willingness to be more open in his social interactions."

129. Based upon his review of the relevant records, in his professional opinion Dr. Hoberman opines that Petitioner "continues to need treatment and supervision in his current treatment setting based on his course of treatment and his present mental status. In addition, given (Petitioner's) ongoing high risk to sexually reoffend and his incomplete treatment to date, the conditions of the provisional discharge plan do not provide a reasonable degree of protection to the public nor will they provide a sufficient basis for the patient to adjust successfully to the community."

CONCLUSIONS OF LAW

1. Petitioner has met his burden of presenting a prima facie case with competent evidence that he is entitled to a Provisional Discharge. Minn. Stat. § 253D.28, subd. 2(d).

2. The Commissioner and the County have failed to prove by clear and convincing evidence that provisional discharge should be denied. Minn. Stat. § 253D.28, subd. 2(d).

3. Petitioner is capable of making an acceptable adjustment to open society. Minn. Stat. § 253D.30, subd. 1(a).

4. Petitioner's course of treatment and present mental status indicate there is no longer a need for treatment and supervision in the committed person's current treatment setting. Minn. Stat. § 253D.30, subd. 1(a).

5. The conditions of the provisional discharge plan will provide a reasonable degree of protection to the public and will enable the committed person to adjust successfully to the community. Minn. Stat. § 253D.30, subd. 1(a).

ORDER

1. Petitioner's Petition for Provisional Discharge is hereby **GRANTED**.
2. The memorandum below is incorporated herein as additional findings of fact and conclusions of law.
3. The entry of this order granting Petitioner's petition for provisional discharge is hereby **STAYED** for 15 days, pursuant to Minn. Stat. § 253D.28 subd. 3.

Dated: January 8, 2018.

BY THE PANEL

Karen Asphaug

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Karen Asphaug
Chief of the Panel

Edward Lynch
Senior Judge of District Court

Thomas G. McCarthy

McCarthy, Tom
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Thomas G. McCarthy
Senior Judge of District Court

MEMORANDUM

A committed person seeking a provisional discharge from a commitment as a psychopathic personality bears the burden of going forward with the evidence and of presenting a prima facie case with competent evidence that the person is entitled to the requested relief. If a prima facie case is presented, any party opposing the discharge bears the burden of proving by clear and convincing evidence that the requested discharge should be denied. Minn. Stat. § 253D.28 Subd.2 (d).

For this Panel to grant Petitioner's request for provisional discharge, the committed person must be "capable of making an acceptable adjustment to open society." Minn. Stat. § 253D.30, subd. 1(a). Additionally, the Panel must consider the following factors:

> "(1) whether the committed person's course of treatment and present mental status indicate there is no longer a need for treatment and supervision in the committed person's current treatment setting; and
>
> (2) whether the conditions of the provisional discharge plan will provide a reasonable degree of protection to the public and will enable the committed person to adjust successfully to the community."

Minn. Stat. §253D.30, subd. 1(b).

Petitioner's request for provisional discharge is supported by his treatment team and clinical leadership at MSOP, is recommended by the SRB and is supported by Dr. Herbert. Petitioner has completed all phases of the MSOP treatment program and has been in the final "reintegration" stage of the program for 7 years. Petitioner has complied with all rules and expectations of the program, has become a mentor for other MSOP clients, has successfully completed many escorted excursions into the community without any incidents, has performed volunteer work in the community and has established a viable community based support

network. Both his MSOP treatment providers and Dr. Herbert opine that Petitioner has "maxed" out his treatment gains in his current setting and Dr. Herbert opines that Petitioner's ongoing treatment needs can be met in a less restrictive setting.

Petitioner's request for provisional discharge is not supported by Dr. Alsdurf, Dr. Kenning or Dr. Hoberman, all of whom are respected forensic examiners. In giving greater weight to the opinions of certain experts, the panel observes that neither Dr. Kenning nor Dr. Hoberman were able to interview Petitioner.

The deceptive polygraphs have been singled out by MSOP and the forensic examiners as significant concerns. Petitioner has been processing the polygraph, fantasy logs and deviancy issues in his treatment groups so neither he nor MSOP are ignoring these issues. His sexual fantasy logs acknowledge that deviant sexual thoughts intrude during masturbation and demonstrate that he is not denying his deviant thinking. It is troubling that MSOP has taken a more supportive approach to the deceptive polygraphs rather than a more treatment oriented approach. MSOP has made it a treatment goal to achieve a non-deceptive polygraph and has even revised the normal protocol for polygraph exams to enhance Petitioner's opportunity for success. Again, this Panel is concerned by the form over substance approach to Petitioner's polygraph assessments.

Since 2012, MSOP has not required a PPG to determine whether Petitioner demonstrates arousal to deviant stimuli and has not challenged Petitioner's explanations for the deceptive polygraphs. Whether the deceptive polygraphs are the result of actual deceit by Petitioner, minimization of his deviant thoughts, minimization of his reaction to the deviant thoughts, unfair administration of the exam or stress from the ongoing legal proceeding, the deceptive polygraphs

alone are not sufficient to preclude provisional discharge. Petitioner can obtain the necessary treatment to address these issues in an outpatient setting or by returning for treatment sessions at the MSOP campus if outpatient providers are unable to provide the necessary treatment. As stated in the SVRA, Petitioner may never be free from deviant sexual thoughts and "the management of these thoughts" should be the critical focus of his treatment.

Petitioner's false claim to Dr. Alsdurf that he no longer maintained fantasy logs and that he had destroyed the fantasy logs he previously maintained is more troubling than the deceptive polygraphs. Petitioner was facing a dilemma that may explain but not excuse these false statements. Fantasy logs are a requirement of the MSOP treatment protocol; clients are instructed to maintain these logs and include in them all of the client's sexual thoughts during each day, including thoughts involved in masturbation. In previous proceedings by Petitioner to obtain a provisional discharge, the information contained in the fantasy logs related to Petitioner's deviant sexual thinking was identified as one of the reasons that forensic examiners did not support Petitioner's request for provisional discharge. It is understandable that Petitioner would be concerned that these logs may be used against him again. To his credit, Petitioner continued to maintain these logs and continued to report deviant sexual thoughts in the logs despite the history of the logs being a negative issue in his attempt to advance to provisional discharge. There is apparently no MSOP policy regarding the use of these logs in reduction of custody requests, how long these logs should be retained or who should retain them. It appears that Petitioner retained possession of these logs and, absent a retention policy, could have destroyed them after processing them with treatment providers.

The logs themselves support the description of Petitioner as hyper-sexual and verify Petitioner's ongoing struggle with deviant sexual thoughts. The difficulty for this Panel is what weight should be given to Petitioner's false statement to Dr. Alsdurf, in conjunction with Petitioner's continued hyper-sexuality and intrusive deviant sexual thoughts. As asserted by multiple experts, and as common sense would dictate, Petitioner's deviant sexual thoughts may never cease and presumably will require constant vigilance and attention for the foreseeable future. Presuming Petitioner's ongoing treatment needs can be addressed in an outpatient setting, this Panel must determine whether the conditions of Petitioner's provisional discharge plan provide a reasonable degree of safety to the public. Again, the disturbing issue for this Panel is Petitioner's deceit in denying the existence of these logs to Dr. Alsdurf. Provisional discharge involves more freedom for individuals, more exposure to the public and requires that individuals will be truthful, transparent, accountable and trustworthy. Petitioner's actions in that regard are troublesome and problematic.

The question becomes whether the failure to be truthful to Dr. Alsdurf is, alone, enough to deny provisional discharge. Before the interview with Dr. Alsdurf was completed, Petitioner (perhaps at the urging of his attorney) disclosed that he in fact maintained fantasy logs and would make these logs available to Dr. Alsdurf. While the deceit is troubling, one lie should not be enough to deprive an otherwise qualified, compliant MSOP client from progressing in treatment; otherwise few clients would ever progress and dishonesty would be tracked, ranked and categorized to identify how long various lies would remain obstacles to advancement.

Does the deceit with Dr. Alsdurf, the deceptive polygraphs, the ongoing struggle with deviant sexual thoughts and Petitioner's history of conning his way through treatment programs

30 years ago create enough concern to cast doubt on his accomplishments in the MSOP program, his demonstrated ability to comply with rules and regulations, his successful community outings and the support he has enjoyed from treatment staff and community groups for the past 7 years? Has the Commissioner and the County proven by clear and convincing evidence that Petitioner's course of treatment and present mental status require treatment and supervision in his current treatment setting and that the conditions of the provisional discharge plan do not provide a reasonable degree of protection to the public and will not enable Petitioner to adjust successfully to the community?

The Panel finds that Petitioner has demonstrated he can control his behavior and comply with rules and expectations of MSOP while residing outside the secure perimeter on the St. Peter Campus and while on escorted outings in the community. He has been successful in the reintegration phase of the treatment program for seven years. Petitioner has achieved all privileges commensurate with his treatment status. It is unclear how Petitioner's reintegration into the community could be more gradual to satisfy Dr. Kenning's concern since his placement at CPS does not provide any additional opportunities for Petitioner to demonstrate his ability to successfully adjust to the community. The opinion of Petitioner's treatment team that Petitioner needs "to engage in treatment programming in the community…to further expand his skills" is persuasive.

The proposed provisional discharge plan includes extensive supervision of Petitioner. It initially provides for extensive supervision of Petitioner, including GPS monitoring, 24 hour supervision by staff at Zumbro House, supervision by MSOP reintegration staff and restrictions from leaving his residence unless accompanied by MSOP staff without approval from the

Reintegration Director. Over time, such conditions will eventually decrease, as recommended by the MSOP Reintegration Director, whose primary focus is on public safety. MSOP has thusfar provided adequate supervision of Petitioner during community outings and it is able to provide continued appropriate supervision of Petitioner through its reintegration agents, in tandem with Zumbro House staff. This Panel is persuaded the current provisional discharge plan can provide the requisite level of safety needed to reasonably protect the public. The Commissioner and County have not met the evidentiary burden of establishing, by clear and convincing evidence, that provisional discharge should be denied.

The Panel has decided this case after careful analysis, consideration and application of the Commissioner and County's burden of proof: clear and convincing evidence. The standard is satisfied when "the truth of the facts sought to be admitted is 'highly probable'". *In re Braylock,* No. A06-1053, 2006 WL3409875 (Minn. Ct. App. Nov 28, 2006) (unpublished). If the goal of treatment is to control Petitioner's behaviors, the success of his treatment is measured by the substantial and compelling evidence that he has done precisely that for the past seven years. Petitioner has complied with his treatment plan. In short, he has done all that MSOP has asked him to do. Petitioner has a lengthy history of continuous participation in treatment and the key to his continued success is adequate supervision.

MSOP does not have a history of recommending provisional discharge for those who are committed to its treatment program. The panel gives great weight to the MSOP recommendation and support of provisional discharge for Mr. Duvall. The State of Minnesota has created and developed the MSOP treatment program. Petitioner has spent seven years in the last phase of that treatment program. The program now says that Petitioner has done all

that he can do at the MSOP program and this Panel give deference to the treatment program's assessment and recommendations.

The Panel makes a weighty decision in this case. The question, in part, is whether Petitioner remains confined in a facility that says he has met all of its protocols, because of his diagnosis as a sexual sadist, a diagnosis that will not change over time. This Panel has reviewed in detail the evidence of what Petitioner has accomplished in treatment and finds those achievements outweigh the fearful diagnosis. Petitioner cannot change his past offense history, but he is committed to change in the present and future.

The Panel notes that Minnesota statutes provide that the executive director of MSOP may revoke a provisional discharge if the provisionally discharged individual "has departed from the conditions of the provisional discharge plan or….is exhibiting behavior which may be dangerous to self or others…(and) order that the committed person be immediately returned to a Minnesota sex offender program treatment facility.". Minn. Stat. § 253D.30 Subd. 5.

Petitioner's remaining treatment needs are well documented and can be met while Petitioner resides in a community setting. The structure and supervision required by the proposed provisional discharge plan and the ability of MSOP to return Petitioner to a MSOP facility provide a reasonable degree of protection to the public and will allow Petitioner to adjust successfully to the community.

APPENDIX A

Commissioner's Exhibits

EXH. #	SOURCE OF DOCUMENTS	EXHIBIT NUMBERS
1	Department of Human Services/Minnesota Sex Offender Program	1-001 – 1-7395
2	Anoka County Sheriff's Office	2-003 – 2-060
3	Hennepin County Attorney's Office	3-001 – 3-213
4	Not submitted	
5	2012 Transcript of Dr. David Thornton's Interview of Duvall	5-001 – 5-126
6	2014 Transcript of Dr. David Thornton's Interview of Duvall	6-001 – 6-056
7	2012 Transcript of Dr. James Alsdurf's Interview of Duvall	7-001 – 7-042
8	Hennepin County Adult Services Records	8-017 – 8-195
9	Original Hennepin County Commitment Exhibits	9-003 – 9-145
10	Dr. Harry Hoberman's CV and Reports	10-031 – 10-336
11	Dr. David Thornton's Report	11-023 – 11-050
12	Dr. James Alsdurf's Transcripts and Reports 2014 and 2017	12-001 – 12-269
13	Dr. Lauren Herbert's Transcripts and Reports 2014 and 2017	13-001 – 13-029
14	Not submitted	
15	Letter to Court from DHS Commissioner	15-001 – 15-002
16	Letter from Hennepin County Attorney To Court re Opinion	16-001
17	Sexual Journals	17-001 – 17-515
18	Project Pathfinders	18-001 – 18-054
19	Provisional Discharge Plan per March 22, 2017	19-001 – 19-002
20	Dr. Mary Kenning CV and Report	20-001 – 20-023
21	Zumbro House, Inc.	21-001 – 21-028

Petitioner's Exhibits

EXH. #	SOURCE OF DOCUMENTS
1	Project Pathfinders Records
2	Project Pathfinders-Primary Discharge Plan – January 2, 2015
3	Special Review Board Findings of Fact and Recommendation March 3, 2016
4	Email from Robin Benson
5	Provisional Discharge Plan – October 6, 2016
6	Provisional Discharge Plan – February 4, 2016
7	Sexual Violence Risk Assessment – Update – Dr. Herbert, March 20, 2017
8	Special Review Board Treatment Report – Update – March 3, 2017
11	Case Disclosure – Dr. Harry Hoberman