



COALITION FOR SEXUAL OFFENSE RESTORATION

*Though I have fallen, I will rise.
Micah 7:8*

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Federal Appeals Court Rules on Brian Von Behren's Challenge regarding 5th Amendment Rights and the Polygraph

The polygraph is a source of major contention in terms of how it is utilized with those who have committed a sexual offense. While supervising officers and sexual offense-specific therapists say it is a "tool" used to assist those who have offended, many clients and others believe it is abused, misused and overused, in some cases coercing people into confessing to victims that they never had (Outside Evaluators' Report on the SOTMP at the Colorado Department of Corrections 2013 stated that 80% of those interviewed said they were coerced into admitting victims they did not have in order to progress through treatment, and eventually get out of prison). NOTE: The CDOC has made many positive changes to its Sex Offender Treatment and Monitoring Program (SOTMP) since the Outside Evaluators' Report for which we are most grateful.

Brian Von Behren, a client at RSA in Lakewood, Colorado, was sentenced to three years of supervision after prison for a child pornography distribution conviction in 2005. The conditions of his supervision were changed during that time, and now required that he "successfully" complete a treatment program for those with a sexual offense. Included in this requirement was the stipulation that he take a sex history polygraph. The polygrapher would ask him four questions that inquired whether he had committed sexual offenses for which he had never been charged or convicted. A treatment program contract had to be signed wherein the treatment provider was obligated to report any crimes that came out during this questioning to the proper authorities.

Brian felt strongly that the requirement for a sex history polygraph containing four such questions violated his Fifth Amendment privilege against self-incrimination. He therefore refused to answer the sexual history questions, and was expelled from the treatment program. This expulsion also triggered a possible revocation of his supervised release because he did not fulfill the conditions of his supervision.

The District Court did not allow Brian VonBehren's request for a stay to further proceedings pending an appeal, but the Federal Appeals Court in Denver did grant a stay. The appeals court reversed on the issue of Fifth Amendment rights!

David Beller, a criminal defense attorney in Denver stated that while the ruling does not reflect a change in law, it "clarifies a probationer's right to remain silent when asked about uncharged criminal behavior not related to a conviction. This decision provides some indication that the legal community's support for polygraphs as an appropriate and constitutional tool in the treatment of sex offenses is waning," he added.

The appellate court stated in its ruling that “a solution to the Fifth Amendment issue would be if the polygraph were used sensibly as part of an offender’s probation and not in criminal prosecution.” Polygraphs are indeed utilized that way around the country. Another attorney from San Antonio, Kurt Gransee, stated that he believes that attorneys across the U.S. will use this opinion in their sexual offense defense cases.

Courthouse News Service quoted Judge Seymour: “We conclude that Mr. Von Behren faces at least some authentic danger of self-incrimination by answering three of the four mandatory questions in the sexual-history polygraph”. The 10th Circuit Court added that “the Fifth Amendment is triggered when a statement provides a lead or link in the chain of evidence needed to prosecute the speaker. Von Behren’s affirmative answers to the polygraph questions would do just that,” Judge Seymour wrote.

This article, except for the first paragraph, was paraphrased from the case itself, Jesse Paul’s Denver Post Article on 5/11/2016, and The Courthouse News Service article on 5/11/16.

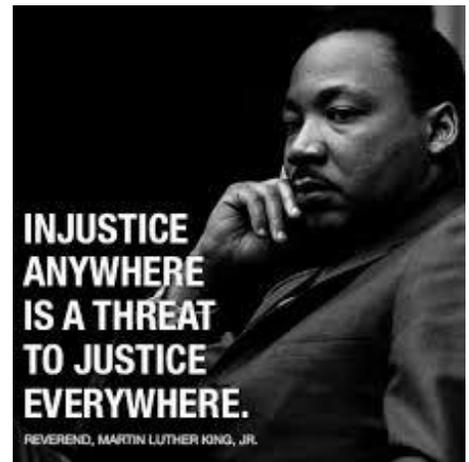
The four sexual history questions asked were: (1) After the age of 18, did you engage in sexual activity with anyone under 18? (2) Have you had sexual contact with a family member or relative? (3) Have you ever physically forced or threatened anyone to engage in sexual contact with you? And (4) Have you ever had contact with someone who was physically asleep or unconscious?

Another opinion was released just a few days later, on May 16, 2016, for which the ADVANCE SHEET HEADNOTE from the case says this:

No. 13SA268, People v. Roberson – Fifth Amendment-Probation Revocation

“The supreme court concludes that on the facts presented here, the defendant’s Fifth Amendment privilege against self-incrimination precluded the district court from revoking the defendant’s sex offender intensive supervision probation based on his refusal to answer a polygraph examiner’s question regarding his use or viewing of child pornography while he was on probation. On the record before the court, however, the court is unable to determine whether the defendant’s privilege against self-incrimination precluded the district court from revoking the defendant’s probation based on his refusal to answer questions concerning any post-trial sexual fantasies involving minors that he might have had within the six months immediately preceding the polygraph examination. Accordingly, the supreme court makes its rule to show cause absolute and remands this case to the district court with directions that the court conduct further proceedings as more fully set forth in this opinion.”

There was a suggestion from a person convicted of a sexual offense here on the outside that the maintenance poly would also come under fire in the near future, and within days, it did, as highlighted in this case. There does seem to be some momentum building! Peggy Heil told me a number of years ago in a personal conversation that it was possible to do “this work” without using the polygraph, but that it would take longer. There are people around the world that do treatment in much less time, without feeling the need to “extract” hundreds of victims from clients via the use of the polygraph. Indeed, the Best Practice Committee suggested that the Standards and Guidelines Re-Write Committee look at the prescribed frequency of polygraphs examinations, as well as at the duration of polygraphs. The committee stated their sense that the board should get away from prescribed time frames and determine frequency based on risk and needs. As Mr. Lobanov-Rostovsky stated in his e-mail to me regarding this suggested change: "My sense is that the committee questioned whether sex history exams or certain questions were necessary at some point once sufficient information had been gathered (e.g., the difference between 26 and 27 victims isn't significant). The committee also suggested that maintenance exams might be varied based on risk and need (e.g. don't need to be done every 6 months necessarily)".



*“Mine eyes have seen the glory of the coming of the Lord;
He is trampling out the vintage where the grapes of wrath are stored;
He hath loosed the fateful lightning of His terrible swift sword:
His truth is marching on.”*

As a member of a community whom is affected by the results of the recent 10th Circuit Court decisions, I see this from a different perspective. I see this as a recognition that those accused, convicted and sentenced for the plethora of sex offenses in the state of Colorado, actually have rights that now have to be respected. I say now. It wasn't always that way.

“The apparent utility of the polygraph to work both as a treatment and supervision aid and as a deterrent for future offending is cited as ample justification for its use.” “Although post-conviction polygraph testing may have some utility by increasing disclosures of prior offending and, within specific cases, admissions of treatment and supervision violations, the limited evidence accumulated thus far does not adequately ascertain its accuracy nor support its efficacy or effectiveness as a deterrent.”

“The article concludes with recommendations for creating a real evidentiary base beyond polygraph testing’s apparent ability to elicit more information from offenders to evidence that can determine whether it is efficacious and effective in reducing criminality and deviance.” - *The (F)utility of Post-Conviction Polygraph Testing, Jeffrey W. Rosky - University of Central Florida, Orlando, FL, USA (August 2012)*

The very reason the name lie-detector is debated amongst psychologists and criminal profilers is because many feel that the polygraph does not detect deception at all, and that it detects the physiological changes produced by fear. Some have even gone as far as to say that it should be changed to ‘The Fear Detector’ (Scott, 2010)

The Fear Detector prolongs prison sentences, causes restrictions of individual liberties and is a treasure for prosecutors to subpoena from providers in making a case against a totally unrelated crime.

The cost to the State and the individual continues to rise for a technology that is outdated and repeatedly being presented as inconsistent and dangerous to use in society as a means of detecting deception. Each of the methods and procedures used to detect deception ‘using polygraph tests has its severe limitations’ (Bull et al. p94, 2009) many of which, we can never overcome. No matter how ‘cutting-edge’ the equipment is, or how experienced the polygraph examiner is at trying to interpret the results of the test, there is no reliable method to catching a liar.

“His truth is marching on.”

- Hester Prynne

The Sunset Review and Re-authorization of the Sex Offender Management Board (SOMB) 2016 The Final Bill

The 2016 Colorado Legislative Session was over on May 11, 2016. The Re-authorization of the Sex Offender Management Board happened in the final few hours of the session. This was following much discussion by House and Senate Judicial Committees regarding: the cost of the board, the efficacy of the board, the size of the board, the “grid-lock” sometimes present on the board, and the board’s seeming inability, or perhaps lack of desire, to fully embrace some of the recommendations made by the Outside Evaluators (see www.csor-home.org under Articles and Publications if you are not familiar with these reports and have access to a computer).

Numerous judicial committee members from both parties quietly expressed interest in looking at the possibilities of a re-designed board over a few years’ time. To that end, the next Sunset Review was set four years out from the present. Sunset Reviews are usually every ten years. This is the second review that has been set for approximately ½ that amount of time, perhaps reflecting the legislature’s desire to see a smaller board, a board that focuses on therapists and therapy, a less expensive board, and a board that coalesces around reducing re-offense and less victimization. They acknowledged that they did not, at this time, know exactly what

this streamlined and re-focused board might look like, and that they needed more time to consider such changes. The vast majority of states have nothing as elaborate or expensive as an SOMB, and treat and supervise on the outside for much shorter times. Notably, recidivism rates are comparable to Colorado despite the difference in duration of treatment and supervision. Management of those who have sexually offended is done by CDOC, parole or probation, or the police who oversee registration.

Here are the major triumphs for those of us who wish to improve the therapeutic milieu and therapeutic opportunities for those who have offended sexually:

1. For the second time in a row, there is a shortened Sunset Review period to keep the board focused on making progress.
2. The legislature set a date approximately one year from now when the board would finish and publish the Standards and Guidelines. The process of rewriting the Standards and Guidelines has generally taken a number of years to finish. The actual publication of the new document has taken even longer. Legislators have set the date of July 2017 as a goal for the board to have the rewrite finished; if the board determines that it will not be able to complete the revision by July 2017, the board “must report to the Judiciary Committees of the General Assembly a projected completion date as part of its annual report”.
3. The board was instructed to “incorporate in the guidelines and standards the concepts of the Risk-Need-Responsivity or another evidence-based correctional model” for both adults and juveniles who had committed a sexual offense
4. A committee is to be established to make recommendations to the board regarding the contents of the Standards and Guidelines. This committee is to be composed of 80% approved treatment providers. (NOTE): While House Bill 1345 was very clear that a committee of 80% therapists should be formed in order to make recommendations to the board on the Standards and Guidelines. Early conversation about this invokes the probability that this committee will be an already functioning committee of therapists who meet to discuss entirely different matters. A prominent board member stated that the legislature did not consult the board before adding this amendment and that it is impossible to form such a committee. The person indicated that therapists are saying they will not participate.
5. For years, the legislature has wanted the board to collect data on its treatment providers and the programs that they provide, in order to evaluate the efficacy of these programs in terms of reducing sexual offending behaviors. There has always been a caveat, however, that this should happen “if” money is identified to undertake the data collection. This year, the Department of Regulatory Agencies (DORA) stated that whether money is identified or not, data collection needs to take place. Because the board stated that it did not, at this time, know what data to collect and did not have a method for collecting it, they were given until July 1, 2017, to present a data collection plan to the legislature.
6. Some of you may remember the Senator Joyce Foster amendment at the previous Sunset Review which proposed that each person who had committed an offense could have a choice of three approved treatment providers. The bill that contained that amendment was vetoed by Governor Ritter. The amendment was proposed again this Sunset, thanks to some good friends and supporters of our cause who clearly have the ear of the legislators. Instead of a choice of three providers, however, there will be a choice of two. The supervising officer still has the ability to choose an individual provider if he/she believes that the person under supervision “needs” a specific treatment program to be successful.

A number of us stayed late into the evening to testify regarding the board’s less than satisfactory response to the Outside Evaluators’ strong recommendations for change. While the board has made some changes away from “one size fits all” and “no known cure”, there are stubborn beliefs that they are not willing to give up. One of those is in the overuse, misuse and abuse of the polygraph. While the Standards are being rewritten concerning the utilization of the polygraph as more of an “adjunct tool”, some prominent board members are unwilling to objectively review the literature and best practice across the country and the world that seriously questions the efficacy, the accuracy and the ethical implications of continued utilization of the polygraph.

The legislature definitely put pressure on the board to make changes. Unfortunately, when it is again time for the next Sunset, many of the legislators presently unhappy with the board’s lack of progress will be gone. Legislator education is a constant endeavor, and it may be that the cost Colorado currently pays to “ensure” the safety of its people by over treating and over supervising the 20% of those who have sexually offended and have been convicted, will ultimately be the driving force behind needed changes to the board and the way it does business!

One final comment: At this writing, the bill has not yet been signed by the Governor of our state. Stay tuned!

CDOC’s First SOTMP Only Citizens’ Advocate Meeting!

Up until May 18, the Citizens’ Advocate Meetings with CDOC Administration and Staff had been held in a joint meeting with general offender families and friends, and family and friends of those with a sexual offense. This meeting was the first time that families of those who have committed a sexual offense met alone with CDOC leadership and staff, with a focus on answering questions specific to the SOTMP Program at CDOC. It was, in my opinion, a really good meeting.

Besides Director Steve Hager, Director of Parole Melissa Roberts and Director of Clinical and Correctional Services Renae Jordan, a number of wardens were present, as well as Leonard Woodson, SOTMP Administrator, Steve Parker, Quality Control, therapists Dana Krakow and Robin Garrelts, Michelle Nelson, assistant to Ms. Jordan, Dr. Jill Lampela, Director of Mental Health Services, Jeff Geist and Susan White from Parole, Rebecca Oakes from the Parole Board and others. Renae Jordan ran through the list of pre-submitted questions, and answered them with lots of questions and comments from the audience.

After the question part of the meeting, there was ample time for families and friends attending to talk with individuals from CDOC and specifically from SOTMP about specific issues that were important to them. It seemed as if families and friends were happy with the way the meeting turned out, and felt as if DOC administrators and staff listened and really attempted to address their questions and concerns. This particular meeting will only be held once each year. The reason for this is apparent. If DOC leadership and staff are always meeting with citizens/families to answer questions, it will be difficult to run programs and get important things done.

PEOPLE ARE OFTEN UNREASONABLE, ILLOGICAL AND SELF-CENTERED. ***FORGIVE THEM ANYWAY.***
IF YOU ARE KIND, PEOPLE MAY ACCUSE YOU OF SELFISH, ULTERIOR MOTIVES. ***BE KIND ANYWAY.***
IF YOU ARE SUCCESSFUL, YOU WILL WIN SOME FALSE FRIENDS AND SOME TRUE ENEMIES. ***SUCCEED ANYWAY.***
IF YOU ARE HONEST AND FRANK, PEOPLE MAY CHEAT YOU. ***BE HONEST AND FRANK ANYWAY.***
WHAT YOU SPEND YEARS BUILDING, SOMEONE MAY DESTROY OVERNIGHT. ***BUILD ANYWAY.***
IF YOU FIND SERENITY AND HAPPINESS, PEOPLE MAY BE JEALOUS. ***BE HAPPY ANYWAY.***
THE GOOD YOU DO TODAY, PEOPLE WILL OFTEN FORGET TOMORROW. ***DO GOOD ANYWAY.***
GIVE THE WORLD THE BEST YOU HAVE, AND IT MAY NEVER BE ENOUGH. ***GIVE THE WORLD THE BEST YOU HAVE ANYWAY.***

YOU SEE, IN THE FINAL ANALYSIS, IT IS ALL BETWEEN YOU AND GOD; IT WAS NEVER BETWEEN YOU AND THEM ANYWAY.

Mother Teresa of Calcutta

Mother Teresa also said while helping those in need: ***“Every day I see Jesus Christ in all of his disturbing disguises.”***

Submitted by Roger Kincaid

News Tidbits

1. A special thank you to Representative Daniel Kagan, Representative Pete Lee, Director of Sexual Litigation for the Public Defender’s Office Laurie Kepros, and Liaison from the Colorado Criminal Defense Bar to the Colorado Legislature Maureen Cain for their amazing work in keeping the issues of the Sex Offender Management Board Sunset Review on track during this legislative session. Because of the emotion and drama surrounding sexual offending and those who have been victimized, this is not an easy subject for many to work on. In a great move, Representative Kagan, who chairs the judicial committee, stopped the amendment process late in the session when he saw that the votes for and against certain amendments were totally aligned with political parties. This move led to successful passage of the amendments right before the session ended, and after the amendments were vetted by both the Democratically controlled House and the Republican controlled Senate.

2. In recognition of Sexual Abuse Awareness Month, Bob Weiner, Chief Deputy District Attorney, Jefferson County, was asked to do an hour long presentation at the SOMB Meeting on Friday May 18. The story he told of a particularly heinous series of offenses by one person was meant to emphasize how awful sexual offending can be. It reminded me of why ads on television featuring seal pups being speared, and an episode of Anthony Bourdain’s Parts Unknown where a camel was torn to pieces while still alive, cause me to turn the channel quickly. The D.A. shared this story in a television Special Victims Unit sort of way; his approach had a similar effect on me to the animal tragedies mentioned above. I sat with others and listened to the gory details of rapes against elderly women and young women, with details I feel would be inappropriate to share here. Instead of these horror stories, I would love to see a presentation by victims’ representatives, D.A.’s and prosecutors on how we can all work together to reduce sexual abuse in our communities. Perhaps a series of roundtable discussions over lunch would get us started on the right path!?

3. The next Sunset Review of the Sex Offender Management Board, assuming Governor Hickenlooper signs House Bill 1345, will be in four years. The current Sunset was five years out. The normal Sunset Review process is ten years. While being vetted, the times proposed bounced around from 2 and 3 years to 7 years, back down to 5 years, and then settled on 4 years. The legislature seems to be sending a strong message to the SOMB that changes based on the Outside Evaluators' Report, current research and best practice need to be implemented as quickly as possible.

TIPS FOR SUCCESS ON PAROLE

By Mark Walker

(Editor's note: This will be an ongoing series from those who are living it.)

I was paroled in 2008, and have been on parole, doing well by God's grace, ever since. When asked how I've been successful since being paroled, I don't really know what to say. I'm amazed at how far the Lord has brought me, and I know I still have a long way to go. A lot of people other than me have contributed to my success. However, there are a few things I found helpful that I can share with you. You may find that concentrating on as many of these areas as you can, will help you to lay a strong foundation for your return to the community.

1. Advance Preparation

You will need to prepare more than just a parole plan in order to give yourself the best opportunity for success. Begin thinking as early as possible about opportunities you can pursue now which will help you prepare for life on the streets. In order to do this, you will need to develop a vision for your future and set some goals that will help you move toward that vision.

For example, I knew I wanted to go back to college when I got out. In order to do that, I would need to be able to find a stable, decent paying job as soon as possible where I could work while I went to school. So I got some feedback from other people about what I was good at. An attorney who had represented me suggested I would make a good paralegal, so I found a school where I could get a paralegal certificate through correspondence. I earned the certificate, and that same attorney hired me when I was paroled. Having a stable job enabled me to cover my living and parole expenses, and to go back to college. I graduated from Moody Bible Institute in about four years, and then was able to go on to seminary where I am working on a master's degree. So the preparation I did on the inside enabled me to be successful in school when I got out.

It is also very important to work at maintaining as many relationships as possible while you are down. I made it a point to stay in touch with my family as much as I could, and I wrote regularly to a pastor at a church in Denver. Not only did this keep me engaged with what was going on outside, but I was also prepared with a network of supportive relationships with people who were able and willing to help me when I was released.

2. Detailed Planning

I found it extremely helpful to carefully think through everything about my upcoming parole that I could. I just sat on my rack and brainstormed every possible situation I might face or need I might have when I got out. Then I made lists of everything I needed to do in the following areas:

- a. Parole – I listed tasks I would need to accomplish right away and questions I wanted to ask my parole officer during our first meeting
- b. Basic documents – I thought of all the personal documents I would need to get, especially a drivers' license and a social security card
- c. Setting up my life – I thought through how I would go about collecting and transporting whatever personal belongings others had kept for me
- d. Financial – I thought through what I would need to do to set up bank accounts, get a debit card and personal checks
- e. Priorities – I thought through the goals I had made for my vision of the future (like going back to school), and then I listed in order the steps I would need to take toward accomplishing those goals

Once I had my lists, I tried to prioritize everything in order of importance, so the first things on my list would be the ones I would need to do right away when I got out. I kept these lists with me and referred to them often during the first few months of my parole.

To be continued...